IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1994] SGCA 43

CA 132/1993

Between

Wisma Development Pte Ltd

… *Appellant*

And

Sing - The Disc Shop Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Insurance — General principles — Subrogation; Tort — Negligence — Breach of duty

Version No 1: 29 Oct 2026 (23:45 hrs)

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

[1994] SGCA 43

CA 132/1993
Karthigesu JA; L P Thean JA; Yong Pung How CJ
18 March 1994

1 Cur Adv Vult

2 **The facts**

3 The appellants were the landlords and the respondents, the tenants, of units 01-16/17 of Wisma Atria (the premises) under a three-year lease dated 24 January 1986 (the lease). Sometime between 15 and 17 July 1986, the tenants took possession of the premises; renovation and interior decoration of the premises amounting to $49,682 were subsequently effected by the tenants. On 15 August 1986, water leaked from a fire hose-reel adjacent to the premises and, as a result, flooded the premises, causing damage to the tenants` property. The tenants had taken out insurance which included the risk of `bursting or overflowing of water tanks/pipes`. The tenants gave notice of the flooding damage to the insurers and made a claim on them. The claim was met by their insurers, who subsequently instituted an action in the district court against the landlords in the name of the tenants in exercise of their right of subrogation. The thrust of their claim was that the flooding was caused by the landlords` negligence.

4 The claim was resisted by the landlords. First, they denied that the flooding was caused by their negligence or that of their servants or agents. Secondly, they maintained that even if the flooding had been so caused, the contractual effect of cl 10(a) (`the insurance clause`) of the lease was that the tenants assumed the risk of such damage and consequently had no claim against them. As the tenants had no right of action against the landlords, their insurers, likewise, were unable to pursue such an action.

5 **Decisions below**

6 In the district court, the trial judge found that the landlords` negligence had caused the damage. He further held that the tenants had not assumed the risk of damage by flooding by virtue of the insurance clause. The insurance clause was construed by the trial judge in the light of cl 11(a) of the lease, which released the landlords from all claims and demands by the tenants unless they resulted from the landlords` negligence. Further, the trial judge also relied on cl 21(h) of the lease, which excluded any term from being implied into the lease, and held that, by reason thereof, it could not be implied into the insurance clause that the tenants assumed the risk of damage by the landlords` negligence. He allowed the claim of the tenants and gave judgment to them in the sum of $41,916 with interest and costs.

7 On appeal to the High Court, Punch Coomaraswamy J agreed with the trial judge`s finding that the landlords had been negligent and also held that, on its true construction, the insurance clause did not protect the landlords against any damage caused by their negligence. He found that since the insurance clause was merely a `covenant at large`, the tenants could not be sued even if they had failed to effect any insurance. Thus, the learned judge held that the insurance effected by the tenants was not for the benefit of the landlords. Accordingly, he

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held that the landlords were not absolved from their liability in negligence. He dismissed the appeal with costs. [See [1993] 3 SLR 781 .]

8 **The appeal**

9 Against the decision of the learned judge, this appeal has been brought. Before us, the landlords appealed on two main grounds. Firstly, they averred that the learned judge had erred in finding that the landlords were negligent, and secondly, that the learned judge had erred in holding that the insurance clause did not absolve the landlords from their liability in negligence. The first is a question of fact, and the second a question of law.

10 **Negligence**

11 Before us, it was submitted on behalf of the landlords that they had not been negligent and had not breached any duty of care owed to the tenants. They contended that the standard of care imposed on them by the courts below was akin to an absolute duty, when what the law required of them was only the standard of reasonable care and skill of a landlord.

12 To deal with this issue, it is necessary to rehearse in some detail the evidence relating to the flooding that took place. On 15 August 1986, at about 10.15am, the tenants` managing director, Leong Loon Wah (Leong), received information that their premises had been flooded. He proceeded to the premises to check the extent of damage and also called for his insurers` surveyor. The insurance surveyor, Phee Thian Chye (Phee), a mechanical engineer with ARIECS Pte Ltd, arrived at the premises at 11am the same morning and investigated the damage. He discovered that the premises were flooded with water up to two inches above the ground, and calculated that there must have

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been at least 5200 cubic litres of water in the premises. He also discovered that there was a fire hose-reel adjacent to the premises, and that there was a slit of about 4cm on the hose at a point, about 7-8cm from the metal drum end of the hose. Phee`s evidence was that there were two linings in the fire hose, an outer lining and an inner lining, and that the slit on the outer lining of the hose was smooth and that on the inner lining was rough. He opined that there must have been initially a smooth slit on the outer lining of the hose and water pressure within the hose must have pushed through the inner lining to meet the slit on the outer lining, thus allowing water to escape and cause the flooding.

