PC Connect Pte Ltd *v* HSBC Institutional Trust Services (Singapore) Ltd (trustee of CapitaMall Trust) and another (Bachmann Japanese Restaurant Pte Ltd, third party) [2010] SGHC 154

Case Number : Suit No 674 of 2008

Decision Date : 20 May 2010

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Tan Ai Ling Jinny (Wee Tay & Lim) for the plaintiff; Gurbani Prem Kumar and Wilma Gaiyithri d/o Muhundan (Gurbani & Co) for the first defendant; Eu Hai Meng (United Legal Alliance LLC) for the second defendant.

Parties : PC Connect Pte Ltd — HSBC Institutional Trust Services (Singapore) Ltd (trustee of CapitaMall Trust) and another (Bachmann Japanese Restaurant Pte Ltd, third party)

Damages

Tort – Negligence

Tort – Nuisance

Landlord and tenant

20 May 2010 Judgment reserved.

Kan Ting Chiu J:

1 The plaintiff, PC Connect Pte Ltd operated a retail outlet dealing with computers and related merchandise at #03-38 Funan Digitalife Mall ("the plaintiff's unit"). The plaintiff instituted these proceedings to seek damages it claimed to have incurred as a result of water leakage from the unit directly above its unit. The unit above, unit #04-38, ("the second defendant's unit") was used by the second defendant, Bachmann Japanese Restaurant Pte Ltd, as a Japanese restaurant. The first defendant managed the Funan Digitalife Mall on behalf of the owners, CapitaMall Trust, and was the landlord of both units.

The plaintiff's case

2 The plaintiff's case was that on 3 December 2006 ("the first incident"), then on 31 August 2007 and 4 September 2007 ("the second incident"), greasy waste liquid leaked from the second defendant's unit onto the plaintiff's unit and damaged the plaintiff's goods.

3 The plaintiff's action was in negligence and nuisance. The allegations against the two defendants related to the maintenance of the pipes and drains in the first defendant's unit, the provision of grease traps and the prevention of water leakage onto the plaintiff's premises. The plaintiff also invoked on the doctrine of *res ipsa loquitur*. The plaintiff also proceeded on the basis that the defendants were liable for the leakage in nuisance.

4 The plaintiff claimed for the costs of the goods damaged by the water, which they quantified

as $111,625.75 on 3 December 2006 and $134,144.31 on 31 August 2007, and $25,558.51 being loss of profit from both incidents.

The evidence

The first incident – 3rd December 2006

5 The plaintiff presented its evidence through two witnesses. One was its Business Manager, Melvin Lee Yiew Kee ("Melvin Lee"). His evidence was that the plaintiff's unit was closed for business between 30 November and 3 December 2006 as its staff were deployed at a computer fair. On 3 December 2006, when they returned to the unit, they found that the floor was wet, water was seeping down the ceiling, and some goods in the unit were damaged. He alerted the first defendant's Centre Management, which sent someone to the unit to investigate and take photographs.

6 This account was not corroborated by the records of the first defendant which included a report of leakage on 9 December 2006, [note: 1] but not on 3 December 2006.

7 However the incident was also referred to in three documents. They were:

(i) a letter from loss adjusters Cunningham Lindsey (Singapore) Pte Ltd ("Cunningham Lindsey") to the plaintiff dated 5 December 2006 [note: 2],

(ii) a letter of Rajah & Tann dated 28 December 2006 [note: 3] written on behalf of the plaintiff to the second defendant giving the latter notice of the water leakage on 3 December 2006, and

(iii) a letter from loss adjusters Crawford & Co International Pte Ltd, the first defendant's insurers dated 13 February 2007 [note: 4] which referred to the first defendant's staff giving notice on 4 December 2006 on an incident of water leakage.

8 Against this backdrop, the first defendant accepted that there was water leakage on 3 December 2006, but the second defendant put the plaintiff on formal proof on this issue. In the totality of the evidence, I accept that water leaked onto the plaintiff's unit on the night of 3 December 2006.

9 In its letter to the plaintiff, Cunningham Lindsey advised the plaintiff to mitigate its loss and to submit a list of the damaged stocks. On 11 December 2006, the plaintiff informed Cunningham Lindsey that the damaged goods were sold to a buyer for the goods at a 80% discount [note: 5] and enclosed a copy of the plaintiff's invoice/delivery order dated the same day. [note: 6]

10 There were three shortcomings in the way the plaintiff presented its case for the 3 December 2006 incident. Firstly, it had not engaged any qualified party to examine and report on the leak. Secondly, it had not engaged any surveyor to examine, record and tally the damage to the plaintiff's goods. Thirdly, the plaintiff had not mitigated its losses properly.

