IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 255

Suit 1715/1987

Between

Chua Keng Mong

… *Plaintiff*

And

Hong Realty Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Bailment — Negligence; Contract — Contractual terms — Exclusion clauses

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

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Chua Keng Mong v Hong Realty Pte Ltd and Others

[1993] SGHC 255

Suit 1715/1987
Goh Joon Seng J
25 October 1993

1 Cur Adv Vult

2 The plaintiff was at all material times a wholesaler and supplier of wallpaper and carpets. The first defendants were warehousemen for reward having their warehouse at No 351 Upper Bukit Timah Road, Singapore (`the warehouse`). The second and third defendants were building contractors.

3 At the material time, the plaintiff`s goods were stored at the warehouse under a warehousing agreement dated 22 April 1986.

4 In October or November 1986, during the currency of the warehousing agreement, the first defendants carried out some renovation and refurbishment works to the office section of the warehouse. The contract for these renovation and refurbishment works was awarded to the third defendants.

5 As a condition for approval of the building plans, the Fire Safety Bureau required the installation of an additional fire-hose reel drum in the renovated office section. Instructions were issued to the third defendants by the first

defendants` architect for this to be carried out. The third defendants thereupon engaged as sub-contractors the second defendants for this item of the works.

6 On the morning of Saturday, 20 December 1986, two workmen in the employ of the second defendants arrived at the warehouse and sought from Mr Paul Thanapal (`Thanapal`), the maintenance officer in charge of the warehouse, permission to enter the storage area to do this work by fixing a `T` joint to the main overhead fire-hose reel supply line (`overhead pipe`). The `T` joint would tap water supply from the overhead pipe for the new fire-hose reel drum to be installed in the office area. Permission was given to the two workers by Thanapal.

7 Just before the 1pm closing time for Saturdays, Thanapal went to the storage area where this work was being carried out. He saw that a mid-section of the overhead pipe had been cut out leaving two cut-off ends of the overhead pipe in position right above the location where the plaintiff`s goods were stored. The two cut-off ends were not capped. Thanapal was told by the two workers that the main valve had been shut. Accordingly, after the workers left, the warehouse was shut for the weekend at 1pm with the two cut-off ends of the overhead pipe remaining uncapped. This is what Thanapal said:

> *On 20 December 1986, a Saturday, at about 11am, two workers from the second defendants arrived and requested permission to go into the warehouse to carry out work to connect an extension pipe from the hose reel supply line pipe to a new hose reel drum at the front office. I asked them how they were going to do it. They told me they were going to shut the main valve to the main supply line and drain the system, then cut the supply line to connect the new pipe. So I gave them permission to do the work. I telephoned DW4 to give them access to the warehouse to do this work. I recognized the contractors because they had done work there before. After they had been given access I went into the warehouse at about 12.30pm to check their work. I saw they were still working on a section of a pipe and about 30 feet of it had been cut and I saw the two open ends. There was no water*

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> *coming out. I asked these two workers whether the main valve had been shut tight. They answered `yes`. I told them we were closing at 1pm; if they could not finish the work, they had to continue on Monday. They knew we closed at 1pm because they had worked during the previous weeks when we closed at 1pm. I informed DW4 to lock up once the workers left. I then went back to my office. Later the two workers came to my office and told me that they would continue on Monday and that the main valve was still shut.*

8 DW4 is one Adrian Tan, the warehouse supervisor who worked under Thanapal. On the following Monday morning, 22 December 1986, when the warehouse was reopened at 8am, it was discovered that the area under the two uncapped cut-off ends of the overhead pipe was flooded and some of the plaintiff`s wallpaper and carpets were soaked. The plaintiff was informed. On arriving at the warehouse at around 10.30am he saw water dripping from the overhead pipe followed by a bigger gush at around 11am. Seeing the damage to his goods, the plaintiff made a request to Thanapal for a joint survey. There was further flow of water from the pipe at 2pm. Some cloth was then used to close up the cut-off ends. At about 4.30pm the cut-off ends were capped with metal caps. Thereafter, there was no further flow of water from the pipe. From the evidence, I find that though the valve had been tightly shut, the water in the system had not been completely drained before the 30 ft section of the pipe was cut out. Due to pressure within the system, the water in the pipe flowed out through the uncapped ends of the pipe.

