Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd (Direct Services (HK) Ltd, Third Party)
[2006] SGHC 28

Case Number : MC Suit 16197/2003, RAS 25/2005

Decision Date : 21 February 2006

Tribunal/Court : High Court

Coram : Andrew Phang Boon Leong J

Counsel Name(s) : Yeow Joo Yun and Vanessa Yeo (KhattarWong) for the plaintiff; Michael Moey Chin Woon (Moey and Yuen) for the defendant

Parties : Emjay Enterprises Pte Ltd — Skylift Consolidator (Pte) Ltd — Direct Services (HK) Ltd

Civil Procedure – Pleadings – Plaintiff obtaining interlocutory judgment with damages to be assessed against defendant – Defendant seeking to rely on exception clause limiting liability at stage of assessment of damages – Exception clause not pleaded by defendant in defence – Defendant arguing exception clause relating to quantum of damages and therefore need not be pleaded pursuant to O 18 r 13(4) Rules of Court – Whether defendant precluded from relying on exception clause – Order 18 r 13(4) Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Contract – Contractual terms – Exclusion clauses – Types of exception clauses and limitation of liability clauses – Nature and purpose of exception clauses – Relevance of primary and secondary obligations to exception clauses – Whether limitation of liability clause dealt with the issue of liability or quantum of damages

21 February 2006

Andrew Phang Boon Leong J:

Introduction and background

1 The present case raised an important issue of law and pleadings. In it, as we shall see, there is an interaction between the rules of pleading on the one hand and the law relating to exception clauses on the other. In particular, can a contracting party rely on an exception clause without having pleaded it by arguing that such a clause relates to the quantum of damages and that, pursuant to O 18 r 13(4) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed), issues relating to quantum of damages need not be pleaded? In order to place this particular provision in context, the whole of O 18 r 13 is set out, as follows:

> (1) Subject to paragraph (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under Rule 14 operates as a denial of it.
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> (2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.
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> (3) Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them.
>
> *(4) Any allegation that a party has suffered damage and any allegation as to the amount of*

damages is deemed to be traversed unless specifically admitted.

[emphasis added]

On a substantive level, the *very nature and functions of exception clauses* would have, as we shall see, to be considered. As an interesting aside, this has traditionally been perceived as constituting a more conceptual issue. However, two points may be usefully noted at this juncture. The first is that there are, as we shall see, *practical* applications and implications as well. The second is more general: The line between theory and practice is often a fine one and, in any event, one ought never to gainsay the role that rigorous theoretical analysis can – and does, in fact – play in ensuring a more nuanced development of the law as set in its broader practical canvass.

2 A very brief description of the factual background might be appropriate at this juncture.

3 The plaintiff had obtained interlocutory judgment against the defendant for breach of contract, with damages to be assessed. In the circumstances, the exception clause in question had not figured with regard to the issue of liability.

4 However, at the stage of the assessment of damages, the defendant sought to introduce the exception clause. More specifically, counsel for the defendant took out an application to adduce new evidence (via an additional witness of fact) in order to rely on a defence based on a limitation of liability clause (which was in fact the exception clause in question). This defence had, in fact, never been pleaded; nor, as already noted, was it raised at the hearing with respect to liability. Not surprisingly, counsel for the plaintiff resisted the attempted introduction of this clause at this particular stage of the proceedings, arguing that the exception clause concerned had not been pleaded. It was argued, again not surprisingly, that as such a clause went to the issue of liability, it ought to have been pleaded and canvassed at the stage when liability was assessed.

5 The learned deputy registrar found in favour of the plaintiff, holding that the argument based on the exception clause was an issue for the main trial only. His decision was upheld on appeal by the learned district judge. The defendant then appealed to the present court.

6 The exception clause concerned reads as follows:

> 19.1 In no case whatsoever shall any liability of the Company howsoever arising and notwithstanding any lack of explanation exceed:
>
> > 19.1.1 the value of the relevant goods where such value has been declared to the Company, or
> >
> > 19.1.2 a sum at the rate of SGD1,000.00 per tonne of 1,000 kilos or a rateable part thereof,
> >
> > whichever is the lesser.