11 In the absence of any independent examination of the premises, there was only Melvin Lee's evidence that:

> [T]he floor was wet, and water was seeping through from the ceiling. [note: 7]

which fell well short of the plaintiff's pleaded case that:

> greasy waste liquid seeped from the 1st Defendant['s] property into the Plaintiff's premises. The waste liquid was seeping out from the pipes, floor traps or other conduit or pipe … and or the floor slab of the 1st Defendant['s] property at or around the said pipes. [note: 8]

12 The absence of any independent survey on the goods was also troubling. All that was produced as evidence of the damage was a list prepared by the plaintiff [note: 9] which was not verified, with no photographs or descriptions of the damage to the goods.

13 The enormity of this omission was revealed at the trial. While the plaintiff had pleaded that:

> Some of the Plaintiff['s] goods were *completely damaged* by the greasy water [note: 10] … [emphasis added]

Melvin Lee, under cross-examination, conceded that the actual damage was restricted to the boxes or packing, [note: 11] and there was no damage to their contents. [note: 12]

14 When the plaintiff overstated the damage so grossly, a serious doubt must arise over the accuracy of its count of the boxes or packages that were affected by the water.

15 The plaintiff pleaded that the affected goods to the value of $111,625.75 were damaged. Melvin Lee's evidence, however, was that $132,887.80 of goods were damaged, which were sold for $26,577.56, at a loss of 80%. The record of sale produced was the plaintiff's invoice/delivery order dated 11 December 2006. [note: 13] Melvin Lee's evidence was that the damaged goods were sold to a *garang guni* man dealing in used computer note books and items without packing, who paid for them in cash. The plaintiff had invited just one *garang guni* man to buy the goods. His identity was not disclosed in the invoice/delivery order and no receipt was issued. There was no evidence that this was a reasonable way for a computer trader to dispose of computers and computer accessories with damaged packaging, or that such goods could only fetch 20% of their usual price.

16 The plaintiff also made a claim for the loss of the profits of $12,210.43 it claimed it would have made from the sale of the goods. Melvin Lee produced a list of the plaintiff's ranges of profit margins it could make from the sale of the goods and exhibited the suppliers' *suggested* retail prices for some of the goods. There was no evidence that the plaintiff sold their goods at the suppliers' suggested prices, and no evidence of the prices the goods were actually sold at. The plaintiff could have proved the profit margin more satisfactorily by producing records of the prices at which it was selling the products. This could be done quite simply by showing invoices and receipts in which the transacted prices are stated. While I accept that the plaintiff would have sold the goods at a profit, I find that the plaintiff had not proved the amount of the lost profit.

17 On a review of all the evidence relating to the plaintiff's claim arising from the leakage on 3 December 2006, I find that firstly, the plaintiff had not proved the leak of greasy waste liquid alleged in its statement of claim, secondly it had not proved the damage that was alleged to have been caused, thirdly that the plaintiff had not mitigated its loss, and lastly that it had not proved its lost profits.

18 In the result, its claims against both defendants in respect of the leakage of 3 December 2006 are dismissed.

The second incident – 31 August and 4 September 2007

19 The plaintiff's unit was closed for business from 30 August to 2 September 2007 because there was another computer fair. On 31 August, Melvin Lee and some colleagues went to the unit and found the store room wet and the ceiling dripping. The plaintiff reported the matter to the police and the second defendant and engaged Chin Cheong of Building Appraisal Pte Ltd to inspect the premises. On 4 September 2007, when leaking was seen again, he informed Chin Cheong of that. The first defendant accepted that the incidents took place, and produced the incident reports [note: 14] on the incident of 31 August. There was no doubt over the second incident.

20 Chin Cheong was a witness for the plaintiff. He is a Chartered Building Surveyor with a degree in Building Survey. He was instructed by the plaintiff in June 2007 to:

1 Review drawings, specifications, historical data and all relevant information;

2 Carry out a survey and inspection of the premises;

3 Analyse the likely cause/s of the water seepage; [note: 15]

but he was not shown any photographs of the first incident.