13 The landlords called an expert witness at trial, Ng Kok Yan, a senior scientific officer with the Singapore Institute of Standards and Industrial Research, who agreed that probably the slit was initiated from outside and it was the water pressure that had caused the inner slit. There was no evidence as to what caused the outer slit.

14 Evidence was also adduced by the landlords that, on 27 May 1986 and 2 June 1986, officers from the Fire Safety Bureau inspected the fire fighting equipment, including the hose-reels, for the purpose of issuing a clearance temporary occupation permit. Major Choy Marn Khoon (Choy), head of inspection and enforcement branch of the Fire Safety Bureau, gave evidence. He said that the checking of hose-reels was carried out at random. He could not say if the hose-reel in question was checked. However, stop cocks and stop valves were checked to see if they were in a closed position; if they were in an open position, they would not pass the test. Choy, in the course of his testimony, brought to the court`s attention cl 8.5.4.1. of the `Code of Practice Regulating the Use and Maintenance of Hose-reel`, which provides as follows:

> *When the tests in sub-cll 8.5.2 and 8.5.3 have been satisfactorily completed, the system should be restored to its normal operating*

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> *state. Reels should never be left under pressure and, where practicable, hoses should be drained prior to being returned to drum.*

15 He further testified that if a stop valve was left in an open position, there would have been water in the hose and this would lead to deterioration of the hose tube.

16 At the material time, the maintenance of the building was under the charge of 2M Property Consultants Pte Ltd, whose maintenance manager was Raymond Choo (Choo). Choo arrived at the scene at about 8am on the day of the incident, and he prepared a report of his investigation to the landlords. In it, he described the events leading to the discovery of the flooding. According to his report, two security guards were on patrol at about 4am on 15 August when they heard water sounds as they were walking down from the second to the first storey. They discovered that water was flowing from the hose-reel adjacent to the tenants` premises, and that the stop valve in the open position. This was immediately closed by the guards. The guards then informed the security officer who then contacted Johnny Chua (Chua), the duty mechanic at the Fire Command Centre. Both men then proceeded to investigate the cause of the flooding.

17 The Fire Command Centre in the building housed the fire alarm panels and the building automation system, which was designed to monitor the starting and stopping of equipment, including water pumps. Whenever a water pump was activated (ie when water is flowing out of a hose-reel), this information would be printed on the computer. The computer, however, would not identify the exact hose-reel from which water was flowing, and a physical check was necessary, and the person on duty in the Fire Command Centre would then either have to search for the defective hose personally or alert the security

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guards to do so. According to Choo, the activation of the pumps had been recorded on the printout from the computer in the Fire Command Centre. But he could not say the time that was on the printout.

18 Chua`s version of the facts was that he had heard the buzzer alarm indicating the activation of the pumps, and he had alerted the security guards to do a physical check. According to Chua, he was informed of the exact location within 10 minutes by the security guards. The trial judge rejected Chua`s evidence as he found it unbelievable that more than 5200 cubic litres of water could flow out of a 4cm slit in merely ten minutes. The trial judge found that it was the security guards who had informed Chua of the leak on the first storey. The trial judge also found that even though Chua was on duty at the Fire Command Centre, he had failed to note the activation of the pumps, and had not taken immediate steps to locate and stop the leak. In effect, the trial judge found that Chua, as the landlords` servant, was negligent in not reacting to the leakage within a reasonable time. It was his duty to deal with such activation of the pumps, but he had failed to take action to remedy the situation, even after an alarm was received indicating the flow of water from one of the hose-reels.