9 Subsequently, the undamaged wallpaper and the undamaged carpets were put aside, and the survey of the damaged goods conducted by marine surveyors Abdul Rahman bin Hussein and Anthony Sunda Babu, from Cleghorn, Wilton & Associates (Singapore) Pte Ltd (`the Cleghorn Survey`), took place from 5 to 9 January 1987. It is the plaintiff`s contention that this was the joint survey he requested. But the first defendants denied that it was a joint

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survey as they had handed the matter to their insurers for attention and they themselves took no part in it.

10 The first defendants` insurers however declined to take part in the joint survey. Through brokers, their insurers, Phoenix Assurance Public Ltd Co, advised as follows:

> *... Insurers have confirmed that they are not sending their surveyors in view that the sub-contractors, Armour Engineering Pte Ltd, have notified their insurers, Commercial Union Assurance plc, who have appointed the adjusting firm of Toplis & Harding (S) Pte Ltd to investigate the circumstances and extent of the damage.*

11 We would advise that, at this instance, you should hold the sub-contractors liable for the damages. Should you receive any intimation of a claim from your customer, please do not admit liability or acknowledge their letters, but pass all correspondence to us for onward transmission to insurers.

12 As a result of the stand taken by the first defendants` insurers, the Cleghorn Survey went ahead without surveyors representing the interest of the first defendants being present.

13 Based on the Cleghorn Survey, the damage and loss sustained by the plaintiff was calculated at $391,909.88.

14 As the plaintiff received no satisfactory response from the defendants to his claim based on the Cleghorn Survey, he commenced these proceedings on 18 June 1987 against the first and second defendants. On 21 April 1988, the third defendants were joined as a party. The plaintiff has obtained leave to enter judgment against the second defendants. The third defendants represented by

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the official receiver did not defend the claim against them when the matter came up for hearing before me.

15 The plaintiff`s claim against the first defendants is for negligence or breach of duty, as bailees or warehousemen for reward, to take proper care of his goods entrusted to them. The first defendants, however, contended that they had taken all reasonable precautions as warehousemen to ensure the safety of the goods in the warehouse and that the cause of the damage was not due to any lack of proper care on their part or that of their servants or agents. Alternatively, they relied on the exemption clauses.

16 The duty of care owed by the bailee to the bailor of chattels was adverted to by Diplock LJ in ***Morris v CW Martin & Sons Ltd*** 1 at pp 734-735:

> *... The legal relationship of bailor and bailee of a chattel can exist independently of any contract, for the legal concept of bailment as creating a relationship which gives rise to duties owed by a bailee to a bailor is derived from Roman law and is older in our common law than the legal concept of parol contract as giving rise to legal duties owed by one party to the other party thereto. The nature of those legal duties, in particular as to the degree of care which the bailee is bound to exercise in the custody of the goods and as to his duty to re-deliver them, varies according to the circumstances in which and purposes for which the goods are delivered to the bailee. ...*

17 One of the common law duties owed by a bailee of goods to his bailor is not to convert them, ie not to do intentionally in relation to the goods an act inconsistent with the bailor`s right of property therein. (See ***Caxton Publishing Co Ltd v Sutherland Publishing Co Ltd*** per Lord Porter.) This duty, which is common to all bailments as well as to other relationships which do not amount to bailment, is independent of and additional to the other common law duty of a bailee for reward to take reasonable care of his bailor`s goods.

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18 To ensure that the place where the goods are stored is a fit and proper place for the storage of the goods is one such duty to take reasonable care. 2 ***Halsbury`s Laws of England*** (4th Ed) para 1539 states:

> *A custodian for reward must exercise due and reasonable care for the safety of the article entrusted to him. The standard of care and diligence imposed on him is that demanded by the circumstances of the particular case, and is higher than that required of a gratuitous depository; it should be the rather greater care that a reasonable man would take of other people`s articles lent to him at his request for his convenience.*

19 The custodian is therefore bound to take reasonable care to see that the place in which the chattel is kept, ... [is] fit and proper for the purpose, to protect it against unexpected danger should that arise, ...