21 He went to the plaintiff's unit on 3 and 5 September 2007 (but did not have access to the first defendant's unit) and subsequently submitted his report. [note: 16] He observed that the floor of the unit was wet and slippery, with a greasy feeling and concluded in his report that: [note: 17]

> 6.1 Further to our visual site inspection, review of historical data, analysis and discussion and relevant photographs, we are of the view that the water seepage problem affecting unit #03-38, is a result of leakage/s or water seepage from a waste pipe that served the upper unit #04-38, which is a food and beverage unit. The waste pipe served solely and exclusively to the unit #04-38.
>
> 6.2 The leakage is caused by a failure at the joint of the waste pipe likely due to waste accumulation in the pipe, chokage clearance and poor pipe maintenance.
>
> 6.3 The spurting effects of the water seepage … indicated chokage clearance using mechanical means and the oily or greasy feel indicated that the most likely source is the kitchen or wet area of unit #04-38.
>
> 6.4 The accumulation of wastewater including oily and greasy substances is likely caused by #04-38's occupants and users. If proper steps been taken to maintain the pipe-work as well as dispose the said waste accumulation, it is unlikely that any chokage of the pipes and the said waste accumulation would have occurred. … solid waste should have been properly disposed off, wastewater from the kitchen channelled to appropriate grease traps and the grease or waste accumulation in the pipes properly removed by professional grease removers or cleaners.
>
> 6.5 The said waste pipe, from site observation appears to serve solely and exclusively to the #04-38 the food and beverage unit. Therefore, it would be the responsibility of the #04-38, to maintain, repair and made [sic] good to the leakage and water leakage of the waste pipe.

22 The first defendant agreed that the water pipe in question served the second defendant's unit exclusively. Counsel for the second defendant sought to put to Chin Cheong the second defendant's position that the pipe did not serve the second defendant's unit exclusively [note: 18] but retracted that because there was no evidence to support that assertion.

23 There were three other reports which touched on the incident. One was by Eric Poh of McLarens Young International, dated 5 January 2007, to the insurers of the second defendant. [note: 19] In this report, it was stated at p 3:

> At this juncture, it would appears [*sic*] that the water leakage could be due to deteriorated or damaged waterproofing membrane to the Insured's kitchen floor. However, we are conducting further investigation to determine the 'cause' of the deteriorated/damaged waterproofing membrane leading to the loss.

Eric Poh was a loss adjuster, and it was not shown that he had any qualifications in examining the leaks, and his report concluded with a recommendation of a provisional reserve against the loss.

24 The second report was by Crawford & Co International Pte Ltd dated 13 February 2007 [note: 20] to the insurers of the first defendant. This was a loss adjustment report. The identity and the qualifications of the author of this report were not disclosed. There was also no reference to any inspection of the premises and the report did not go beyond stating:

> It is believed faults in the floor waterproofing, was allowing water from the kitchen to seep through.

25 The third report was produced by Anthony Cheng Shao Hing of Camden Engineering Associates. He was a professional mechanical engineer engaged by the second defendant in July 2009 after the second defendant had vacated the premises. He did not profess any special knowledge in building inspection. His findings were that he suspected that:

(i) water had flowed down from the second defendant's unit to the plaintiff's unit because of damaged water-proofing membrane at the kitchen floor of the second defendant's unit (but this was expressly stated to be subject to verification by a professional civil engineer), and

(ii) improperly installed and/or damaged floor trap at the kitchen sink of the second defendant's unit.

26 The makers of these three reports were not called as witnesses at the trial, and their absence further reduced the probative value of their reports.

27 On reviewing the evidence, I find Chin Cheong's findings on the cause of the second incident of water leakage cogent against the background of his professional qualifications, his personal observations of the conditions and his explanations for his conclusions.

28 As in the claim arising from the first incident, there was no survey of the affected goods and no proof of the loss of profits in this claim. The other issue, *ie*, the failure to mitigate the loss, was even more serious. The plaintiff had not sold the alleged affected goods, and was claiming their full cost

price. It had not mitigated its loss at all. Consequently, the plaintiff can only be entitled to nominal damages for the loss.

The legal issues

Liability in negligence for the second incident

29 I will examine the respective defendants' liability for the water leakage. I will start with the position of the second defendant.

30 The second defendant was in occupation of the unit as a tenant of the first defendant. At the time of the second incident, the second defendant was in occupation of the unit under a tenancy agreement dated 15 September 2006 for a term running from 1 August 2006 to 31 July 2008. [note: 21] Clause 2.13.1 of the tenancy agreement provided that it was the tenant's duty:

> To keep the Premises and every part thereof clean and hygienic and tidy and at a standard acceptable to the Landlord and to keep all pipes drains basins sinks and water closets if any in the Premises clean and unblocked. Any cleaners employed by the Tenant for the purposes hereof shall be at the sole expense and responsibility of the Tenant. [note: 22]

31 Was there a duty of care on the second defendant to prevent the water seepage? The second defendant's unit was directly above the plaintiff's unit and it was obliged to maintain the pipe. The Court of Appeal declared in *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 that the governing conditions for the imposition of a duty of care are firstly, legal proximity, and secondly, policy considerations. Applying the test to the facts, I find that the second defendant owed a duty of care to the plaintiff, and that it had failed to discharge the duty.