19 It was common ground that the water that caused the flooding and damage to the premises emanated from the slit in the hose, and that, for such large quantity to have flowed out of the slit hose, the stop valve must have been in an open position. The learned trial judge found that the hose-reel and the stop valve were in the control of the landlords and their servants. The stop valve was supposed to be in a closed position whenever the hose was not in use. The trial judge held that the landlords had failed to put in place a system for checking and ensuring that the stop valves were closed when the hose-reels were not in use and this failure had contributed to the occurrence of the flooding, and accordingly they were negligent. He said:

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> *It was my finding that, initially, there was a smooth split on the outer lining of the hose. Water pressure in the hose as a result of water entering the hose due to the stop valve being left in an open position had resulted in water pushing through the inner lining to meet the split on the outer lining and the water had then flowed out of the hose to cause the damage in the plaintiffs` premises. The hose and the stop valve were in the control of the defendants [the landlords] and their servants. Whenever the hose was not in use, the stop valve was supposed to be in a closed position. It was clear that the defendants had not put in place a system for checking and ensuring that the stop valves were closed when the hose-reels were not in use and this had contributed to the occurrence of the flooding. It was my finding that the defendants were negligent.*

20 Before us, counsel for the landlords attacked this finding of the trial judge. He submitted that there was no evidence as to what had caused the 4cm slit in the hose, and that the landlords had exercised sufficient care and skill in the purchase and installation of the fire hose-reel. He also argued that the slit in the hose could not have been noticed or discovered by the landlords even upon reasonable examination. Thus he contended that imposing a duty on the landlords to ensure that there was no slit in every single hose would be akin to imposing an absolute duty on them. Counsel cited the case of ***Haseldine v CA Daw & Son Ltd & Ors*** for the proposition that they had exercised sufficient care by employing and relying on the competence of their several architectural and engineering consultants in the purchase and installation of the fire hose-reels.

21 In this case, the landlords` negligence was not with regard to the purchasing and installation of the fire hose-reels, but the absence of an established system for detecting and ensuring that all the stop valves of the fire hose-reels were in the closed position when the hose-reels were not in use, which had been the cause of the flooding. It is true that the landlords would not have been able to discover slits in the hoses unless they unwound each and every hose-reel and examined them closely. But the leaving of the stop valve in the

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open position was the real cause of the flooding. If the stop valve had not been left in that position, there would not have been any water pressure present to push through the inner lining to meet the slit on the outer lining. Even if there had been a slit on both lining, the volume of water that would have flowed out of the hose would have been limited if the valve was closed. It certainly cannot be said that requiring the landlords to devise a proper and adequate system of ensuring that the stop valves were closed would be akin to imposing an absolute duty on them. In any case, the landlords knew, or ought reasonably to have known, that one of the criteria required by the Fire Safety Bureau for passing of safety inspection was that the stop valves must be in the closed position.

22 Apart from that finding of negligence, the trial judge also found that the landlords` employee, Chua, was negligent in not reacting to the leakage within a reasonable time. If he had reacted promptly, the extent of the damage on the tenants` property would have been considerably minimized. Indeed, he could or might even have prevented the damage from being caused to the tenants` property.

23 Accordingly, we agree with Punch Coomaraswamy J and affirm the trial judge`s findings of negligence.

24 **Insurance clause**

25 The second defence raised by the landlords is more complex. It turns on the construction of cl 10(a) and other provisions of the lease. It is convenient at this juncture to set out the provisions of that clause which are 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*

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> *of a similar nature including, but not limited to, public liability and fire risks.*

26 The thrust of this defence is that, under the insurance clause, the tenants have a legal obligation to insure both the premises and the tenants` own property therein. The intention was that the insurance effected by the tenants would enure to the benefit of both the parties; otherwise, the insurance clause would have no substance or subject matter as it would then be an obligation entered into by the tenants only for their own benefit. Pursuant to that clause, the risk of damage to the premises, including damage caused by the negligence of the landlords has been covered by the insurance, and, accordingly, the tenants have no claim against the landlords for negligence; and it follows, therefore, that the tenants` insurers have no claim against them by way of subrogation. In support of this defence, numerous authorities were relied upon.

