CST Cleaning & Trading Pte Ltd v National Parks Board
[2008] SGHC 140

Case Number : DA 5/2008

Decision Date : 22 August 2008

Tribunal/Court : High Court

Coram : Chan Sek Keong CJ

Counsel Name(s) : Letchamanan Devadason (Steven Lee Dason & Khoo) and Mahtani Bhagwandas (Harpal Mahtani Partnership) for the appellant; Ramesh Selvaraj (Allen & Gledhill LLP) for the respondent

Parties : CST Cleaning & Trading Pte Ltd — National Parks Board

Contract – Contractual terms – Rules of construction – Indemnity clause – Agreement between contractor and statutory board to indemnify statutory board against liability – Statutory Board incurring liability as result of concurrent negligence and occupier's liability – Whether indemnity clause applying to situation of concurrent causes and extent of indemnity available to statutory board

22 August 2008 Judgment reserved.

Chan Sek Keong CJ:

1 This is an appeal by CST Cleaning & Trading Pte Ltd ("the Contractor") against the judgment of the district judge ("the District Judge") in District Court Suit No 1111 of 2005 ("the DC Suit") in which he ordered the Contractor to pay to the National Parks Board ("the Board") the sum of $114,270.52 with interest and costs pursuant to the terms of an indemnity given by the Contractor to the Board (see *National Parks Board v CST Cleaning & Trading Pte Ltd* [2008] SGDC 7).

The background facts

2 The Contractor is a cleaning contractor. The Board is a statutory board whose functions include, *inter alia*, the maintenance of public parks in Singapore. The Pasir Ris Park ("the Park") is one of such parks. By a contract dated 23 October 1998 ("the Contract"), the Contractor agreed to provide cleaning services to the Park subject to the terms contained therein.

3 On 5 December 1999, a young boy, Liew Yu Wei ("Liew"), was cycling on a footpath at the Park when he collided with a lorry travelling on the same footpath and suffered injuries. The lorry was driven by one Ang Cheng Chai ("Ang"), who was an employee of the Contractor's subcontractor, Tan Tai Sang Pte Ltd ("the Subcontractor").

4 As a result of his injuries, Liew commenced an action in Magistrate's Court Suit No 1693 of 2001 ("the MC Suit") for damages against: (a) the Board for negligence and/or occupier's liability as the occupier of the Park; (b) the Contractor in vicarious liability for the negligence of the Subcontractor; and (c) the Subcontractor as the employer of the lorry driver, Ang, whose negligence had caused the injuries to Liew. The magistrate who heard the MC Suit ("the Magistrate") found that the Board and the Subcontractor, though not acting in concert, had committed a tort contemporaneously and caused the same or indivisible damage, with each liable for the whole damage, which the Magistrate later apportioned at 50% for each party. The Board was found liable *qua* occupier of the Park or, alternatively, *qua* joint tortfeasor with the Subcontractor in negligence for causing Liew's injuries.

5 Liew's claim against the Contractor in vicarious liability for the Subcontractor's acts was dismissed on the ground that the Subcontractor was an independent contractor of the Contractor.

6 Pursuant to the judgment in the MC Suit, the Board paid Liew the entire amount of damages awarded to Liew amounting to $98,161.39 for which the Board was wholly liable by virtue of it having been found jointly liable with the Subcontractor (see *Oli Mohamed v Murphy* [1969-1971] SLR 270 at 272, [10] and *Wong Jin Fah v L & M Prestressing Pte Ltd* [2001] 4 SLR 529). The Board also paid the Contractor the sum of $16,109.13, being 50% of the taxed costs and court fees pursuant to the judgment in the MC Suit. The total loss thus suffered by the Board amounted to $114,270.52.