32 The plaintiff's claim against the first defendant in negligence has to be examined on its own facts. The first defendant was not in occupation of the second defendant's unit. The pipe in question served the second defendant's unit exclusively, and the duty to maintain the pipe had been placed on the second defendant. In the circumstances, the first defendant was not under a duty of care to maintain the pipe.

33 Even if the first defendant had the duty to maintain the pipe, it may not be answerable to the plaintiff for the leakage. The plaintiff was in occupation of unit #03-38, but it was not the first defendant's tenant. The tenant of the unit was Neat Technology Pte Ltd ("Neat"). Neat had entered into a tenancy agreement for the unit for the period 1 June 2003 to 31 May 2006. At the end of that term, the first defendant offered Neat a further term from 1 June 2006 to 31 May 2006 on the terms and conditions set out in the draft tenancy agreement that was forwarded with the offer, [note: 23] and it was also provided that the terms of the draft tenancy agreement shall apply to the new term even if it was not executed.

34 Neat accepted the first defendant's offer, but the tenancy agreement for the extended term was not executed. However, by cl 4.3.1 of the draft agreement, it was provided:

> Notwithstanding anything herein contained, *the Landlord shall not in any way be responsible or liable to the Tenant or its agents invitees and licensees* who may be permitted to enter or use the Premises or the Building or any part thereof for accidents happening or injuries sustained whether resulting in death or not *for loss of or damage to property goods or chattels* in the Premises or the Building or any part thereof *howsoever caused* and the Tenant shall keep the

Landlord fully indemnified against the same. [note: 24]

[emphasis added]

35 Although Neat was the tenant, the plaintiff occupied the unit. [note: 25] There is a background to this state of affairs. Originally, Neat sold computer and associated products under the "PC Connect" brand name, but that brand was eventually discontinued. Besides being a brand name, "PC Connect" was also used as the plaintiff's corporate name. The plaintiff had the same shareholders and directors as Neat, and it carried on business in the unit which Neat had been using and paid rent directly to the first defendant although the rent receipts were issued to Neat. The arrangement reflected the close relationship between the two companies. In these circumstances, it can be inferred that the plaintiff had knowledge of the terms of the tenancy agreement that allowed Neat, and through Neat the plaintiff, to occupy the unit. In any event, even if the plaintiff did not have the knowledge, it should not be in a better position than Neat *vis-à-vis* the first defendant for damages sustained in the premises.

Liability in nuisance for the second incident

36 Against the backdrop that the second defendant was the occupant of the unit from which water had escaped down to the plaintiff's unit, the second defendant is liable in nuisance to the plaintiff.

37 In the case of the first defendant, the matters referred to in [34] to [35] apply to exempt it from liability.

38 There was also a more important issue: whether the first defendant could be liable for the leakage when it was not in occupation of the second defendant's unit.

39 The plaintiff submitted that the first defendant was liable in nuisance even if it was not in occupation of the unit and relied on the decision in *Wilchick v Marks & Silverstone* [1934] 2 KB 56 ("*Wilchick*"). The facts of the case were that the plaintiff was injured by a falling shutter from a house abutting the highway. The house belonged to the owners who were large property owners to a tenant on a weekly tenancy. The house which was under rent control was rented out to a tailor in a small way of business. There was no contractual liability either on the landlord or the tenant to repair, although the landlord had reserved the right to enter the property and do repairs if they thought fit. The plaintiff brought an action against the landlord and the tenant, and succeeded against them.

40 Goddard J stated in his judgment (at p 67) that:

> If a landlord lets premises on which he knows that a nuisance exists but takes a covenant from his tenant to put or keep them in repair, no liability remains in him … but there is no case which precisely covers the present facts, where, neither landlord nor tenant being under covenant to repair, the former reserves the right to enter and do necessary repairs and, knowing that repairs are necessary, fails to do them.

And further (at 67) that :

> … A property owner knows that his house if not repaired must at some time get into a dangerous state: he lets it to a tenant and puts him under no obligation to keep it repaired: it may be the tenant is one who from lack of means could not do any repairs. The landlord has expressly reserved to himself the right to enter and do necessary repairs: why then should he be under no

duty to make it safe for passers by when he knows that the property is dangerous? The proximity is there: he has the right to enter and remedy a known danger. Is the injured person to be left in such a case only to a remedy against the tenant, who in this sort of tenancy, which commonly obtains only with regard to small properties, is probably in quite humble circumstances?