27 The first is ***Ross Southward Tire Ltd v Pyrotech Products Ltd*** . In that case, the tenant of a building was obliged under the lease to pay all `insurance rates`, and, pursuant to the lease, the tenant paid to the landlord the amount required for the premium. The latter took out an insurance policy covering, inter alia, fire damage to the building. The building was subsequently destroyed by a fire occasioned by the negligence of the tenant`s employees and it was rebuilt with the insurance moneys. The insurer claimed against the tenant the amount paid under the policy by way of subrogation of the landlord`s rights. It was held by the Supreme Court of Canada, by a majority, that the risk of loss by fire, including the risk of loss by reason of the negligence of the tenant or its employees, passed to the landlord under the provisions of the lease which obligated the tenant to pay `insurance rates`. Laskin CJC said, at p 251:

> *Counsel for the appellant did not urge (indeed, he stated that it was not necessary to his position) that the landlord was in breach of a covenant to insure and that the covenant should have*

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> *embraced risk of loss by fire resulting from the tenant`s negligence. Rather, it was his contention that under the provision of the lease respecting payment of insurance rates by the tenant, the risk of loss by fire passed to the landlord, at least upon the presentation by the landlord of the insurance bill, and that the matter thereafter was between the landlord and its insurer. I agree with this contention. Applying to the lease and to the provision in question the ordinary test of reading it reasonably and in a business sense, I see no other meaning that can be given to the lease short of reading the relevant words out of it.*

28 Clearly, the decision was predicated on the tenant`s covenant to pay the insurance premium and the payment thereof by the tenant. The policy as taken out by the landlord covered the risk of the loss occasioned. The learned Chief Justice, after having referred to some cases cited by the landlord, said, at p 252:

> *I do not find these cases of any assistance in determining the present case, which is concerned not with an attempt to shelter under a landlord`s undertaking to pay insurance premiums but with an assertion of a claim by a tenant to benefit from its payment for insurance pursuant to the terms of its lease. In this respect, the tenant may be said to have qualified its obligation to repair beyond the normal exception of not being liable for accidental fire. It has paid for an expected benefit, as between itself and its landlord, which any standard fire policy would reflect in providing indemnity to the landlord and which the policy taken out in this case did reflect. It follows, in my opinion, that it may make a difference whether, as in the* ***Huston*** *case, the landlord undertakes to pay insurance premiums and whether, as in this case, it is the tenant who covenants to pay them.*

29 The Supreme Court of Canada in the subsequent case of ***T Eaton Co Ltd v Smith*** went even further. In that case, the tenant leased two contiguous properties from different landlords. The buildings on which the two properties stood were destroyed by a fire caused by the negligence of an employee of the tenant. Both the leases contained, inter alia, covenants by the landlords to insure the property against fire damage and covenants by the tenant to repair, to repair on notice, and to leave the premises in good repair. But there was no covenant by the tenants to pay any premium for the insurance. On the other hand, each of

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the leases also contained a clause giving to the tenant an option to purchase the premises, which provided, inter alia, that, until completion of the purchase, the risk of the premises remained with the landlords. That clause, so far as relevant, was in the following terms:

> *The said premises shall be and remain at the risk of the lessor until closing. Pending completion of the sale, the lessor will hold all insurance policies and the proceeds thereof in trust for the parties as their interests may appear and, in the event of damage to the said premises, the lessee may either have the proceeds of the insurance and complete the purchase or may cancel the agreement of sale and purchase.*

30 After the insurers had paid the amounts of the fire damage to the landlords, they sought to recover both the amounts from the tenant in exercise of their right of subrogation. It was held, again by a majority, that they were precluded by the terms of the two leases from claiming against the tenant having regard to the fact that the landlords had in each case covenanted in the lease to insure the premises against fire. The majority judgment was again delivered by Laskin CJC. His basic propositions were stated as follows, at pp 428-429:

> *It is settled law that the exception of fire in a repairing covenant does not exculpate a tenant from liability for a fire caused by its negligence or that of a person for whose negligence it is vicariously liable. If it can escape this liability in the present case, it can only be on the basis that the landlord`s covenant to insure is a covenant that runs to the benefit of the tenant, lifting from it the risk of liability for fire arising from its negligence and bringing that risk under insurance coverage.*

31 Had the landlord insured without giving a covenant to that effect in the lease, the tenant`s risk of liability for fire resulting from negligence would be unquestionable; and if the landlord collected from his insurer, the latter would have an equally unquestionable right of recovery from the tenant in a subrogated action. The contention of the respondents [the landlords] is that the insuring covenant in the present case does not alter the result because, as I understand

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the submission of the respondents, the covenant to insure has subject-matter without relating it to coverage against the risk of fires caused by the tenant`s negligence. The appellant [the tenant], ... urges that where the covenant to insure is not at large but is, as in this case, a covenant ***with the lessee*** that the landlord will keep the buildings on the premises insured against loss by fire, it must be given effect against liability for fires arising from the tenant`s negligence because otherwise, as a covenant expressly running to the benefit of the tenant, it would have no subject-matter.