The DC Suit

7 Having paid out the entire amount under the judgment in the MC Suit and 50% of the costs to the Contractor, the Board then commenced an action in the DC Suit against the Contractor for an indemnification of the amount of $114,270.52, under cl 22(a) of the Contract, which reads:

> The Contractor shall be liable for and shall indemnify the Board in respect of any liability, loss, claim or proceedings whatsoever arising under any statute or common law in respect of personal injury to or death of any person whomsoever arising out of or in the course of or by reason of the execution of the Works *provided that the same is due to any negligence, omission or default of the Contractor, his servants or agents or any sub-contractor, his servants or agents.* [emphasis added]

8 The Board's case before the District Judge was based on a literal reading of the words of cl 22(a): the Board had suffered a loss of $114,270.52 in respect of the personal injury to Liew arising out of or in the course of or by reason of the execution of the contract works and the *same*, *ie*, the personal injury to Liew, was due to the negligence of the Subcontractor's servant, Ang, and the Contractor was thus liable for the loss for which it had to indemnify the Board. The Board contended that its claim to be indemnified fell squarely and clearly within the words of the indemnity clause.

9 The Contractor's defence was equally simple: it was that the indemnity was intended to cover the situation where the Board, as an employer, was made liable for any personal injury arising from the execution of the contract works for which it was not itself negligent. In other words, the indemnity was intended to cover the Board's vicarious liability and not the Board's own liability in negligence. Here, the Board was held liable to Liew for its own negligence in occupier's liability, and therefore cl 22(a) did not cover such a liability. Furthermore, there was an ambiguity in the indemnity clause, which should be construed against the *proferens* (*ie*, the Board) under the *contra proferentem* rule of construction.

10 The District Judge accepted the submission of the Board. He held that on its natural and ordinary meaning, the indemnity clause applied. The Board had suffered a loss and it was due to the negligence of the Subcontractor's servant in causing injury to Liew. The District Judge rejected the Contractor's argument that the *contra proferentem* rule applied because there was no ambiguity in the words of the indemnity clause. He held that reading the words as not being applicable to a situation where the Board itself was negligent would require him to rewrite the indemnity clause or read into it extra words that were not there. The District Judge was of the view that the commercial purpose of indemnity clauses like cl 22(a) was to provide employers with full protection irrespective of who was negligent so long as the employer suffered a loss or incurred a liability because of the contractor, its subcontractor or their respective agents and servants.

The Contractor's arguments on appeal

11 The Contractor's arguments before me were basically a reiteration of its arguments before the District Judge. Its counsel contended that the District Judge had failed to give effect to the proviso (*ie*, the emphasised words at [7] above) in the indemnity clause and had turned the Contractor into an insurer for the Board. He reiterated that the indemnity clause had no application unless the Board was held liable for the negligence of the Contractor, the Subcontractor or their respective servants or agents, but here the Board was held liable for its own negligence. In other words, the indemnity was intended to cover the vicarious liability of the Board and not its own direct liability.

The Board's arguments on appeal

12 The Board's arguments before me were also a reiteration of its arguments before the District Judge. However, counsel for the Board further argued that the Board was seeking only to be indemnified for the loss and liability incurred by the Board that were factually attributable to the Subcontractor's servant, Ang. The argument was that, but for the initial negligent act of the Subcontractor's servant, the Board could not and would not have been sued in the first place, as the collision would not have occurred. The Board referred to the decision of the English High Court in *Hosking v De Havilland Aircraft Co, Ltd* [1949] 1 All ER 540 ("*Hosking*") in support of its argument.

The case of *Hosking*

13 In *Hosking*, the employer had engaged contractors to carry out building works on a plot of land adjacent to its factory. The contractors had dug a hole into the ground in order to lay pipes under the land. They placed a plank across the hole so that workmen could cross from one side to the other. The plaintiff, an employee of the occupiers of the factory, was crossing the plank in the course of his work when the plank broke. The plaintiff fell into the hole and suffered injuries. The employer was held liable for breach of its statutory duty under the Factories Act 1937 (c 67) (UK) for failing to ensure that the plank was of sound construction and properly maintained and for failing to provide a safe means of access**.** In third-party proceedings, the employer claimed to be indemnified by the contractors under the following indemnity clause in the contract between the parties:

> The contractor shall be solely liable for and shall indemnify the employer in respect of and shall insure against any liability, loss, claim or proceedings whatsoever arising under any statute (other than the Workmen's Compensation and Employers' Liability Acts) or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the execution of the works, *unless due to any act or neglect of the employer or of any person for whom the employer is responsible.* [emphasis added]

14 Lewis J held that, although the occupiers of the factory were liable to the plaintiff for breach of statutory duty, they were still entitled to claim the indemnity against the contractors. Lewis J, in construing the indemnity clause, said at 542–543:

> The result, in my view, is that the occupiers are liable, but that by no means concludes the case. The contractors were the persons who put down a rotten plank to be used both by their own people and by those employed by the occupiers, and, in my judgment, they would be responsible to the plaintiff at common law for having caused this accident. The matter does not rest there, because in the third party proceedings (which I am asked to deal with in this action) reliance is placed on an indemnity which is not altogether easy of construction. … It is said that the closing sentence of that clause [the proviso] applies in this case, and that, if the occupiers were responsible for the accident because they were in breach of the Factories Act, 1937, then the indemnity does not run against the contractors. On that I need only say that, if such a state of affairs is excluded by the contract, the indemnity would appear to be entirely useless, because

> one has no right of indemnity against another person unless one is oneself liable. An indemnity pre-supposes that one has a liability against which someone else indemnifies one. I find it very difficult to make sense out of the indemnity clause if it means that, in circumstances such as the present, the indemnity does not apply. I am, therefore, of opinion that, not only are the contractors, as well as the occupiers, liable to the plaintiff for this accident, but under the third party proceedings for indemnity, the occupiers are entitled to recover from the contractors.

15 It may be noted that the indemnity clause in *Hosking* is substantially the same as cl 22(a) in the present case, except for the proviso. In the present case, the proviso *included* the liability to indemnify the employer if the contractor, its subcontractor or their respective servants or agents were negligent. In *Hosking*, the proviso *excluded* the contractors' liability to indemnify the employer where the personal injury was due to any act or neglect of the employer. Yet, Lewis J stated that the employer was entitled to be indemnified by the contractors even though its breach of statutory duty had resulted in the injury to the plaintiff. Accordingly, counsel for the Board argued that if in *Hosking* the employer was entitled to be indemnified by the contractors, where the proviso had excluded the liability of the contractors to indemnify, the present case was *a fortiori.*

16 In reply, counsel for the Contractor contended that the reasoning of Lewis J in *Hosking* was faulty for the following reasons:

> (a) if the ordinary meaning of the proviso excluded the contractors' liability to indemnify the employer where the employer was responsible for a breach (as it did), then that meaning should be upheld; and
>
> (b) the indemnity was not rendered entirely useless, as it could operate where the employer was not responsible for the tort.

Counsel further argued that Lewis J's statement in *Hosking* was *obiter* as he ultimately decided that the contractors were liable to indemnify the employer, not under the indemnity clause, but under the Law Reform (Married Women and Tortfeasors) Act 1935 (c 30) (UK) ("the 1935 Act").

17 It is not necessary for me to decide in this appeal whether the interpretation given by Lewis J in *Hosking* to the indemnity clause in that case was correct or not, as eventually the judge did not rely on the indemnity clause but decided to apportion the liability of the parties under s 6 of the 1935 Act. At 543 of his judgment, Lewis J said:

> I make the order under [the 1935 Act] and I say no more in regard to the indemnity clause. *The occupiers shall be indemnified in that sum by the contractors, who, … are to pay the costs of the action.* [emphasis added]

The provisions of the 1935 Act have been substantially re-enacted in ss 15 to 17 of the Civil Law Act (Cap 43, 1999 Rev Ed) which the Board has not relied upon, presumably because they have no application as the Contractor was held not negligent and therefore not liable to Liew (see s 15(5) of the Civil Law Act and *Halsbury's Laws of Singapore*, vol 18 (LexisNexis Singapore, 2004 Reissue, 2004) at para 240.038, n 4).

