

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 119

DA 36/1991

Between

Wisma Development Pte Ltd

... Appellant

And

2M Property Consultants Pte
Ltd

... Respondent

GROUND OF DECISION

Contract — Breach; Insurance — General principles — Subrogation

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Wisma Development Pte Ltd v 2M Property Consultants Pte Ltd

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DA 36/1991
Yong Pung How CJ
05 May 1992

1 The plaintiffs are the owners of a building. The defendants are independent contractors who, by a maintenance tenancy agreement between themselves and the plaintiffs (which is described in the pleadings to have been dated 31 December 1986, but which covered the period from 10 July 1986 to 9 July 1987), agreed to carry out maintenance works on the building. It was a term of this agreement that the defendants should exercise all reasonable care and diligence in carrying out their duties under the agreement. At all relevant times the plaintiffs had leased unit #03-34 of the building to a tenant.

2 On 23 September 1986 the tenant reported that one of the ceiling boards of the unit was water-stained. At about 4pm that afternoon, two of the defendants' employees came to inspect the unit. Inside the unit, one of them climbed a ladder and removed a ceiling board to inspect the air-conditioning system. He thought the water pipe was choked, and proceeded to unscrew the bleeder valve on it so as to increase the water pressure along the pipe to clear the blockage. He did this without taking the normal precaution of first checking to see if the valve was already loosened. After only three turns, the valve came

off entirely and a high-pressure jet of water gushed out, sweeping him off the ladder. He fell onto some wooden racks, damaging them, and the water continued to pour into the unit, flooding the premises.

3 The tenant wrote to the plaintiffs, claiming for the damage to the premises. The plaintiffs forwarded the claim to their insurers, who appointed loss adjustors to investigate the claim. The loss adjustors duly reported to the insurers. Eventually, the tenant accepted \$27,718.39 from the insurers on behalf of the plaintiffs `without any admission of liability`. The tenant also signed a subrogation agreement and assignment dated 10 December 1986, acknowledging receipt of the said sum and agreeing to `assign, set over, transfer, subrogate and substitute` to the insurers all the tenant`s rights and remedies, claims, interest or actions in the matter.

4 The insurers commenced this action in the name of the plaintiffs, seeking by way of subrogation to recover the said sum or, alternatively, damages from the defendants, on the ground of the defendants` or their servants` alleged negligence and/or breach of duty and/or breach of contract.

5 The district judge found that the defendants` servant had been negligent in operating the bleeder valve, and further, that the defendants were in breach of their duty under the maintenance tenancy agreement. In the result, however, he dismissed the claim on the basis that the payment made to the tenant by the plaintiffs was not made pursuant to any liability of the plaintiffs but was in fact an ex gratia payment, to which the doctrine of subrogation could not apply. The plaintiffs appealed against this decision and I dismissed the appeal. I now set out my grounds for doing so.

6 The doctrine of subrogation allows the insurer `the advantage of every right of the assured`, however it arises, `by the exercise or acquiring of which right or condition the loss against which the assured is insured can be, or has been, diminished` (per Brett LJ in ***Castellain v Preston & Ors***

7 1 at p 386). It is important to identify `the assured` in this case, and the rights of action of that assured, to which the insurers may be subrogated. It was the tenant who directly suffered the damage. But under the contract of insurance between the plaintiffs and the insurers, to which the tenant was not party, the plaintiffs were `the assured`.

8 The question then was what rights the plaintiffs had against the defendants, that the insurers could be subrogated to. These have to be rights by the exercise of which the loss suffered by the plaintiffs can be diminished, which brings us to the problem of determining the loss that was suffered by the plaintiffs. In this regard it is relevant to observe that the tenant assigned his rights, not to the plaintiffs, but to the insurers.

9 Before continuing this line of reasoning, I pause to point out that both the tenant and the plaintiffs had rights of action against the defendant. The tenant`s right of action lay in tort because it was not party to the maintenance tenancy agreement; the plaintiffs` lay in contract only because they claimed only pure economic loss.

10 The insurers having paid the tenant compensation on behalf of the plaintiffs, it may be deemed for present purposes that the positions of the insurers and the plaintiffs were the same. Clearly a `loss` of \$27,718.39 was thus incurred. It is a matter of semantics whether this is addressed, as the defendants` counsel did, as a question of whether there was in fact a `loss` or

whether it is accepted to be a loss but addressed as a question of causation, though I prefer the latter treatment.