7 It can be seen immediately that this clause was *not* a total exclusion of liability clause. This is important because had it in fact been of such a nature, it would *clearly not* have related to the quantum of damages but, rather, to liability. If so, that would have been an end to the matter since it would have been clearly untenable for the defendants to have invoke O 18 r 13(4) of the Rules of Court (which has been reproduced above at [1]). It could, of course, be argued that a total exclusion of liability clause does, *literally*, go to the quantum of damages inasmuch as it attempts to exclude

any payment of damages whatsoever. However, this is a disingenuous argument that should, in my view, be rejected. What a total exemption of liability clause attempts to do is to exclude *liability* altogether. A *by-product*, so to speak, of such a total exclusion of liability (assuming that the clause is effective in the first instance) is that no damages are payable. But that is not the heart of the matter. The core issue really hinges on liability, not the quantum of damages. And, as already mentioned, I shall have occasion to revisit the nature of a total exemption or exclusion of liability clause later in this judgment.

8 However, the particular exception clause sought to be introduced at the assessment stage in the present proceedings was in fact a *limitation of liability* clause and it is clear law that such a clause would be interpreted less stringently by the courts compared to a total exclusion of liability clause: see the oft-cited House of Lords decision of *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 WLR 964 (and applied in the local context: see, for example, the Singapore High Court decision of *Rapiscan Asia Pte Ltd v Global Container Freight Pte Ltd* [2002] 2 SLR 325 at [61]). For this very reason, however, it cannot be stated – not out of hand, in any event – that this particular clause clearly does not relate to the quantum of damages. This was in fact the nub of the issue in the present proceedings and as set out briefly at the outset of this judgment: Could the defendant now argue that this clause could be introduced at the assessment stage even though it had not been pleaded simply because it went to the assessment of the quantum of damages and was, therefore, not required to be pleaded pursuant to O 18 r 13(4)?

9 There are two related issues here. The first is whether or not a limitation of liability clause (as opposed to a total exclusion of liability clause) goes to liability and/or to the quantum of damages. The answer to this particular issue will impact on whether or not such a clause could be introduced without being pleaded pursuant to O 18 r 13(4). I should observe that this does not necessarily conclude the case in any way in favour of the defendant. Even if such a clause could be so introduced, it would still have to be shown to be *applicable* on the facts of the present case and this would, as the parties have assumed, entail the calling of relevant witnesses as well as an analysis of the relevant law itself.

10 The second issue is even more general: To what extent is O 18 r 13(4) applicable to facts such as those which existed in the present proceedings in the first instance? I turn now to consider both issues *seriatim*.

The nature and functions of an exception clause

11 As already alluded to above, my focus, in accordance with the specific facts before me in the present proceedings, is on a limitation of liability clause – as opposed to a total exclusion of liability clause. I should observe, parenthetically, that this is why I choose to adopt the more generic terminology, "exception clauses", when referring to such clauses as a whole. This terminology originated, as far as I know, in the seminal treatise in the area by Prof Brian Coote, *Exception Clauses* (Sweet & Maxwell, 1964). Indeed, I shall have occasion to return to this brilliant work again later.

12 An exception clause is a term of the contract. In particular, such a clause is intended to operate either to modify the obligations under the contract and/or to act as a defence to any claim by the other party to the contract. If so, such a clause goes to liability as opposed to the assessment of the quantum of damages.

13 Certainly, it is true that a distinction has been drawn in the case law between primary and secondary obligations in the context of exception clauses, with the classic exposition being by Lord Diplock in the House of Lords decision in *Photo Production Ltd v Securicor Transport Ltd*

[1980] AC 827 ("the *Photo Production* case"). In the circumstances, an extended setting out of the learned law lord's observations in this particular regard would be apposite. Lord Diplock observed thus (at 848–850):