18 In any case, the principles in this area of the law are clear. The extent of the Contractor's liability under cl 22(a) must depend on the express terms of the clause, including the proviso and its effect, if any, on the preceding general words. Moreover, as I have pointed out earlier, there is a significant difference between the proviso in *Hosking* and the proviso in the present case.

Possible meanings of clause 22(a)

19 In my view, cl 22(a) has three possible meanings. The Board's claim turns entirely on its interpretation of cl 22(a) which the District Judge accepted: that so long as the Contractor, the Subcontractor or any of their respective servants or agents was negligent, the indemnity would bite, even though the Board itself had caused the injury concurrently (as was the case). The District Judge gave an inclusive effect to the proviso to determine the liability of the Contractor and excluded the concurrent fault of the Board in causing the injuries to Liew. This is the first meaning of cl 22(a).

20 On the other hand, the Contractor's defence before the District Judge was that the proviso had no application where the Board itself was negligent and had caused the personal injury to Liew, even though the Subcontractor's servant had also caused the injury concurrently (as was the case). The Contractor's defence gave an exclusive effect to the proviso so as to exclude the concurrent fault of the Subcontractor's employee, Ang, in causing the injuries to Liew. This is the second meaning of cl 22(a).

21 These are the two contending meanings of cl 22(a) placed before me for decision. Neither party was interested in giving a third meaning to cl 22(a) so as to cover a situation where any injury to any person lawfully in the Park was caused jointly by both parties (as was the case). The third meaning of cl 22(a) would be that the Contractor will indemnify the Board to the extent of its own fault or that of a subcontractor, or any of their respective employees. If the parties had considered and agreed that this was the meaning of cl 22(a), there would have been no legal dispute, given the decision of the Magistrate to apportion the liability of the Board and the Subcontractor at 50% each. I now have to decide which of the three interpretations of cl 22(a) is correct, applying the established principles of construction of indemnity clauses under the law.

Construction of exemption and indemnity clauses

22 The principles of construction relating to exemption clauses are well established – having been stated by Lord Morton of Henryton in *Canada Steamship Lines Ld v The King* [1952] AC 192 ("*Canada Steamship Lines*") and accepted by all courts in the common law world. These principles are equally applicable to indemnity clauses (see Viscount Dilhorne and Lord Fraser of Tullybelton in *Smith v South Wales Switchgear Co Ltd* [1978] 1 WLR 165 ("*South Wales Switchgear*") at 167 and 172, respectively). In *E E Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 WLR 221 ("*Caledonia*"), Hobhouse J gave a useful summary of these principles and their relationship to the *contra proferentem* rule of construction. He said (at 227):

> The question remains one of the construction of the contract, applying the established principles of construction. These include the principle that the parties to a contract are not to be taken to have agreed that a party shall be relieved of the consequences of its negligence without the use of clear words showing that that was the intention of the contract. In *Walters v. Whessoe Ltd.* (1960) 6 B.L.R. 23, 35, Devlin L.J. said: "The law therefore presumes that a man will not readily be granted an indemnity against a loss caused by his own negligence." In *Smith v. South Wales Switchgear Co. Ltd.* [1978] 1 W.L.R. 165, 168, Viscount Dilhorne said:
>
> > "While an indemnity clause may be regarded as the obverse of an exempting clause, when considering the meaning of such a clause one must, I think, regard it as even more inherently improbable that one party should agree to discharge the liability of the other for acts for which he is responsible."
>
> This principle overlaps with but is not the same as the "contra proferentem" rule – that

> contractual provisions should prima facie be construed against the party who was responsible for the preparation of the contract and/or who is to benefit from the provision. … The relevant principle is simply one which involves construing exemption and indemnity provisions as applying to a party's own negligence, only if that intent is made clear in the contract; this principle is equally capable of application whether the clause is mutual or unilateral.