20 In ***Brabant & Co v Thomas Mulhall King*** , the government being bailees for reward stored the appellant`s explosive goods in sheds near the bank of a river. Due to heavy flood, the waters of the river rose to an exceptional height. As a result, the appellants` explosive goods were rendered valueless by their immersion in water. It was held that the selection of such a site rendered it incumbent upon the government to place the goods at such a level as would, in all probability, ensure their absolute immunity from the incursion of flood water. In delivering the judgment of the Privy Council, Lord Watson said at pp 640-641:

> *Their Lordships can see no reason to doubt that the relation in which the government stood to the appellant company was simply that of bailees for hire. They were therefore under a legal obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred.*

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21 Their Lordships think it right to indicate that, in their opinion, the locality of the government stores to which the present case relates was not a matter of which reasonable complaint could be made, and that it bulked too largely in some of the questions put to the jury. It is not only convenient, but it may be highly expedient, that stores for the reception of explosive substances landed from vessels before they enter the harbour should be placed near to the water-edge. But the selection of such a site, however justifiable in itself, imposes upon the storekeeper the plain duty of making arrangements within the store by which the goods are placed at such a level as will, in all probability, ensure their absolute immunity from the incursion of flood water.

22 Turning to the instant case, Mr Tan Lye Woo (`DW1`), a senior draftsman in the employ of the first defendants` architects, Akitek Regional, said:

> A: … If I knew there was a pile of carpets, I would see that the water in the system is drained off by shutting off the main valve, turning on the hose and letting the water drain off before cutting the pipe. If this is not done, water will come out when the pipe is cut.
>
> Q: If the main valve had been turned off and you turned on the hose, if no water came out when the pipe was cut, would you think that the system had been dewatered totally?
>
> A: Before the workers cut the pipes they must see that no water came out when pipe is cut because there were carpets there. I would expect a competent contractor or sub-contractor to take this precaution. …

23 This is also the evidence of Mr Ong Chin Moh (`DW2`) of Steadfast Singapore Pte Ltd, who installed the fire alarm at the warehouse for the first defendants. In his examination-in-chief he said:

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> A: … This extension is not a difficult work. It is not dangerous or hazardous work. This work can be done safely if proper precautions were taken, eg you need to drain most of the water from the hose reel so that the remaining water would be minimal, then cut the pipe. But there should be a pail underneath the cut ends of the pipe to catch the dripping water, if any, and a portion of the carpet should be covered.
>
> Q: If you have drained the system and no water had come out, would you still place a pail beneath the cut ends of the pipe?
>
> A: This pail is placed as a precaution because, when you cut the pipe, you would not know if the water had been completely drained off.

24 Under cross-examination by plaintiff`s counsel he said:

> Q: You said it was prudent to put a pail below the cut opening?
>
> A: Yes, because water might still be inside.
>
> Q: Would it be prudent to leave a cut pipe uncapped over a weekend?
>
> A: Certainly not prudent. It is dangerous.
>
> Q: If work was not finished and work stopped, the cut opening should have been capped?
>
> A: Yes.

25 I therefore hold that, in allowing the two cut-off ends of the overhead pipe to remain uncapped from 20 to 22 December 1986 without a pail below each cut-off end of the pipe to catch any dripping water when the warehouse was closed for the weekend, the first defendants had not taken reasonable care to see that the area where the plaintiff`s wallpaper and carpets were stored was fit and proper for storage of such goods.

26 The first defendants, however, rely on the exemption clauses II, III and IV which read:

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> II Goods are not insured by Hong Realty Pte Limited but lie in the godown entirely at owner`s risk. Hong Realty Pte Limited, however, will endeavour to effect an insurance on behalf of the owner, provided they receive instructions in writing, and the premium is duly paid or agreed to be paid by the owner prior to the goods being received for storage.
>
> III Hong Realty Pte Limited will not be responsible for the condition or contents of any package received for storage, nor for loss of weight or for any loss or damage to the said goods, before or whilst being stored or remaining on storage, caused by act of God, enemies, hostilities, strikes, lockouts, riots, restraint of princes, rulers or people, effects of climate, monsoons, tempests, torrential rains, floods, sea or water, temperature changes, heat, fire, lightning, earthquake, explosion, vermin, white ants, unprotected or insufficiently protected castings or machinery, defective or insufficient packing or packages, obliteration of marks, hook holes, tearing or covers bursting of bands or hoops, leakage, rust, decay, sweat, mildew, dryrot, evaporation, fumigation, accidents, latent or patent defects of the godown, floods or natural causes, or circumstances over which Hong Realty Pte Limited have no control, misfeasance, error in judgment, theft, burglary, forgery of documents or title or the forgery of any documents by means of which any unauthorized person obtained possession of the goods, negligence or default of the company`s servants or agents and any person acting for or under the employ of the company.
>
> IV The responsibility of Hong Realty Pte Limited for any loss or damage caused by water sprinkler devices shall be excluded whether such damage is caused by the intentional operation of such devices to prevent fire or as a result of latent or patent defect in the system including the mechanical failures or malfunction of such devices from any cause whatsoever.