11 The plaintiffs do not profess in their statement of claim to have suffered any physical damage at all. As I have already pointed out, the sole loss claimed by them was economic loss. Did the defendants' breach of duty under the contract, which undoubtedly caused physical damage to have been suffered by the tenant, 'cause' the plaintiffs to pay the tenant? The defendants' argument that the payment was voluntary amounts to this: that the chain of causation was broken because, although the plaintiffs did pay the tenant as a consequence of the defendants' breach of the maintenance tenancy agreement, they did not have to. And equity, the author of the doctrine of subrogation, will not assist a volunteer.

12 It is well accepted that the actions of a plaintiff's servants or agents will not break the chain of causation between the breach of contract and the damage if such actions were reasonable in the circumstances. The mere fact that the loss adjusters warned the insurers that the payment was probably not recoverable was not altogether determinative of the voluntary nature of the payment, since the loss adjusters' opinion could not determine the legal relationship between the parties. All it meant was that at the time the payment to the tenant was made, the insurers knew they were taking the risk that the defendant might have been a servant of the plaintiffs and thus immune from suit.

13 The insurers paid the tenant on behalf of the plaintiffs for two broadly discernible reasons: first, because they relied upon the determination of the loss adjusters, these being professionals in the field but not legally trained; second, because they had sound commercial or practical reasons for paying up promptly. In my view, the chain of causation between the defendants' breach of contract

and the resultant loss to the plaintiffs was broken: despite the defendants' breach of duty, neither the plaintiffs nor the insurers should have had to pay the tenant at all, according to the terms of the lease. In arriving at this conclusion, I am fortified by the reasoning of the House of Lords in **Esso Petroleum Co v Hall Russell** [1989] AC 643

14 In that case, an oil tanker crashed into a jetty in the Shetland Islands, owing to the alleged negligence of the builders of a tug that had been in attendance upon her. Her cargo of bunker oil escaped, causing pollution to the foreshore. The tanker owners were parties to a voluntary agreement made among the majority of the world's tanker owners. This obliged them to pay moneys in satisfaction of claims in respect of oil pollution damage. Pursuant to this agreement, the tanker owners made payments, inter alia, to the crofters on the Islands in respect of the harm caused to their sheep by the pollution of the foreshore. The tanker owners then claimed in their own name the sum of these payments as losses incurred as a result of the physical damage to their tanker. The case is not in fact directly applicable to the present one because of this, but it is nonetheless instructive. The House of Lords held that the sum was not recoverable. Essentially the claim was made on two bases: subrogation and negligence.

15 On the claim in negligence, Lord Goff held that the necessity to pay under the agreement did not affect the voluntariness with which the tanker owners entered into it, and therefore the financial loss could not be likened to loss of hire of the damaged vessel, for example, and remained of the nature of pure economic loss, for which damages are not recoverable in negligence.

16 Lord Jauncey, with whom the other three Law Lords agreed, regarded the payment as voluntary because the obligation to pay did not arise out of the

alleged negligence of the tug builders - even assuming the damage to have been caused wholly by the tug builders, the tanker owners would not have had to pay at all if they had not entered into the agreement.

17 It seems to me that the assumption must have been made that if the shipowners had not entered into that agreement, they would not have had to pay the victims, and if they had, they would not have been entitled to recover. This situation would have resembled the instant case, since it was argued before me that the effect of the insurance policy and the tenancy agreement was to negate the plaintiffs' liability to the tenant so that the payment was a voluntary one, made for the reasons I have already set out.

18 Much time was spent before me and in the court below on the applicability of **King v Victoria Insurance Co Ltd** [1896] AC 250 as opposed to **Esso Petroleum Co v Hall Russell** [1989] AC 643. However, I do not think that **King v Victoria Insurance Co Ltd** [1896] AC 250 is applicable to this case, for the same reason that it does not in fact conflict with **Esso Petroleum Co v Hall Russell** [1989] AC 643. In **King v Victoria Insurance Co Ltd** [1896] AC 250 the insurer paid its client, the plaintiff, who was the assured and not merely a third party payee. The main question of law concerned the insurance policy and it was a clear case of subrogation. In the instant case, the insurers did not pay their clients, the plaintiffs, and then sue in the plaintiffs' name; they paid the plaintiffs' **tenant** and then sued in the plaintiffs' name.

19 To put it plainly, the insurers had the means to recover the money as against the defendants. They might have made use of the tenant's rights against the defendant, and depending upon the effect of the subrogation agreement and assignment, sued in their own names or the tenant's. They did neither. The

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insurers **were** subrogated to the plaintiffs` rights of action in contract against the defendants, but in my judgment, those rights were illusory in this case.

20 **Outcome:**

21 Appeal dismissed.

Yong Pung How CJ

Govindarajalu Asokan (Rodyk & Davidson) for the appellants
Simon Yuen and Kuah Boon Theng (Khattar Wong & Partners) for
the respondents