23 This principle as applied to the construction of indemnity clauses (which I shall refer to as "the 'inherently improbable' principle of construction") was accepted by our Court of Appeal in *Marina Centre Holdings Pte Ltd v Pars Carpet Gallery Pte Ltd* [1997] 3 SLR 625, a case concerning an exemption clause. L P Thean JA said at [37]:

> The underlying reason for this approach [the "inherently improbable" principle of construction] is that the court starts with a presumption that parties to a contract do not normally agree to accept the consequences of each other's negligence, ie by way of an exemption clause, *much less to shoulder responsibility for them, ie by way of an indemnity clause*, and will not be taken to have intended to do anything so improbable, unless the contract does not admit of any other reasonable construction. … [emphasis added]

The *contra proferentem* rule of interpretation is also an established rule of interpretation of exemption clauses under our law (see *Tay Eng Chuan v Ace Insurance Ltd* [2008] SGCA 26) and applies equally to the interpretation of indemnity clauses.

This court's approach

24 The facts in the present case are not in dispute. The Board has suffered a loss in respect of the personal injury to Liew which was caused jointly by the negligence of the Subcontractor's servant, Ang, and its own negligence and/or its breach of duty as the occupier of the Park. It is common ground that *but for* the Board's *own breach of duty* at common law as an occupier of the Park to Liew (an invitee), or alternatively, its negligence, in breaching its duty of care to Liew, the accident would not have happened at all. Each of them (the Board and the Subcontractor) was liable for the whole damage on the ground that they had concurrently caused the personal injury to Liew. These being the facts, the question this court should consider is whether it should adopt an "all or nothing" approach, *ie*, either that the Board is entitled to a full indemnity from the Contractor so long as the Subcontractor or its servant was negligent, or that the Board cannot claim anything from the Contractor because the Board itself was negligent and had caused the personal injury to Liew, even though the negligence of the Subcontractor's servant was a concurrent cause of Liew's injuries.

25 In this connection, I should first dispose of an argument made by counsel for the Contractor that if Liew had sued the Board alone in the present case, it would have been held solely liable for its own breach of duty as an occupier of the Park. In that event, the Board would not have been able to call on the Contractor to indemnify it under cl 22(a) as its loss would not have been caused by "any negligence … of the Contractor, his servants or agents or any sub-contractor, his servants or agents". In my view, this argument has no merit as it assumes that the indemnity does not apply in a case of concurrent causes. If the Board had been sued alone, it could have joined the Contractor as a third party for an indemnity under cl 22(a), just as the employer had done so in the case of *Hosking*. We would still be faced with the same question as to the effect of the proviso in a case of concurrent causes.

26 I would approach the construction of cl 22(a) in the following manner. I start on the basis, as stated by Hobhouse J in *Caledonia* ([22] *supra*) at 232, that:

> [T]he parties to commercial contracts must be taken to know what those principles [of construction] are and to have drafted their contract taking them into account; when the suggested result could have been easily obtained by an appropriate use of language but the parties instead only used general language, the result of the general principle is that the parties will not be taken to have intended to include the consequences of a party's negligence.

In the above passage, Hobhouse J's reference to "the general principle" is that of the principle of construction in relation to exemption and indemnity clauses, *ie*, "that in the absence of clear words the parties to a contract are not to be taken to have intended that an exemption or indemnity clause should apply to the consequences of a party's negligence" (*ibid*). However, the more general point that was made in that passage is that, when applied to cl 22(a) in the present case, the suggested result from the point of view of the Board could easily have been obtained by the use of appropriate language, *eg*, by the insertion of words such as "whether or not the personal injury is also caused by the negligence, omission or default of the Board".