27 On construction of exemption clauses, ***Chitty on Contracts, General Principles*** (26th Ed) para 945 states:

> *Exemption clauses must be expressed clearly and without ambiguity or they will be ineffective. The clause must clearly express what its intention is. In* ***Alison (J Gordon) & Co Ltd v Wallsend Shipway and Engineering Co Ltd****, a cylinder was sold by the defendants to the plaintiffs `subject to our usual guarantee clause`. The clause usual in the trade `guaranteed` the purchaser against defects discovered within six months of delivery, but excluded liability for consequential damage. It was held that the defendants were not protected, for `if a person was*

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> *under a legal liability and wished to get rid of it he could only do so by using clear words.` Exemption clauses will therefore be construed strictly, and the degree of strictness appropriate to their construction may properly depend upon the extent to which they involve departure from the implied obligations ordinarily accepted by the parties in entering into a contract of a particular kind ...`*

28 See also ***Suisse Atlantique SociÃ©tÃ© d`Armement Maritime SA v NV Rotterdamsche Kolen Centrale*** at pp 431-432 per Lord Wilberforce:

> *... I treat the words `exceptions clause` as covering broadly such clauses in a contract as profess to exclude or limit, either quantitatively or as to the time within which action must be taken, the right of the injured party to bring an action for damages. Such a clause must, ex hypothesi, reflect the contemplation of the parties that a breach of contract, or what apart from the clause would be a breach of contract, may be committed, otherwise the clause would not be there; but the question remains open in any case whether there is a limit to the type of breach which they have in mind. One may safely say that the parties cannot, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party`s stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intent.*

29 In ***Moran v Lipscombe*** , the plaintiff left his car at the defendant`s garage. In the garage was exhibited a notice, seen by the plaintiff, reading `Cars garaged and driven at owner`s risk - Every care but no responsibility`. The defendant drove the car on the road to test the headlights when a collision caused by the defendant`s negligence damaged the car. In an action by the plaintiff for damages, it was held that the notice did not amount to an unequivocal and unambiguous notification to the plaintiff that the car was being accepted by the defendant on terms that the defendant was not to be liable for the consequences of his own negligence in driving and therefore the defendant was liable. At p 15 Macfarlan J said:

> *... It is argued that the words of the present notice, `at owner`s risk` and `no responsibility` would, in a contract of carriage, have ample room to operate without excluding negligence, inasmuch*

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> *as the common carrier is at common law an insurer; that a bailee is at common law liable only for negligence; and therefore the notice is inoperative unless it be construed to exclude negligence. This argument written out means not that the notice did convey to the bailor, or would convey to the average intelligent layman that the garage proprietor was exempt from negligence, but that if the plaintiff knew the law as to bailments he would know that the garage proprietor was not liable in any event except for negligence, and, if he argued correctly, and if he assumed that the notice was intended to cut down the common law liability, he would conclude that the notice was intended to exempt from liability for negligence; and that he must be taken to know the law, and so must be taken to have agreed to exempt the garage proprietor from liability for negligence. Applied to a notice of this kind, such an argument appears to us to be little less than grotesque.*

30 The question to us appears to be - To a man reading it without any a priori assumption that it is or is not intended to cut down the common law liability, does it convey clearly and unequivocally that his car is being accepted for garaging or driving only on the understanding that if the garage proprietor handles or drives it negligently or recklessly, and it is thereby injured, he is to have no redress? In our opinion it does not.

31 Thus cl II under which the plaintiff`s goods were said to be lying in the warehouse at the owner`s risk cannot relieve the first defendants from their own negligence.

32 In ***Canada Steamship Lines Ltd v Regem*** ,5 by a lease dated 18 November 1940, the Crown leased to a shipping company a shed for storing freight situated on the bank of a canal in the city of Montreal. Clause 7 of the lease provided that `the lessee shall not have any claim ... against the lessor for ... damage ... to the ... said shed ... or to any ... goods ... placed ... in the said shed.`

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33 By cl 8 the Crown undertook to maintain the shed. Clause 17 provided that:

> *the lessee shall at all times indemnify ... the lessor ... against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.*

34 On 5 May, 1944, while repairs to the shed, involving the use of an oxy-acetylene torch, were being carried out by the Crown`s employees, a spark from the torch was negligently allowed to fall on some bales of cotton waste, which caught fire and the shed and its contents were destroyed. In a claim by the company against the Crown for damages for negligence, the Crown relied on cl 7 as relieving them from liability, and under cl 17 claimed from the company to be indemnified against claims by the owners of goods destroyed by the fire.

