IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 226

DA 19/1993

Between

Wisma Development Pte Ltd

… *Appellant*

And

Sing - The Disc Shop Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Insurance — General principles — Subrogation

Version No 1: 11 Sep 2026 (01:05 hrs)

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Wisma Development Pte Ltd v Sing - The Disc Shop Pte Ltd

[1993] SGHC 226

DA 19/1993
Punch Coomaraswamy J
25 September 1993

1 This is an appeal from the decision of district court judge Mr Francis Remedios. The facts of the case are simple and are within a narrow compass.

2 Two units in a building at Orchard Road called `Wisma Atria` were tenanted out by the appellants/defendants to the respondents/plaintiffs. Clause 10(a) of the tenancy agreement provided as follows:

> *Tenants to insure: The tenants shall insure the demised premises and all tenants` property therein for their full insurable value against all risks commonly insured against in respect of premises of a similar nature including, but not limited to, public liability and fire risks.*

3 Further, the tenancy agreement contained the material provisions:

> *Clause 11(a)*
>
> *Release of landlords: The tenants agrees to occupy use and keep the demised premises at the risk of the tenants and hereby releases to the full extent permitted by law the landlords and its agents servants contractors invitees and employees* ***in the absence of any negligence on the part of the landlords*** *from all claims and demands of every kind in respect of or resulting from any accident damage or injury occurring in the demised premises and* ***in the absence of any such negligence*** *as aforesaid the landlords shall have no responsibility or liability for any loss damage or injury suffered by the tenants (whether*

> *to or in respect of the tenants` person or property or the business conducted by the tenants) as a result of any breakage, leakage, accident or event in the demised premises. [Emphasis supplied.]*

4 On 15 August 1986, water leaked from a fire hose adjacent to the respondents` units. In consequence, the units were flooded causing damage to the respondents` property. The respondents had taken out insurance which included the risks of `bursting or overflowing of water tanks/pipes`. The respondents gave notice of the flooding damage to and made claim on the insurers. The claim was met by the insurers who initiated these proceedings in the name of the respondents in exercise of their right of subrogation. The basis of the claim was that the flooding and the consequent damage was caused by the negligence of the landlords, their servants or agents. The landlords denied negligence. They further took the position that even if the flooding had been caused by their negligence the contractual effect of cl 10(a) was to make the respondents assume the risk of such damage and accordingly the appellants were not answerable to the respondents or their insurers.

5 The district court judge made a finding that the appellants` (landlords`) negligence caused the damage. His finding is unassailable. The judge further held that the tenants had not assumed the risk of damage by flooding under cl 10(a). The learned judge construed cl 10(a) in the light of cl 11(a) which released the landlords from claims and demands except when caused by the landlords` negligence. In doing so, the learned judge relied on cl 21(h) which reads as follows:

> *Exclusion of implied terms: The covenants, provisions, terms and agreements herein cover and comprise the whole of the agreement between the parties hereto or their appointed agents and the parties hereto declare that no further or other covenants, agreements, provisions or terms whether in respect of the demised premises or otherwise shall be deemed to be implied herein or to arise between the parties hereto by way of collateral or other agreement by reason of any promise, representation,*

Version No 1: 11 Sep 2026 (01:05 hrs)

> *warranty or undertaking given or made by either party hereto to the other on or prior to the execution hereof and the existence of any such implication or collateral or other agreement is hereby negatived.*

6 The learned judge further observed that in another tenancy agreement made between the same parties subsequent to this incident the insurance clause contained an additional provision that `All such policies shall include a provision for waiver of subrogation against the landlords`. The judge reasoned that the absence of this provision in the case before him was a clear intention to preserve the subrogation rights of the tenants` insurers to proceed against the landlords.

7 In my view the cl 10(a) did not afford any protection to the landlords against any damage caused by the negligence of the landlords. The effect of an insurance provision in a lease has come under consideration in England, Canada and New Zealand. The principal authority on the point is the decision of the Supreme Court of Canada in ***Ross Southward Tire Ltd v Pyrotech Products Ltd*** . In that case, there was a covenant by the tenants to pay insurance premiums for fire insurance immediately when due. The tenants did pay them on being billed by the landlords. Thus the landlords obtained insurance against fire. When loss was caused by fire resulting from the tenants` negligence, it was held that the effect of the landlords` obligation to insure gave protection against the risk of loss by fire caused by the tenants` negligence because the tenants were entitled to take advantage of the payment of insurance premiums for a policy under which indemnity was given for loss by fire, including fire arising from some person`s negligence, be it that of the tenants or someone else.