27 In the present case, the drafter of cl 22(a) is likely to be a lawyer and would have taken into account the established principles of construction of contract clauses. He would have known that, in the absence of the proviso, the court would apply the "inherently improbable" principle of construction to cl 22(a), and would construe the indemnity as not applying to a party's own negligence. There would be nothing in cl 22(a) to say expressly that the Contractor had to indemnify the Board for the Board's liability or loss due to its own negligence. This much seems clear if cl 22(a) had not included the proviso. Hence, the relevant question to ask is whether the Board has successfully crafted a proviso that will render the Contractor liable to indemnify the Board for any loss it has suffered by reason of any personal injury caused by the negligence of the Contractor or any other person for whom it is responsible, such as the Subcontractor in the present case.

28 In expressly stating that the Contractor must indemnify the Board if the personal injury for which the Board is held liable is due to any negligence, omission or default of the Contractor, any subcontractor or their respective servants or agents, the proviso appears to be targeting the application of the "inherently improbable" principle of construction and negating it by expressly providing that the Board would be entitled to be indemnified for any loss so long as it is caused by the negligence of the Contractor or the subcontractor. But, is the proviso sufficiently clear to impose liability to indemnify on the Contractor alone in a situation, like the present, where the loss of the Board was due to concurrent causes?

29 The Contractor does not address this point directly. Its main contention is that the underlying basis of cl 22(a) is vicarious liability, *ie*, cl 22(a) only applies if the Board is held vicariously liable for the acts or omissions of the Contractor, the Subcontractor or their respective servants or agents. The District Judge rejected this argument on the ground that the words of the proviso were clear and unambiguous that the indemnity would kick in because of the negligence of the Subcontractor's servant. I agree with the District Judge to the extent that effect must be given to the proviso, as otherwise it would fulfil no function whatsoever. There would be no reason to write in the proviso since, without the proviso, the Board would not be able to claim an indemnity for any loss caused by its own negligence as the application of the "inherently improbable" principle of construction would have led to this result. The proviso was inserted to achieve a certain objective and therefore must mean something. In substance, the Contractor is contending that the proviso not only failed to negate or neutralise the application of the "inherently improbable" principle of construction, but that it actually reinforces the principle. In my view, given the express words of the proviso, this is too fanciful an argument to have any merit.

30 In my view, neither the interpretation given by the Board nor that given by the Contractor is

correct. Clause 22(a) has failed to make it clear that the Board would not be liable for its own negligence although the clause has made it clear that the Contractor would be liable as an indemnitor for the Contractor's negligence and that of its subcontractor. It seems to me that cl 22(a) was drafted to meet a situation where either the Board or the Contractor is wholly liable for any injury caused to any person in the Park whilst the Contractor is carrying out the contract works, but not a situation where both parties are jointly liable for the same personal injury suffered by a person lawfully in the grounds of the Park. Otherwise, the Board would have clarified what the legal position would be if it were itself negligent or in breach of its duties as an occupier to invitees in the Park. The fact is that neither party had expressly provided in cl 22(a) for a situation, like the present case, of concurrent causes. How should this court deal with this kind of unforeseen situation? In this regard, it may be useful to see how the English courts have dealt with this issue in the context of an indemnity clause.

31 In *Caledonia* ([22] *supra*), the parties had agreed to an indemnity clause in Art 10(b) of their contract, which read:

> Each party hereto shall indemnify, defend and hold harmless the other, provided that the other party has acted in good faith, from and against any claim, demand, cause of action, loss, expense or liability (including cost of litigation) arising by reason of any injury to or death of any employee, or damage, loss or destruction of any property, of the indemnifying party, resulting from or in any way connected with the performance of this [service] order.

The plaintiffs invoked the indemnity against the defendants after they had paid compensation for the death of the defendants' employee arising from a fire on an oil rig belonging to the plaintiffs. The death of the defendants' employee was caused concurrently by the plaintiffs' breach of statutory duty and the negligence of the plaintiffs' employee. The plaintiffs sued the defendants on the indemnity and relied on its literal words. Hobhouse J applied the three-pronged test formulated by Lord Morton in *Canada Steamship Lines* ([22] *supra*) and dismissed the claim. Hobhouse J held that the "inherently improbable" principle of construction applied to Art 10(b) even though the death of the defendants' employee was due to concurrent causes.