35 The Privy Council held that a clause purporting to exempt a party to a contract from liability for negligence must contain express language to that effect; in the absence of such language, but if the words used were wide enough, in their ordinary meaning, to cover negligence, the existence of a possible ground of damage other than that of negligence might deprive the party of the protection of the clause on a claim for negligence; on construction, cl 7 and cl 17 were not expressed in such clear terms as would exempt the Crown from liability for the negligence of its servants or entitle it to an indemnity from the company for such negligence in the course of carrying out the obligation of the Crown under cl 8; under the provisions of the Civil Code of Lower Canada the damage might be based on some ground other than negligence; and, therefore, the Crown had failed to establish its defence under cl 7 or its claim for indemnity under cl 17.

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36 In delivering the judgment of the Privy Council, Lord Morton of Henryton at pp 310-311 said:

> *Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarized as follows: (i) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called `the* ***proferens****`) from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed as to whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court of Canada in* ***Glengoil SS Co v Pilkington****. (ii) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the* ***proferens****. If a doubt arises at this point, it must be resolved against the* ***proferens*** *in accordance with art 1019 of the Civil Code of Lower Canada. `In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation.` (iii) If the words used are wide enough for the above purpose, the court must then consider whether `the head of damage may be based on some ground other than that of negligence` to quote again Lord Greene MR in the* ***Alderslade*** *case. The `other ground` must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it, but, subject to this qualification, which is, no doubt, to be implied from Lord Greene`s words, the existence of a possible head of damage other than that of negligence is fatal to the* ***proferens*** *even if words used are, prima facie, wide enough to cover negligence on the part of his servants.*

37 ...

38 ... but these two clauses [cll 7 and 8] must be read together, according to the ordinary principles of construction. So reading them, it appears to their Lordships most unlikely that cl 7 was intended to protect the Crown from claims for damage resulting from the negligence of its servants in carrying out the very obligations which were imposed on the Crown by cl 8. It is difficult to imagine the Crown saying to the company when the lease was being negotiated: `Notwithstanding that the Crown agrees to maintain the shed at its own expense throughout the term of the lease and notwithstanding that such an agreement

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implies an obligation to use due care in its performance, if the Crown`s servants set about the work of repair in such a negligent manner that the shed and all the goods therein are destroyed, you are to have no claim for damages against the Crown.` If the Crown had made such a suggestion, it seems unlikely that the company would have accepted it.

39 Applying the dicta of Lord Morton, it is my view that the exemption clauses relied on by the first defendants do not exempt them from liability for a breach of duty to ensure that the place where the plaintiff`s goods were stored was fit and proper for such purpose. Accordingly I hold the first defendants liable for the loss and damage suffered by the plaintiff.

40 On quantum, I accept the Cleghorn Survey Report which supports the plaintiff`s claim. The first defendants have offered no evidence to the contrary on the number of rolls of wallpaper and carpets damaged, other than contending that if immediate salvage operation had been mounted the loss would have been minimized. I therefore accept the Cleghorn Survey Report on the number of rolls and measurements of wallpaper and carpets damaged. The measure of damage recoverable is the replacement value. Per Lord Denning MR in ***Building and Civil Engineering Holidays Scheme Management Ltd v Post Office*** 6 at pp 261-262:

> *... At common law in a case of bailment, the general principle is restitutio in integrum, which means that the party damnified is entitled to such a sum of money as will put him in as good a position as if the goods had not been lost or damaged. This is subject, however, to the qualification that the damages must not be too remote, that is, they must be such damages as flow directly and in the usual course of things from the loss or damage, see* ***The Argentino****. If the party damnified suffers damage of a special kind, he is entitled to recover it, subject to the qualification that the damages must not exceed such damages as would be produced in the ordinary course of things by the act complained of, see* ***Cory v Thames Ironworks****. When*

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> *goods are lost or damaged in transit, the damage ordinarily produced is, in the case of loss, the cost of replacement; or in the case of damage, the cost of repair. That is the amount which, in the absence of contract, the bailor can recover. He cannot recover indirect or consequential damages (such as loss of profits on a business) because those can only be recovered in cases on contracts proper, where notice of special circumstances is brought home, see* ***British Columbia Saw-Mill Co v Nettleship****.*

41 The wallpaper and carpets were imported mainly from the United States. On the evidence, the prices of carpets at the date of the loss and of the hearing were about the same as the prices paid for by the plaintiff.