> A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words.
>
> Leaving aside those comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of ***primary*** obligations give rise to ***substituted or secondary*** obligations on the part of the party in default, and, in some cases, may entitle the other party to be relieved from further performance of his own primary obligations. These secondary obligations of the contract breaker and any concomitant relief of the other party from his own primary obligations also arise by implication of law – generally common law, but sometimes statute, as in the case of codifying statutes passed at the turn of the century, notably the Sale of Goods Act 1893. ***The contract, however, is just as much the source of secondary obligations as it is of primary obligations***; and like primary obligations that are implied by law, secondary obligations too can be modified by agreement between the parties, although, for reasons to be mentioned later, they cannot, in my view, be totally excluded. In the instant case, the only secondary obligations and concomitant reliefs that are applicable arise by implication of the common law as modified by the express words of the contract.
>
> Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach; but, with two exceptions, the primary obligations of both parties so far as they have not yet been fully performed remain unchanged. This secondary obligation to pay compensation (damages) for non-performance of primary obligations I will call the "general secondary obligation." It applies in the cases of the two exceptions as well.
>
> The exceptions are: (1) Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed. (If the expression "fundamental breach" is to be retained, it should, in the interests of clarity, be confined to this exception.) (2) Where the contracting parties have agreed, whether by express words or by implication of law, that *any* failure by one party to perform a particular primary obligation ("condition" in the nomenclature of the Sale of Goods Act 1893), irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed. (In the interests of clarity, the nomenclature of the sale of Goods Act 1893, "breach of condition", should be reserved for this exception).
>
> Where such an election is made (a) there is ***substituted*** by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay

monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (b) the unperformed primary obligations of that other party are discharged. This secondary obligation is additional to the general secondary obligation; I will call it "the anticipatory secondary obligation."

In cases falling within the first exception, fundamental breach, the anticipatory secondary obligation arises under contracts of all kinds by implication of the common law, except to the extent that it is excluded or modified by the express words of the contract. In cases falling within the second exception, breach of condition, the anticipatory secondary obligation generally arises under particular kinds of contracts by implication of statute law; though in the case of "deviation" from the contract voyage under a contract of carriage of goods by sea it arises by implication of the common law. The anticipatory secondary obligation in these cases too can be excluded or modified by express words.

[emphasis added in bold italics]

Finally, the learned law lord also observed thus (at 850–851):

Mr Lords, *an exclusion clause is one which excludes or modifies an obligation, whether primary, general secondary or anticipatory secondary, that would otherwise arise under the contract by implication of law*. Parties are free to agree to whatever exclusion or modification of all types of obligations they please within the limits that the agreement must retain the legal characteristics of a contract; and must not offend against the equitable rule against penalties; that is to say, it must not impose on the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation. Since the presumption is that the parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend on the extent to which they involve departure from the implied obligations. Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear. But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only. [emphasis added]

14 The legal effect of the *Photo Production* case is to allow the courts the flexibility to give effect to exception clauses at common law even where a fundamental breach of contract has occurred. In other words, a fundamental breach of contract does *not necessarily and automatically* destroy the efficacy of an exception clause because, whilst the primary obligations come to an end, the secondary obligation (to pay damages) remains and an exception clause might cover this last-mentioned liability. Whether or not the exception clause in question does in fact cover such liability is not an automatic rule of law as such but, rather, a matter of *construction of the contract*. In other words, the court's task is to *construe* the exception clause concerned in the context of the contract as a whole in order to ascertain whether the contracting parties *intended* that the exception clause cover the events that have actually happened. If they did, then the exception clause would be given effect to by the court, notwithstanding the fact that a fundamental breach has occurred. This is

because, to re-emphasise a crucial point, the *intention* of the parties is the touchstone.