32 However, in relation to the legal effect of concurrent causes, Hobhouse J in *Caledonia* said at 231–232:

> Where there are concurrent causes, each cause is a cause of the consequent event. If the event would have occurred in the absence of a particular fault, that fault is not a cause of the event. Accordingly, it is not correct to say in the present case that the plaintiffs were liable in respect of the death of Mr. Quinn [the defendants' employee] because of the breaches of statutory duty; they were liable because of the breaches of statutory duty *and* the negligence of their servant. It was the concurrent effect of both those causes that gave rise to the death of Mr. Quinn and without either of those causes that death would not have occurred and the plaintiffs would not have been liable. Therefore the correct question remains whether the plaintiffs have a right to an indemnity from the defendants in respect of a liability of which *a* cause was the negligence of one of their servants. It is still necessary to ask whether, as a matter of the construction of the clause, it does cover such a liability. [emphasis in original]

33 The plaintiffs' appeal to the Court of Appeal was dismissed (see *E E Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 WLR 1515 ("*Caledonia (CA)*"). In the Court of Appeal, Steyn LJ (with whom the other members of the court agreed), gave different reasons, however, for reaching the same conclusion as Hobhouse J on the effect of concurrent causes. Steyn LJ said at 1525:

I start with the question of causation. This aspect must be approached on the basis that the facts set out in the points of claim and in the affidavit of Mr. Christopher Sprague (the plaintiffs' solicitor) are assumed to be correct. That is how the matter came before the judge, and that is how it was placed before us. On those assumed facts we are not concerned with the notions of causa sine qua non or other abstruse theories of causation. The law is concerned with practical affairs and takes a common sense view. On the assumed facts there were two concurrent causes, each of which was in the eye of the law effective to cause the event which led to Mr. Quinn's death. The plaintiffs' negligence was an effective cause of Mr. Quinn's death and the plaintiffs' breaches of statutory duty were also an effective cause of Mr. Quinn's death.

That brings me directly to the issue of construction. It seems to me right to approach the interpretation of article 10(b) not in a technical way but in the way in which the commercial parties to the agreement would probably have approached it. The observations of Lord Diplock in *Photo Production Ltd*. *v*. *Securicor Transport Ltd*. [1980] A.C. 827, 851F–G encourage me to think that such an approach to the construction of article 10(b) is realistic. And the supposition is that article 10(b) does not apply to negligence. Given this premise it seems realistic to view article 10(b), operating as it does by way of reciprocal exceptions and indemnities, as an agreed distribution or allocation of risks. The rationale was that each party would bear the risk in respect of his own property and employees. To the extent that they released each other from liability, they thereby contractually assumed the risk. But article 10(b) should be construed as containing a reservation of each party's right to sue the other in negligence, and a correlative agreement that the indemnities would not avail either if so sued in negligence. Properly construed, article 10(b) provides that each party shall bear and assume the risk of his own negligence. If the approach I have adopted is correct, as I believe it is, the consequence is that article 10(b) should be construed as providing that the indemnities are not applicable if the event in question has been caused not only by a party's breach of statutory duty but also by his negligence. The short point is that the plaintiffs have contractually assumed the risk of their own negligence and cannot seek to avoid the consequences of that assumption of risk by seeking to rely on a breach of statutory duty. If it were necessary to do so, I would base my view on a constructional implication in article 10(b): see *Gillespie Bros*. *& Co*. *Ltd*. *v*. *Roy Bowles Transport Ltd*. [1973] Q.B. 400, 420F–G, *per* Buckley L.J. But I consider that the better view is that it arises as a matter of construction pure and simple. Mr. Aikens [counsel for the plaintiffs] said that the plaintiffs could have sued only on the breach of statutory duty. But the point is one of substance. The defendants were entitled to raise it by way of defence as they have in fact done. As a matter of analysis I therefore have come to the conclusion that the judge answered the second question correctly.