42 In ***The Despina R; Owners of the mv Eleftherotria v Owners of the mv Despina R*** ,7 in an appeal arising out of a collision between the Despina R and another vessel, the House of Lords held that in a claim based on tort, it was fairer to give judgment in the currency in which the loss was sustained than in the sterling equivalent at the date of the breach or loss; that the principles to be applied in ascertaining the currency of the loss were those of restitutio in integrum and reasonable foreseeability and, therefore, where a plaintiff proved that he conducted his business in a specific currency and it was reasonably foreseeable that he would use that currency to purchase the necessary currency to meet the immediate and direct expenditure caused by the defendant`s tort, then judgment should be expressed in the plaintiff`s currency.

43 The award in the matter before me in respect of the damage to the wallpaper and carpets should therefore be in Singapore currency using the exchange rate pertaining at the date of the loss, based on costs of replacement on cif basis plus allowance for local transport and clearance. Based on the Cleghorn Survey Report, this works out as follows:

Date of Loss

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Unit Price of Damaged Carpets

Supplier`s cost, insurance, freight,
inland trucking, bank charges, currency
exchange, local transportation,
clearance (per sq ft) Price S$ (psf) Total Sq Ft Total Price
Towne House
US$6.42 x 2.1765
= S$13.973 per sq yd [divide] 9
= S$1.552 per sq ft (+ 20 cif) 1.752 17,339.00 30,377.93
Venus
US$7,46 x 2.1765
= S$16.237 per sq yd [divide] 9
= S$1.800 per sq ft (+ 20 cif) 2.000 11,813.00 23,626.00
Seton Square
US$49,829.36 [divide] 6,600.36
= US$7.55 x 2.1765
= S$16.432 per sq yd [divide] 9
= S$1.826 per sq ft (+ 20 cif) 2.026 7,486.00 15,166.64
Nassau
US$7.56 x 2.1765
= S$16.454 per sq yd [divide] 9
= S$1.828 per sq ft (+ 20 cif) 2.028 7,595.00 15,402.66
(Contd on next page)
(Contd from previous page)
Supplier`s cost, insurance, freight,
inland trucking, bank charges, currency
exchange, local transportation,
clearance (per sq ft) Price S$ (psf) Total Sq Ft Total Price
Myraid

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US$4.72 x 2.1765

= S$10.273 per sq yd [divide] 9

= S$1.141 per sq ft (+ 20 cif) 1.341 3,228.00 4,328.75

Hawthorne

US$17.21 x 2.1765

= S$37.457 per sq yard [divide] 9

= S$4.162 per sq ft (+ 20 cif) 4.362 7,621.00 33,242.80

NSK943

[times]250 x 0.013855

= S$3.464 per sq ft 3.464 2,668.00 9,241.95

Angelique

[times]255 x 0.013855

= S$3.533 per sq ft 3.533 2,625.00 9,274.13

Rare Find

US$16.97 x 2.1765

= S$36.935 per sq yd [divide] 9

= S$4.104 per sq ft (+ 20 cif) 4.304 5,917.00 25,466.77

Needle Punch

US$4.00 x 2.1765

= S$8.706 per sq m [divide] 10.764

= S$0.809 per sq ft (+ 20 cif) 1.009 211.00 212.90

Why Not

S$1.60 - 19,014.00 30,422.40

Japanese Loop (Sally)

US$4.00 x 2.1765

= S$8.706 per sq m [divide] 10.764

= S$0.809 per sq ft (+ 20 cif) 1.009 7,901.00 7,972.11

Japanese Cut Pile (Sally)