8 In the subsequent of case of ***T Eaton Co Ltd v Smith*** , the Supreme Court of Canada reaffirmed its reasoning in the ***Pyrotech Products*** , case. In this case the appellants (tenants) leased two contiguous properties from different

Version No 1: 11 Sep 2026 (01:05 hrs)

landlords. The building on which the two properties stood were destroyed by a fire caused by the negligence of an employee of the tenants. Both leases contained covenants by the landlords whereby they undertook to insure the property against fire damage. In both leases the tenants covenanted to repair, to repair on notice, and to leave the premises in good repair. After the insurers paid the amount of fire damage to the landlords, they sought a right of subrogation against the tenants. The landlords relied on the reinstatement clause; the tenants were liable for their negligence.

9 The Supreme Court of Canada stated that it was settled law that the exception of fire in a repairing covenant did not exculpate tenants from liability for fire caused by their negligence or that of a person for whose negligence they were vicariously liable. If they can escape this liability in the case, it could only be on the basis that the landlords` covenant to insure was a covenant that ran to the benefit of the tenants, lifting from them the risk of liability for fire arising from their negligence and bringing that risk under insurance coverage. The court then held that if there had been no covenant by the landlords to insure in the lease, the liability of the tenants for fire resulting from the negligence of their employee would have been unquestionable.

10 The effect of the insurance obligation was to entitle the tenants to protection against the risk of loss by fire caused by their negligence. This was notwithstanding the repairing covenants which, if they had stood alone, would have saddled the tenants with liability for losses from such fires. The court went on to hold that where the covenant to insure is not at large but is, a covenant with the lessee that the landlords will keep the buildings on the premises insured against any loss by fire, it must be given effect against liability for fires arising from the tenants` negligence because otherwise, as a covenant expressly running

Version No 1: 11 Sep 2026 (01:05 hrs)

to the benefit of the tenants, it would have no subject matter. There was no need for the covenant; it was only for the benefit of the landlords.

11 In ***Malborough Properties Ltd v Malborough Fibreglass Ltd*** , the plaintiffs owned a factory which was leased to the defendants. The defendants used the premises for their business of manufacturing fibreglass products, mainly boats. In accordance with their lease, the defendants insured the premises in the name of the plaintiffs against fire and earthquake to its full insurable value and against loss of rents. The factory was seriously damaged by fire. The plaintiffs, having reinstated the factory by use of the insurance moneys, brought an action for the full amount of the fire damage alleging that the fire was caused by the negligence of the defendants.

12 The trial judge found that the fire was caused by the negligence of the defendants but that the defendants were nevertheless not liable to the plaintiffs. The plaintiffs appealed, and the defendants cross-appealed against the finding of negligence. The Court of Appeal held that the judge was entitled on the evidence to conclude that the fire which damaged the demised premises was caused by the negligence of the lessee. In the absence of a contrary provision in the lease, the lessee would be liable for negligence. The court then by a majority held that there was a contrary provision in the lease.

13 The fire insurance paid for by the lessees covered the lessors and was intended to cover the lessors against the risk of loss by fire whether accidental or occasioned by negligence, including negligence of the lessee. It could not have been intended that the lessor should be entitled to recover under the policy paid for by the lessees and also be entitled to pursue a separate claim for damages against the lessees. It was implicit that the parties agreed that, to the

Version No 1: 11 Sep 2026 (01:05 hrs)

extent of the cover provided by the insurance, the risk of loss by fire, whether or not due to the lessees` negligence, passed to the lessors.

14 The insurance cover protected the lessors against loss of rents and against loss or damage to the demised premises. Once the lessees had paid the necessary premium, the lessors were indemnified against the risk of loss by fire. In those circumstances it would not be consistent with the intentions of the parties expressed in the lease to allow the lessors to make a separate and second claim against the lessees in respect of the same subject-matter. The court followed the ***Pyrotech Products*** , and ***Eaton*** , decisions of the Supreme Court of Canada.

15 It is important to note that in the ***Eaton*** , case, the covenant was not at large, which gave a liberty to the landlords, but a covenant by which the landlords covenanted with the lessee that he will, throughout the currency of the lease and any extension thereof, keep the premises insured against loss by fire. The insurance covered loss even if the tenants negligently caused it.