32 The learned Chief Justice then referred to ***Pyrotech Products*** and said that he accepted the argument advanced on behalf of the tenant, and continued, at p 429:

> *In my opinion, the resolution of the issue in this case depends on whether the option to purchase provisions of the Smith and Tuck leases provide a sufficient explanation of the reason for the insuring obligation assumed by the landlords to leave the risk of fires on the tenant under the repairing covenants where the fires are the result of its negligence.*

33 The learned Chief Justice (at pp 430-431) found that the option clause, which protected the tenant as purchaser from bearing the risk of loss by fire (which would otherwise have passed to the tenant on the exercise of the option), fortified his view that the tenant was to have the benefit of the insurance.

34 The third case is ***Marlborough Properties Ltd v Marlborough Fibreglass Ltd*** , which is a decision of the Court of Appeal in New Zealand. There, the plaintiffs leased to the defendant a factory for the manufacture of fibreglass products. The lease by cl 3 provided:

> *The lessee will, at all times, duly and punctually pay all premiums and other moneys necessary ... and [keep] the demised premises insured in the name of the lessor against fire*

> *and earthquake to its full insurable value under a replacement policy to the full replacement value thereof.*

35 Pursuant to that clause, the requisite insurance against fire and other risks was taken out by the defendants in the name of the plaintiffs alone. Subsequently, the factory was severely damaged by fire and the plaintiffs reinstated the factory by the use of the insurance moneys and brought an action against the defendants claiming that the fire was occasioned by the negligence of the defendants. It was held by the Court of Appeal, also by a majority, that the insurance effected by the defendants (at their cost) was intended to cover the plaintiffs against the risk of loss by fire, whether accidental or occasioned by negligence, and it could not have been intended that the plaintiffs should be entitled to recover under the policy which was paid for by the defendants and should also be entitled to pursue a separate claim for damages against the defendants. It was implicit that the parties agreed that, to the extent of the cover provided in the insurance, the risk of loss by fire, whether or not due to the defendants` negligence, passed to the plaintiffs. Richardson J said, at pp 469-470:

> *It is obvious that the fire insurance paid for by the lessee covered the lessor and was intended to cover the lessor against the risk of loss by fire whether accidental or occasioned by negligence, including negligence of the lessee. I cannot accept that the parties intended that the lessor (and the insurer can be in no better position than the insured) should be entitled to recover under the policy paid for by the lessee and should also be entitled to pursue a separate claim for damages against the lessee. I think it is implicit that the parties agreed that, to the extent of the cover provided by that insurance, the risk of loss by fire, whether or not due to the lessee`s negligence, passed to the lessor. Given the nature of the lessee`s undertaking, it was obviously sensible for the parties to agree in advance as to how the risk of loss or damage to the demised premises would be met. They entered into the covenants to repair. In addition, and not unreasonably, they decided on the provision of insurance cover at the expense of the lessee. They agreed that the lessee would select the insurer and arrange the insurance. That insurance cover protected the lessor against loss of rents and against loss of*

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> *damage to the demised premises `to its full insurable value under a replacement policy to the full replacement value thereof`. Once the lessee had paid the necessary premium the lessor was indemnified against the risk of loss by fire. In those circumstances, it would not be consistent with the intentions of the parties as expressed in the lease to allow the lessor to make a separate and second claim against the lessee in respect of the same subject-matter.*

36 We now come to the decision of the English Court of Appeal in ***Mark Rowlands Ltd v Berni Inns Ltd*** . There, the defendant was the lessee of a part of a building in Leeds for a term of 30 years, and, by cl 3(3) thereof, the defendant covenanted as follows:

> *To pay to the landlord a sum or sums of money equal to the amount or amounts ... which the landlord shall from time to time expend in effecting or maintaining the insurance of the demised premises and being a fair proportion ... of premiums paid in respect of insuring the landlords premises in their full rebuilding value ... against loss or damage by fire ... and such other risks as the landlord shall from time to time during the said term reasonably deem necessary ...*