34 In the present case, both the Board and Ang were negligent and the injury caused to Liew would not have occurred but for the concurrent breach of duty and negligence on the part of both the Board and Ang. However, in my view, the question of whether the Board is or is not entitled to be *fully* indemnified under cl 22(a) of the Contract (which is the main issue in this appeal) cannot be answered by reference to the technical issue of causation nor by trying to ferret out the express intention of the parties since they had not, it seems to me, addressed their minds to a case of concurrent causes. That is why each party is arguing for either a full indemnity, or no indemnity and not a partial indemnity on the basis of the apportioned fault.

35 But, as Steyn LJ also said in *Caledonia (CA)* at 1520, the question before the court is "not to divine what the parties in fact intended" but to determine, in the present case, what the words of cl 22(a) mean. To my mind, the structure of cl 22(a) suggests that the main object of the proviso is to ensure that the Board would be indemnified for any loss it has suffered as a result of any negligent act of the Contractor or the Subcontractor or their respective servants or agents. The proviso was

inserted for that purpose. The Board did not address its mind to its own negligence as an occupier of the Park. It did not address its mind to a situation involving the concurrent fault of the parties. It also did not address its mind to a situation where the Contractor is not wholly negligent, but partially negligent, whatever the degree of negligence might be. A relevant question would be whether this court should construe the proviso to render the Contractor liable for the Board's liability to an invitee in the Park if, for example, the Contractor were only 10% liable for any injury caused to that invitee.

36 In my view, since cl 22(a) appears to have a lacuna, it will be necessary to resort to the established principles of construction of contractual terms to resolve this issue.

37 One such principle would be the *contra proferentem* rule "that contractual provisions should prima facie be construed against the party who was responsible for the preparation of the contract and/or who is to benefit from the provision" (*per* Hobhouse J at 227) where there is an ambiguity in the relevant provision. Applying the *contra proferentem* rule to cl 22(a) against the Board on the Contractor's argument that it is ambiguous because it does not cover the situation of concurrent causes would result in the Board being deprived of its indemnity under cl 22(a). However, in my view, I do not think that the *contra proferentem* rule should be applied to cl 22(a), not because there is no ambiguity in cl 22(a) (as there is to the extent as mentioned) but because it is impossible for this court to ignore the presence of the proviso and not give effect to it, as if it were not there. In my view, approaching the interpretation of cl 22(a) not in a technical way, but in the way in which the commercial parties to the agreement would probably have approached it, the correct way to interpret cl 22(a) is to give effect to the indemnity *only to the extent that the Board itself is not at fault* in causing injury to any person lawfully present in the Park. Conversely, the Contractor is liable to indemnify the Board for any liability or loss suffered by the Board *to the extent of the negligence* of the Contractor or that of the Subcontractor or their respective servants or agents.

38 This approach, in my view, reconciles the application of the "inherently improbable" principle of construction (that the Board will not be exempted from the consequences of its own negligence or, alternatively, will not be entitled to be indemnified by reason of its own negligence) and the proviso which seeks to impose an indemnification liability on the Contractor in the circumstances therein mentioned. Since neither party has agreed to be liable for the negligence of the other party according to the terms of cl 22(a), each must be liable for, and to the extent of, its own negligence. On this interpretation, the Board is entitled to be indemnified by the Contractor to the extent of the contributory negligence of the Subcontractor's servant, Ang, *ie*, for 50% of the loss suffered by the Board.

Conclusion

39 For the reasons given above, this appeal is allowed to the extent as stated. The Board is entitled to judgment against the Contractor for 50% of the total amount of $114,270.52 with interest thereon calculated from the date of payment to Liew up to the date of payment of this judgment. Since neither party has succeeded in full in these proceedings, each party will bear its own costs here and below.