US$4.00 x 2.1765

= S$8.706 per sq m [divide] 10.764

= S$0.809 per sq ft (+ 20 cif) 1.009 1,119.00 1,129.07

Carpet Tile

S$2.30 - 166.80 383.64

I PC Tiensin Chinese Wool

S$4.80 - 84.00 403.20

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Supplier`s cost, insurance, freight,

inland trucking, bank charges, currency

exchange, local transportation,

clearance (per sq ft) Price S$ (psf) Total Sq Ft Total Price

Bergoss 100% Polyamid Foam Backed Carpets

S$1.80

Green - 671.50 1,208.70

Orange - 302.80 545.04

Brown - 855.80 1,540.44

Green - 355.50 639.90

Orange - 2,094.20 3,769.56

Red - 763.50 1,374.30

Velvet II Green (Japanese Cut Pile)

S$16.10 [divide] 10.764

= S$1.496 per sq ft - 100.00 149.60

Axminster

S$4.50 - 985.00 4,432.50

(50) % Wool 50% Acrylic

S$2.80 - 64.00 179.20

Japanese Wool 100%

S$4.16 - 600.00 2,496.00

Wallpaper Mughetto

(1) roll = 5,600 lira

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x 0.001641

= S$9.19 per roll - 235.00 2,159.65

Ceiling Wallpaper (Germany)

S$23.00 - 57.00 1,311.00

Grand total 226,456.84

44 The plaintiff carried out salvage work by separating the undamaged from the damaged rolls and, wherever possible, cut out the undamaged parts of partially damaged rolls. The cost of the operation, including the use of a forklift, amounted to $2,047. In addition, the plaintiff claimed $1,947.40 for the survey fee paid to Cleghorn, warehouse charges and loss of profit. I hold that the survey fee is a disbursement item in the bill of costs in these proceedings. I disallow the claim for warehouse charges as these would have been incurred even if this incident had not occurred. The claim for loss of profit is too remote. Accordingly the total loss claimable is as follows:

(i) for damage to wallpaper and carpets $226,456.84

(ii) salvage expenses $ 2,047.00

$228,503.84

less salvage value $ 4,000.00

$224,503.84

45 The first defendants, however, contended that the plaintiff failed to mitigate his loss by not commencing salvage operations immediately when the carpets were found to be wet on 22 December 1986 or thereafter. Instead, the plaintiff arranged for a survey and that, too, took place from 5 to 9 January 1987.

46 On mitigation, Viscount Haldane LC in ***British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways of London Ltd*** 8 at p 689 said:

> *The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.*

47 It is however for the first defendants to prove that the plaintiff had failed to mitigate. See ***McGregor on Damages*** (15th Ed) para 289:

> *The onus of proof on the issue of mitigation is on the defendant. If he fails to show that the plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure will apply. This has been long settled, ever since the decision in* ***Roper v Johnson*** *and was confirmed by the House of Lords in* ***Garnac Grain Co v Faure & Fairclough****. Yet in* ***Selvanayagam v University of the West Indies*** *the Judicial Committee of the Privy Council held that, where a physically injured plaintiff had refused to undergo medical treatment to alleviate his injury, the burden was on him to prove that he had acted reasonably, a burden which he was found to have discharged. Any suggestion that personal injury may differ from the commercial context which gave the rule as to onus its genesis comes up against the two authoritative decisions of the House of Lords in which it was laid down that the burden of proof remains with the defendant in the particular case of the refusal of medical treatment, viz* ***Steele v Robert George & Co*** *and* ***Richardson v Redpath, Brown & Co****. The latter case was indeed cited by their Lordships in* ***Selvanayagam*** *but without any appreciation of what it had to say on the burden of proof, and their suggestion that the Australian case of* ***Fazlic v Milingimbi Community Inc*** *places the burden of proof on the plaintiff does not survive an examination of that decision.* ***The Guildford****, the remaining authority cited by their Lordships, was more explicitly misrepresented. While a passage from Lord Merriman`s judgment there was prayed in aid in support of their Lordships` confident assertion that they `had no doubt` that the plaintiff had the burden of proof and that this was `well established,` Lord Merriman was dealing not with mitigation at all but with remoteness, where there has been a substantial degree of controversy on burden of proof with the better view favouring a plaintiff`s burden. One can only conclude that the decision of the Privy Council, being against the entire weight of authority, was arrived at per incuriam. Certainly, its conclusion appears to have been sensibly ignored in subsequent cases, as by the Court of Appeal in* ***London and South of England Building Society v Stone*** *and again in* ***Metelmann & Co v NBR (London)****.*

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48 I adopt this paragraph as a correct statement of the law on mitigation.