37 and the landlord by cl 4(2) covenanted as follows:

> *To keep the landlord`s premises, including the demised premises, insured against loss or damage by the insured risks and to lay out any moneys received under such insurance in rebuilding and reinstating as quickly as possible the demised premises or such parts thereof as shall be destroyed or damaged.*

38 The lease also contained, inter alia, provisions to the effect that if the demised premises were destroyed by fire, the tenant would be relieved from its obligations to repair under the lease. The landlord insured the entire building solely in its name against fire and other risks. The entire building was destroyed by a fire occasioned by the negligence of the tenant. The insurer paid the landlord the cost of rebuilding and reinstating the building and thereafter exercised its rights of subrogation and initiated proceedings against the tenant claiming damages for negligence. It was held by the High Court that the

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insurance was taken for the joint benefit of the landlord and tenant and the insurer could not, by way of subrogation, claim against the tenant. On appeal, the decision was affirmed by the Court of Appeal. The court followed the two Canadian cases discussed above and also some American cases. Kerr LJ, who delivered the main judgment of the court, held that it was clear from the terms of the lease that the parties intended that the insurance effected by the landlord should enure for the benefit of both of them and that, in the event of fire, regardless of whether it was due to accident or the tenant`s negligence, the landlord was to recoup its loss from the insurance moneys, and, in that event, it had no further claim against the tenant. Since the landlord could not maintain an action against the tenant, the insurer did not have any right of subrogation against the tenant as well. Kerr LJ said, at p 484:

> *An essential feature of insurance against fire is that it covers fires caused by accident as well as by negligence. This was what the plaintiffs agreed to provide in consideration of, inter alia, the insurance rent paid by the defendants. 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 landlords` loss was to be recouped from the insurance moneys and that, in that event, they were to have no further claim against the tenants for damages in negligence. Another way of reaching the same conclusion, on which counsel for the defendants also relied, is that, in situations such as the present, the tenant is entitled to say that the landlord has been fully indemnified in the manner envisaged by the provisions of the lease and that he cannot therefore recover damages from the tenant in addition, so as to provide himself with what would in effect be a double indemnity.*

39 It is clear to us that in each of these cases, the court held that, on the true construction of the insurance clause and other relevant provisions of the lease, the insurance was taken out for the joint benefit of the tenant and the landlord and that it was the intention of both parties that the landlord, in the event of a destruction of the building by fire, whether or not caused by the negligence of the tenant, was to recoup its loss from the insurance moneys. In ***Ross***

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Southward Tire , ***Marlborough Properties*** and ***Mark Rowlands*** , the relevant terms giving rise to such intention were clearly the covenant by the landlords to insure the premises in question and the covenant by the tenants to pay the insurance premiums, although the policies taken out were in the sole names of the landlords, and, in each of those cases, the tenant did pay the premiums required. The covenant by the tenant and payment of the insurance premiums were plainly crucial in the determination of that issue in those cases. In ***T Eaton Co*** , there was a covenant by the landlord to insure, and although there was no covenant by the tenant to pay the insurance premium, there was an option clause in each of the leases which expressly provided that the risk of the building would remain with the landlords.

40 **Construction of the insurance clause**

41 The insurance clause at hand is materially different from the relevant insurance clauses in the four cases. It obligated the tenants to insure (i) the demised premises and (ii) all the tenants` property therein, against all risks commonly insured against in respect of premises of a similar nature. This clause by itself is not sufficient to relieve the landlords from their liability to the tenants for negligence. None of the authorities which we have considered have laid down that the mere covenant or undertaking to insure, by itself, in a lease or tenancy agreement is a sufficient indication of such an intention to relieve the other party, whether such party be the landlord or the tenant, from the liability for negligence. In ***Marlborough Properties*** , Richardson J said, at pp 468-469:

> *The mere fact that there is a fire insurance cover on the demised premises does not relieve the lessee of its prima facie obligation, stemming historically from the tenant`s liability for voluntary waste, to make good damage resulting from a fire caused by its negligence. Nor is it sufficient that the lease recognizes the existence of an insurance cover. It is obvious enough, too, that the parties may agree, either expressly or by necessary*