15 It may be noted that despite some apparent authority to the contrary (see, in particular, the Singapore Privy Council decision of *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576; [1959] MLJ 200 ("the *Sze Hai Tong Bank* case")), the present position in the Singapore context appears to be that established in the *Photo Production* case (see, for example, the Singapore High Court decisions of *Metro (Pte) Ltd v Wormald Security (SEA) Pte Ltd* [1980–1981] SLR 539 and *AA Valibhoy & Sons (1907) Pte Ltd v Banque Nationale de Paris* [1994] 2 SLR 772; as well as the Singapore Court of Appeal decision of *Parker Distributors (Singapore) Pte Ltd v A/S D/S Svenborg* [1982–1983] SLR 153). This underscores the importance of the concept of freedom of contract and is consonant with modern trade and commerce – bearing in mind the fact that the task of construction lies not in just any tribunal but, rather, with the courts. There also appear to be no problems of binding precedent since the Singapore Court of Appeal is now the highest court in the land and is therefore not bound by Privy Council decisions, notwithstanding the fact that the latter would obviously be given the most serious consideration. However, the *Sze Hai Tong Bank* case was obviously decided at a time when the law had not settled in its more modern and established form as embodied in the *Photo Production* case. As importantly, perhaps, there was then an ostensibly greater need to protect the consumer, which need is now mitigated by the (statutory) presence of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) (see also *per* Lord Wilberforce and Lord Diplock in the *Photo Production* case ([13] *supra* at 843 and 851, respectively)). This particular Act operates, of course, in addition to the traditional common law doctrines and safeguards.

16 At this juncture, it might be apposite to note that both primary and secondary obligations nevertheless deal, in the final analysis, with issues of the respective contracting parties' *obligations* and, hence, are directly related to the issue of *liability*, although the latter (secondary obligations) deal primarily with the obligation to pay damages. In this last-mentioned regard, one must, in my view, draw a distinction between the obligation to pay damages on the one hand and the quantum ultimately payable on the other.

17 Indeed, it may also be appropriate to note Lord Diplock's observations in an earlier House of Lords decision – *Moschi v Lep Air Services Ltd* [1973] AC 331. In this case, the learned law lord refers, with limpid clarity, to the fact that both primary and secondary obligations are precisely that – *obligations*. Speaking in the context of the rescission of a contract, Lord Diplock observed thus (at 350):

> Generally speaking, the rescission of the contract puts an end to the primary obligations of the party not in default to perform any of his contractual promises which he has not already performed by the time of the rescission. It deprives him of any right as against the other party to continue to perform them. It does not give rise to any secondary obligation in *substitution* for a primary obligation which has come to an end. The primary obligations of the party in default to perform any of the promises made by him and remaining unperformed likewise come to an end as does his right to continue to perform them. But for his primary obligations there is *substituted* by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the primary obligations. *This secondary obligation is just as much an obligation arising from the contract as are the primary obligations that it replaces* … [emphasis added]

I note, in particular, the last sentence in the above quotation which I have italicised for emphasis.

18 I do acknowledge, nevertheless, that the reference to secondary obligations might have implications in so far as the assessment of damages are concerned. However, this is only so in *the*

most extended and literal sense. Where an exception clause seeks to exclude liability completely, such a clause, as I have already mentioned, clearly deals with liability rather than quantum of damages. It is true that, if such a clause applies, no damages are payable. However, this follows as a matter of logical necessity. The focus, in other words, is on the issue of liability. Naturally, if there is no liability to begin with, no damages are payable. However, the issue of damages at this point is a "non-issue" because, *ex hypothesi*, no liability arises in the first instance. If, however, counsel for the defendant's argument in the present proceedings is taken to its logical conclusion, then it would follow that *even* exception clauses which seek to exclude liability *completely* would *necessarily relate to* the *quantum* of damages as well – save for the fact that, as just mentioned, if the clause concerned can be invoked successfully, the quantum of damages payable is *zero*. In other words, if counsel for the defendant's argument is persuasive, then *both* limitation of liability clauses *as well as* total exclusion of liability clauses would differ merely in *degree*, rather than in kind. However, I did not understand counsel for the defendant to take the argument that far and understood him to concede that clauses which attempt to exclude liability *completely* go to *liability*, and *not* quantum of damages. I have, in fact, already dealt briefly with the nature and function of total exclusion of liability clauses above.

19 I pause here to note that possible conceptual confusion arises only because *every decision as to liability will, literally speaking, have a bearing on the quantum of damages payable*. *However*, we must bear in mind the fact that this is not the crux of the issue at hand. *The nub, or crux, is the primary nature and purpose of an exception clause, regardless of whether it is a total exclusion of liability clause or a limitation of liability clause.* And this, as I have already pointed out, is to govern the *obligations* of the respective parties to the contract – an issue that necessarily relates to *liability* rather than the quantum of damages, although the latter is inextricably linked to the former as a matter of *literal* fact as well as causation.