16 The above principle was accepted and applied by the English Court of Appeal in ***Mark Rowlands Ltd v Berni Inns Ltd & Ors*** . The district judge summarized this case as follows:

> *In the* ***Mark Rowlands*** *case the issue was whether a landlord`s fire insurers could recover damages by subrogation from a tenant through whose negligence the insured building had been destroyed by fire. The terms of the lease between the landlord and the tenant provided:*
>
> (1) that the landlord should insure the whole building against fire;
>
> (2) the tenant was to contribute to the cost of the insurance;
>
> (3) the tenant was to be relieved from his repairing obligations in the event of damage by fire;

> (4) the landlord would layout the insurance moneys to rebuild the demised premises.
>
> *Kerr LJ found that the decisive issue was whether the terms of the lease precluded the landlord from recovering damages from the tenant on the ground that the fire covered by the landlord`s insurers had been caused by the negligence of the tenant.*

17 The finding of Kerr LJ was that it was clear from the terms of the lease that it was the intention of the parties that in the event of damage by fire, whether due to accident or negligence, the landlord`s loss was to be recouped from the insurance moneys and in that event they were to have no further claim against the tenant for damages in negligence. And since the landlord could not maintain an action for negligence, the insurers, whose rights depended on the rights of the landlord, did not have any right of subrogation.

18 It is important to add that in the ***Mark Rowlands*** case, the tenants paid the insurance and the landlords covenanted to keep the premises insured. Kerr LJ referred to a number of North American authorities and followed the reasoning which I have set out above. At pp 232-233, Kerr LJ said:

> *An essential feature of insurance against fire is that it covers fires caused by accident as well as by negligence. This was what the plaintiff agreed to provide in consideration of, inter alia, the insurance rent paid by the defendant. The intention of the parties, sensibly construed, must therefore have been that in the event of damage by fire, whether due to accident or negligence, the landlord`s loss was to be recouped from the insurance moneys and that in that event they were to have no further claim against the tenant for damages in negligence.*

19 The crucial factor in these cases is that the party in negligence paid the cost of insurance separately or as part of the rent and in return for such consideration the other party undertook to effect insurance which would cover an event which included negligence of the party who paid the cost of insurance.

Version No 1: 11 Sep 2026 (01:05 hrs)

20 On the true construction of the insurance clause at hand, it was a covenant at large. The tenants could not be sued if they failed to effect insurance. It was therefore not for the benefit of the landlords. Accordingly the landlords were not relieved from their liability in negligence. This is the true ground why the appellants were liable.

21 The present case is very akin to ***Aira Force SS Co Ltd v W Christie & Co*** . It was an action for damages for injuries to the plaintiffs` steamship, Aira Force, by reason of the negligence of the defendants` servants. By a time charterparty, dated 2 February 1892, the ship was let to the defendants as charterers for the term of two months. The charterparty contained a clause that the owners (the plaintiffs) `shall pay for the insurance on the vessel (if any).` The defendants loaded on board the ship a cargo of sleepers. In the course of loading, a fire occurred in the ship, owing to the negligence of the defendants` servants in the use of certain lamps. It was admitted by the defendants that their servants had been negligent, but they contended that the clause in the charterparty that the owners should pay for the insurance on the vessel showed that the insurance was to be for the joint benefit of both parties, and it negatived the idea that the defendants were to insure or to be liable for the damage. The defendants were held liable, and judgment was given for the plaintiffs. The Court of Appeal affirmed the decision.

22 The Master of the Rolls said that prima facie the defendants were liable for the damage to the plaintiffs` ship. The clause relied upon by the defendants was that `the owners shall pay for the insurance (if any).` That clause did not imply that the shipowners were obliged to insure and pay for the insurance. Even if it did, it would not imply that the shipowners would not be paid by the charterers for damage to the ship caused by the negligence of the charterers` servants. The shipowners would have two remedies - a choice of remedies. They

need not look only to the underwriters, who, perhaps, would not be able to pay. It is clear that the insurance clause was one at large as the owner was not obliged to insure, and the charterer failed to extract an undertaking from the owners for a consideration specifically or as part of the charterhire to insure against the charterer`s negligence. The charterer had no enforceable right against the owner for his failure to insure. Similarly, in this case, the landlords had no enforceable right against the tenants. The insurance clause meant that the tenants could not look to the landlords for the cost of insurance.

23 I would finally add that the waiver of subrogation clause in the new lease and the exclusion of negligence in cl 11(a) have no bearing on the construction of cl 10(a).

24 The appeal is accordingly dismissed and the appellants shall pay the costs of the appeal.

25 Appeal dismissed.

Punch Coomaraswamy J

P Selvadurai and Jessie Thong (Rodyk & Davidson) for the appellants
Foo Yuk Lin (Tang & Pnrs) for the respondents

Version No 1: 11 Sep 2026 (01:05 hrs)