> *implication, that the lessee will not be liable to the lessor for fire damage due to the negligence of the lessee. There is no express provision to that effect in this lease, so the question is whether the provision for insurance is explicable only on the basis that the parties intended thereby to discharge the lessee of liability for negligently caused fires. That is a matter of construction of the insurance provision in its context in the lease.*

42 In ***Leisure Centre Ltd v Babytown Ltd*** , the lessor covenanted to insure the demised premises and to apply the proceeds of insurance in reinstatement. The demised premises were damaged and the lessor claimed that the damage was caused by the negligence of the lessee. It was held by the Court of Appeal that the lessor`s covenant to insure and reinstate did not affect the lessee`s liability for negligence. The parties made no express agreement on the question and there was no sufficient basis for implying a term exempting the lessee from liability. Cooke J in the concluding part of his judgment said, at p 323:

> *Consistently with cl 9, the parties could have gone on to agree expressly that the lessee would not be liable for negligence. But with equal consistency, they could have agreed expressly that the lessee would be so liable. Neither solution would have been unreasonable. In fact, they made no express agreement on the point. I see no sufficient basis for implying an exemption term.*

43 Reverting to the case at hand, we are unable to find any trace of an indication in the lease that the parties intended that the insurance taken out under cl 10(a) was to enure to the benefit of both the landlords and the tenants, and that, as between them, the risk of loss or damage to the premises and the tenants` property therein was to be covered solely by the insurance taken out, and that, as a result, the tenants would have no claim against the landlord even if the loss or damage was caused by the latter`s negligence. On the contrary, we find in cl 11(a) a clear indication that the landlords would be and remain responsible to the tenants for damage caused by their negligence. Clause 11(a) provides:

> *The tenants agree to occupy, use and keep the demised premises at the risk of the tenants and hereby release, to the full extent*

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> *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 of the business conducted by the tenants) as a result of any breakage, leakage, accident or event in the demised premises. [Emphasis added.]*

44 If the insurance clause is to be construed to put the risk on the tenants, the words `in the absence of any negligence on the part of the landlords` in cl 11(a) would be rendered meaningless. The presence of cl 11(a) clearly shows that when the parties entered into the agreement, they intended that the tenants would only bear the risk of damage as far as the landlords or their servants were not negligent.

45 Before us, counsel for the landlords contended that Punch Coomaraswamy J had failed to consider three authorities which supported his contention that even if the negligent party had not paid for or contributed to the insurance premiums, the insurers would still be unable to recover from the negligent party. The three authorities cited were: ***James Archdale & Co Ltd v Comservices Ltd*** ; ***Norwich City Council v Harvey & Ors*** ; and ***Scottish Special Housing Association v Wimpey Constructions UK Ltd*** . The facts in those cases were too far removed from the case at hand to be of any assistance. There is a crucial distinction between the relevant clauses in those cases and the insurance clause at hand. The clauses in the three cases consisted of two different parts: the first part specified that the risk of the damage was to be borne by one party, and the second part imposed on the same party an obligation to maintain adequate insurance against that risk. For example, cl 20[C] in ***Norwich v Harvey*** stated:

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> *The existing structures ... owned by him or for which he is responsible and the works ...* ***shall be at the sole risk of the employer*** *[ie the building owners] as regards loss and damage by fire ... and* ***the employer shall maintain adequate insurance against those risks****. [Emphasis added.]*

46 The first part of the clause clearly has transferred the risk of damage by fire to the building owners and the second part has imposed on them a positive obligation to effect adequate insurance. Therefore, the construction of those clauses in the three cases cannot really assist the landlords` case before us. The learned appellate judge rightly disregarded these cases.

47 Our conclusion is that the landlords were negligent and that the insurance clause does not have the effect of absolving them from liability. Accordingly, the tenants have a right to recover damages from the landlords for the damage to their property, with the result that the tenants` insurers, by virtue of the right of subrogation, have a claim against the landlords. In the result, we dismiss the appeal with costs. There will be the usual consequential order for payment to the tenants or their solicitors, to account for their costs, the deposit paid into court as security for costs.

48 ***Appeal dismissed.***

Karthigesu JA
L P Thean JA
Yong Pung How CJ

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Foo Yuk Lin (Tang & Pnrs) for the respondents