20 Let me elaborate on the concept of *literal reduction in the quantum of damages payable* a little more from a slightly different comparative perspective. I accept, once again, that it is *literally or factually* true that a limitation of liability clause, if applicable, does reduce the quantum of damages that is claimable. However, this is equally the case – viewed from the perspective of *factual consequences* – with other contractual doctrines as well, such as the doctrine of waiver. If the plaintiff has waived its rights under the contract, then no damages are obviously claimable. But the fact that no damages are claimable does not, as I have already stated, mean that the doctrine of waiver deals with the assessment of damages as opposed to the issue of liability.

21 I note that Prof Coote distinguishes between two types of exception clauses – Type A and Type B, respectively. Type A exception clauses are those "whose effect, if any, is upon the accrual of primary rights" ([11] *supra* at p 9), whilst Type B exception clauses are those "which qualify primary or secondary rights without preventing the accrual of any particular primary right" (*ibid*). The learned author views limitation of liability clauses as falling under Type B (see generally, pp 153–154), whilst he views total exclusion of liability clauses as falling under Type A (see generally, pp 152–153). The interesting point to note, however, is that nowhere does Prof Coote consider either or both of these categories of exception clauses as going to the assessment of the quantum of damages; the focus is, on the contrary, on the primary and secondary *rights* of the contracting parties in question and this, as already elaborated upon above, pertains to the issue of *liability* instead. More specifically, the learned author is concerned to elucidate a clearer and more nuanced framework through which exception clauses can be analysed. He is, in my view, entirely correct in pointing to the fact that such clauses should not be viewed solely as defences or shields to potential contractual liability (these constitute Type B exception clauses). There are undoubtedly a great many situations where this will be the case. In such situations, there is no question as to the existence or scope of the primary rights in question. The only question is whether or not the (Type B) exception clause serves

as a defence exonerating the party in alleged breach of the primary rights concerned.

22 However, as Prof Coote perceptively points out, there are also a great many other situations where the exception clause in question in fact impacts directly on the actual scope and content of the contractual liabilities themselves at their "root", so to speak (these constitute Type A exception clauses). In other words, the exception clause concerned might prevent the primary right from arising in the first instance. Looked at in this light, such a clause does not operate (unlike a Type B exception clause) as a defence to the alleged breach of primary rights as such but, rather, alters the *very nature* of the primary rights themselves.

23 However, what is of crucial importance in so far as the present proceedings are concerned is that *regardless* of whether a clause is classified as a Type A exception clause or a Type B exception clause, the focus is still with respect to the issue of *obligations and liability*, and *not quantum or assessment of damages*.

24 I note, further, that a limitation of liability clause could, on occasion at least, reduce the amount claimable by the plaintiff to such an extent that it is either on the borderline of, or actually becomes, a complete or total exclusion of liability clause. In such situations, the distinction between both types of clauses becomes blurred, or even non-existent.

25 In any event, the consideration of a limitation of liability clause seems to me to be a logically prior inquiry to that of the assessment of damages. If so, then, as I have just mentioned, such a clause deals, in the final analysis, with the issue of liability, and not the quantum of damages.

26 Such a conclusion is strengthened, in my view, by counsel for the plaintiff's argument to the effect that allied issues of incorporation and construction are really issues relating to liability and are therefore dealt with prior to the assessment of damages proper. Indeed, if, on the other hand, counsel for the defendant's argument is correct, the court would have to deal with these issues (and perhaps even other issues relating, for example, to the reasonableness – or otherwise – of the exception clause concerned under the UK Unfair Contract Terms Act) at the stage of *assessment of damages* when they ought, in both principle and logic, have been dealt with at the stage of *liability*.