49 The first defendants sought to discharge this burden through DW3, Mr Denny Sim (`Sim`). He had been a loss adjuster for ten years before the date of this loss. He said: `... I was instructed in March 1987. No one from my office attended the survey between 5 January 1987 and 9 January 1987.`

> Q: P1 pp 31-36 show the goods, p 37 shows the cut water pipe section. Pages 38-65 show the damaged carpets and wallpapers. The incident happened on 22 December 1986, the first survey was from 5 January 1987 to 9 January 1987. During this survey, those goods which were not damaged were removed. Do you think that when an incident of this nature is discovered, salvage measures should be immediately commenced?
>
> A: Salvage measures should immediately be put in hand when damage occurred. This would mitigate the loss, eg carpets should be shampooed clean. There are commercial firms which do this. Sorting-out operations should have been carried out from 22 December 1986 when the water damage was discovered. There are two ways water can seep into the carpets: (1) from the top seeping downwards, and (2) water from the base being absorbed upwards. This will cause damage to carpets previously undamaged.
>
> Q: [By court] Bearing in mind the workers left on 20 December 1986 and the damage was discovered at 8am on 22 December 1986, would the damage sustained by 22 December 1986 be irreversible?
>
> A: No, those in between could have been salvaged. Waiting for two more weeks, moulds would develop. Once carpets became mouldy, the stains would be permanent.
>
> Q: P1 p 40 photo 10A, a carpet with intermittent patches, would it be better to salvage the patches between the wet parts?
>
> A: Yes, some salvage value of 15-20% could be redeemed. P1 p 41 photo 11 showing intermittent wet patches - if acted on immediately, the carpet could be shampooed, 30-40% plus shampooing charge. For a carpet of 53ft by 12ft, the shampooing charge is not over $0.45 per sq ft.

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50 P1 referred to by Sim was the Cleghorn Survey Report. They only show the damaged and partially damaged wallpaper and carpets. The undamaged ones and the salvageable parts of the partially damaged ones had been removed. The plaintiff had 3,000 rolls of wallpaper. His claim is only for 292 rolls. As for the carpets, 50% had been salvaged and moved away. The carpets salvaged would no doubt include those lying between the wet ones on the top and bottom of each stack.

51 On shampooing, Sim gave the charges at not over $0.45 per sq ft. Sim however readily admitted that he is not an expert on carpets or wallpaper. When cross-examined by counsel for the plaintiff he said:

> Q: Are you a carpet expert?
>
> A: No.
>
> Q: P1 p 5, are you familiar with wallpaper?
>
> A: I am not an expert on wallpaper.
>
> Q: What about carpets?
>
> A: I am not familiar with all those names [of carpets]. P1 pp 7-26.
>
> Q: You cannot tell the quality of a carpet?
>
> A: By name no, but I can give a very rough estimate as to its cost.
>
> …
>
> Q: You are not a valuer of carpets?
>
> A: Correct.
>
> Q: You are not a carpet expert nor do you shampoo carpets?
>
> A: No.

52 The plaintiff on the other hand has been a wholesale supplier of wallpaper and carpets since 1971. He also lays and shampoos carpets. He did

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not shampoo the damaged carpets because, in his view, shampooing would not help and it was too costly in the circumstances. This is what he said in answer to a question:

> *I do shampooing of carpets and also sub-contract shampooing of carpets. I did not shampoo these damaged carpets because it would not help due to their condition. I did salvage part of the carpets by cutting out the damaged portions and the undamaged parts, I put back for sale. No one would buy wet carpets as they would become discoloured and eventually turn very smelly. To shampoo, it is $0.30 per sq ft plus forklift and labour charges to lay out the damaged carpets. It would be too costly to salvage the damaged goods. It was not worth trying to salvage them. Finally, I sold them at $4,000.*

53 The first defendants have not shown to my satisfaction that the damaged carpets and the damaged wallpaper could have been salvaged by shampooing in the case of the damaged carpets after the damage was discovered and hence it was not reasonable on the part of the plaintiff not to have done so.

54 There will thus be judgment for the plaintiff in the sum of $224,503.84 with interest at 6% pa from the date of the loss to date of judgment. On costs, the hearing was unnecessarily prolonged by some issues raised by the plaintiff which had no merit. I therefore award plaintiff 80% of the taxed costs.

55 ***Plaintiff`s claim allowed.***

Goh Joon Seng J

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Shantini Ramachandra (Wee Ramayah & Pnrs) for the plaintiff
Ravi Chelliah (Cooma Lau & Loh) for the first defendants

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