41 It can be readily seen that the facts are distinguishable from the facts of the present case. Firstly, the first defendant had placed the duty to maintain the pipe on the tenant. Secondly, the socio-economic conditions in *Wilchick* are not present in the present case. There was no suggestion that the second defendant lacked the means to maintain the pipes and to pay damages, and it was insured against such risks. I find that the reasoning in *Wilchick* does not apply to the present case and the first defendant should not be liable for the leakage.

42 There was another fundamental issue in the action in nuisance. This claim was for private nuisance affecting the plaintiff's unit. The Court of Appeal had noted in *Epolar System Enterprises Pte Ltd and others v Lee Hock Chuan and others* [2003] 2 SLR(R) 198 at [10] that generally only a person with proprietary interest such as a freehold or leasehold interest can bring proceedings in private nuisance, and as a rule, occupation *per se* will not suffice.

43 However, the Court also referred to some cases in which it had been found that a person in *de facto* possession by way of exclusive possession may be entitled to sue. The Court then went on to find that the first, second and third plaintiffs in that case who were occupying and carrying on business in the premises were in possession of the premises in their own right, and were entitled to sue.

44 In the present case, the plaintiff had taken over the unit from Neat [note: 26] and had carried on business there. It paid rent directly to the first defendant and relieved Neat from that burden. It had the physical possession of the unit, if not the tenancy. While it did not have a proprietary interest in the unit in the form of a freehold or a leasehold interest, it has a right from Neat to occupy the unit, and it has the capacity to sue.

45 On the evidence, I find that it has proved its claim against the second defendant. However, for the reasons stated in [28], it had not proved its damages, and it will only be awarded nominal damages.

The Third Party Proceedings

46 The first defendant had, in addition to defending the plaintiff's claim, commenced third party proceedings against the second defendant for the latter to indemnify it against any liability towards the plaintiff. The second defendant had denied that it was obliged to indemnify the first defendant.

47 The first defendant's claim for indemnity was founded in Cl 2.13.1 and Cl 2.13.5 of the tenancy agreement with the second defendant [note: 27] under which the second defendant was obliged:

> 2.13.1 To keep the Premises and every part thereof clean and hygienic and tidy and at a standard acceptable to the Landlord and to keep all pipes drains basins sinks and water closets if any in the Premises clean and unblocked. Any cleaners employed by the Tenant for the purposes hereof shall be at the sole expense and responsibility of the Tenant.
>
> 2.13.5 Without prejudice to any other provision in this Tenancy Agreement, to indemnify the Landlord against all costs claims liabilities fines or other expenses whatsoever which may fall upon the Landlord by reason of any non-compliance with the provisions of this clause 2.13.

48 The first defendant was entitled to seek to be indemnified by the second defendant against the plaintiff's claims against it arising from the water leakage. Although the plaintiff's claims against the first defendant ultimately failed, the third party proceedings were properly taken out.

Conclusion

49 (i) The plaintiff's claims against the first defendant are dismissed.

(ii) The plaintiff is to have judgment against the second defendant for the second incident with nominal damages of $100.

(iii) The second defendant shall pay costs of the third party proceedings to the first defendant.

50 I will hear the parties on costs in connection with the plaintiff's claims.

[note: 1] 1DBD 289–290

[note: 2] 1D1

[note: 3] 1DBD228

[note: 4] 1DBD306–310

[note: 5] 1D1(ii)–(iii)

[note: 6] 1D1(iv)

[note: 7] Affidavit of evidence-in-chief of Lee Yiew Kee para 8

[note: 8] Statement of Claim para 4

[note: 9] 1D1at p (iii)

[note: 10] Statement of Claim para 7(a)

[note: 11] Notes of Evidence 24 August 2009 page 28 lines 20–24

[note: 12] Notes of Evidence 24 August 2009 page 29 lines 4–5

[note: 13] Affidavit of Lee Yiew Kee pages 62–63

[note: 14] 1DBD 297–301

[note: 15] PBD36 paras 3.1(1) to (3)

[note: 16] PBD32–77

[note: 17] PBD40–41 paras 6.1– 6.5

[note: 18] Notes of Evidence 25 August 2009 page 50 lines 16–19

[note: 19] 2DBD84–86

[note: 20] 1DBD306

[note: 21] 2DBD37 – 42

[note: 22] 2DBD49

[note: 23] 1DBD52–87

[note: 24] 1DBD76

[note: 25] Notes of Evidence 24 August 2009 page 7 lines 28–29 and Plaintiff's Closing Submissions para 8(d)

[note: 26] Notes of Evidence 24 August 2009 page 97 line 24

[note: 27] 2DBD37–79

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