27 Whilst I acknowledge that it might be possible to argue that limitation of liability clauses might impact only partially in so far as the amount of damages claimable is concerned and do not (by their very nature) exclude wholly a claim for damages, it is invariably the case that the limitation is a significant one. Indeed, I have already pointed to the fact that a limitation of liability clause might shade into the realm of total or the near-total exclusion of liability (see [24] above). If the defendant in the present proceedings is correct, the court would have to decide whether a particular exception clause was, especially in marginal cases, truly a limitation clause or a total exclusion of liability clause "in disguise", so to speak. This would lead to excessive uncertainty and even "legal hair-splitting", and is yet another reason why limitation of liability clauses must be construed as going to liability, rather than to the quantum of damages.

28 I am further of the view that a liquidated damages clause is *not* similar to a limitation of liability clause and therefore reject, in this regard, the argument of counsel for the defendant who referred (not surprisingly) to the leading House of Lords decision of *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79. The former constitutes a genuine attempt at fixing the quantum of loss, assuming that a breach has already occurred. It therefore lies, in my view, more appropriately in the sphere of assessment of damages and, as such, has been dealt with in the chapter on remedies in the various contract textbooks. However, the latter is quite different: It is an attempt to reduce the scope of liability and, hence, has been dealt with in the

chapter on the terms of the contract in the contract textbooks. The following observations by Prof Coote ([11] *supra* at pp 153–154) might also be usefully noted:

> Whatever the superficial similarity, they [limitation of liability clauses] are not to be classed as agreements for liquidated damages, since they are not a genuine pre-estimate of damages; and the House of Lords [in *Cellulose Acetate Silk Company, Limited v Widnes Foundry (1925), Limited* [1933] AC 20] has held that they are not penalty clauses.

29 I do note, however, that Lord Diplock did, in the *Photo Production* case, refer to the need not to offend against the rule against penalties and the concomitant need to ensure that there not be imposed "upon the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation" ([13] *supra* at 850). This would appear to suggest that a liquidated damages clause ought – contrary to the view expressed in the preceding paragraph – to be construed as one dealing with liability as opposed to the assessment of damages. However, we do need to bear in mind a general fact already noted earlier on in this judgment – that there will be inevitable overlaps between the spheres of liability and assessment of damages. More importantly, and as Prof Coote has himself pointed out in the preceding paragraph, a liquidated damages clause, dealing as it does with a genuine pre-estimate of loss, leans (if at all) more towards the issue of assessment or quantum. Indeed, by its *very nature and definition*, a liquidated damages clause *fixes the quantum in advance*. Hence, I would still be of the view that a liquidated damages clause ought, unlike an exception clause, to be placed within the sphere of quantum as opposed to liability. Even if I am wrong on this particular issue, this does not, in any event, detract from the general reasoning which has compelled me to arrive at the conclusion that an exception clause does *not* deal with issues of assessment or quantum but, rather, deals with (or at least has its primary focus on) issues of liability instead.

30 I note, in passing, that counsel for the defendant sought (in turn, in passing) – but rather ingeniously, in my view – to argue that the exception clause concerned related to the mitigation of damages. It is clear, of course, that mitigation of damages is, in law, a separate and distinct concept. If by "mitigation", he meant – although I think that this was not the case – the literal meaning of "a reduction in damages", then that, with respect, would not (and in fact did not) take the defendant's case forward at all. In any event, even if the defendant was indeed intending to raise mitigation of damages as a defence, this would, as is pointed out below (at [34]), need to be pleaded.

The applicability of O 18 r 13(4) of the Rules of Court

31 In any event, I find that O 18 r 13(4) does not permit a defendant to argue, without more, that issues as to the assessment of damages need not be pleaded. They merely permit the defendant concerned to argue that any allegation as to, *inter alia*, the amount of damages put forward by the plaintiff is deemed to have been traversed. The onus on the defendant to specifically plead a particular argument (such as that proffered in the instant case) remains.

32 If so, then I find that it would be substantively prejudicial to allow the defendant to amend its pleadings at this late stage. Indeed, interlocutory judgment has already been entered on behalf of the plaintiff. To allow the defendant to introduce a limitation of liability clause at this late stage might, if the clause is found applicable, be to the irreparable prejudice of the plaintiff. This is, *a fortiori*, the case if, as I hold, the focus of the limitation clause is on liability as opposed to the quantum of damages, even though there is some inevitable overlap in fact.

33 In this regard, the decision of the English Court of Appeal in *Plato Films Ltd v Speidel*

[1961] AC 1090 ought to be noted. It was held – correctly, in my view – that notwithstanding the then English equivalent of our O 18 r 13(4), the then English equivalent of our O 18 r 8 (relating to any pleading subsequent to a Statement of Claim) ought to prevail (see, especially, at 1104–1105). This is only right as the requirements of both procedural as well as substantive justice and fairness would require that the plaintiff not be taken by surprise (and *cf* the English Court of Appeal decision of *Weait v Jayanbee Joinery Ltd* [1963] 1 QB 239, where the point, however, was not (in the final analysis) decided definitively). Order 18 r 8 itself reads as follows:

> (1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —
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> (*a*) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (*b*) *which, if not specifically pleaded, might take the opposite party by surprise*; or
>
> (*c*) which raises issues of fact not arising out of the preceding pleading.
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> (2) Without prejudice to paragraph (1), a defendant to an action for the recovery of immovable property must plead specifically every ground of defence on which he relies, and a plea that he is in possession of the immovable property by himself or his tenant is not sufficient.
>
> [emphasis added]

34 The following observations by Prof Jeffrey Pinsler also appear to support the approach just taken and merit quotation in full (see *Singapore Court Practice 2005* (Jeffrey Pinsler gen ed) (LexisNexis, 2005) at para 18/13/3):

> Any allegation that a party has suffered damage and any allegation as to the amount for damages is deemed to be traversed unless specifically admitted. This rule means that the defendant is not required to traverse these allegations concerning damage. *However*, it is *very common practice* for an allegation of damage (whether general or special) *to be traversed in the form of a denial or non-admission. It has been suggested that despite the rule, this is a welcome practice as it enables the plaintiff to know what case he will meet on the issue*. … *Also see r 8(1)(b), which requires* matters to be pleaded *if otherwise they would take a party by surprise.* Moreover, if the defendant intends to raise matters which affect damage, such as causation and remoteness, they must be specifically pleaded (r 8(1)(a) and (b)). *Similarly, if the defendant alleges that the plaintiff should have mitigated his loss, this must be pleaded together with the particulars which substantiate the allegation* (see *Plato Films v Spiedel* [1961] AC 1090). [emphasis added]

35 Finally, I should add that the following observations by S Rajendran J in *Rapiscan Asia Pte Ltd v Global Container Freight Pte Ltd* ([8] *supra* at [64]) are also apposite in this particular regard:

> Mr Loo [counsel for the defendant], in his closing submissions, adverted to other clauses in the SFFA Conditions that may have limited liability for negligence. These other clauses were, however, not invoked by Global [the defendant] in its pleadings and I agree with Mr Palaniappan [counsel for the plaintiff] that it would be prejudicial to Rapiscan [the plaintiff] for this court to consider defences that Global had not raised in its pleadings.

Conclusion

36 For the reasons stated above, I held that the exception clause concerned went to liability as opposed to the assessment of damages and that, in any event, O 18 r 13(4) of the Rules of Court was not applicable to the facts of the present case. In the circumstances, I dismissed the defendant's appeal with costs.

37 Finally, I would like to commend counsel for both parties for taking the time and trouble to craft their respective submissions. They demonstrated a pride in their work that more pragmatic counsel interested only in the business (as opposed to the practice) of the law might well have deemed unnecessary. However, it is, in my view, of the first importance that all counsel be committed to submitting before the courts the very best legal arguments that they can muster, even if (as here) the value of the subject matter of the litigation might not have warranted it when viewed from the perspective of merely materialistic lenses. If Singapore law is to develop and be a force to be reckoned with on the world stage, the *attitude of mind* displayed by counsel in the present case is imperative. Indeed, such an approach is not merely idealistic – it is also necessary. There is, in other words, no longer a gap between ideal and actuality. Both are inextricably connected together in a manner that demonstrates the best qualities of advocacy and, ultimately, of the enterprise of the law itself.