Tech Pacific (S) Pte Ltd v Pritam Kaur d/o Joginder Singh formerly trading as Eshar Security Services and Another
[2003] SGHC 242

Case Number : Suit 153/2002

Decision Date : 20 October 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : N.B. Rao and Rajinder Singh s/o Avtar Singh (B Rao and K.S. Rajah) for the plaintiff; First defendant in person; Toh Kok Seng and Lee Hui Yun (Lee and Lee) for second defendant

Parties : Tech Pacific (S) Pte Ltd — Pritam Kaur d/o Joginder Singh formerly trading as Eshar Security Services; Isetan Singapore Ltd

Contract – Breach – Clause in lease agreement – Whether included provision of security services – Whether obliged to provide more than one guard each night

Tort – Negligence – Duty of care – Whether omission of guard to apprehend a thief not known to him to be in building was pure or culpable omission – Whether landlord owed duty of care to tenants to prevent thieves and unauthorised persons from stepping into corridors of rented premises.

Tort – Negligence – Res ipsa loquitur – Whether specific acts of negligence or cause of negligence pleaded defeated any reliance on res ipsa loquitur.

1 The plaintiffs are a company which is in the business of trading in computer products. They leased premises on the second and third floors of a building known as Seiclene House at 25 Delta Road. The Seiclene House belonged to the second defendants who also own and run department stores. The premises leased by the plaintiffs were specifically, units #02-01/04 and #03-01/04. The first defendant, now a bankrupt, was at the material time carrying on the business of supplying security services. She ran her business under the name of Eshar Security Services. Eshar was engaged by the second defendants, by contract, to provide security guards to Seiclene House. It was established at trial that sometime between 8.30pm on 13 February 2003 and 7.30am on 14 February 1996 that unit #02-01/04 was burglarised and the loss of property amounted to $253,820.36 (including $1,780 for repairing the roller shutters and door). The thieves had broken into the unit by sawing off the aluminium roller shutters and then breaking the lock of the door.

2 The plaintiffs alleged that the second defendants were liable in breach of cl 2(b) of the contract of lease, and alternatively, in negligence in failing to provide any adequate security or failing to supervise the security officers. The plaintiffs' claim against the first defendant was on the basis of vicarious liability on account of her being the employer of the only security guard on duty at Seiclene House on the night in question. That guard was not called as a witness by any party. There was no reliable evidence, however, to connect him with the theft. He as well as the plaintiffs' employees were questioned by the police but released. The details of how the theft was carried out were also unavailable. The plaintiffs' case, therefore, was essentially founded on inferences and conclusions to be drawn from the following assertions, namely, that:-

a) the second defendants were contractually obliged under cl 2(b) to provide security to their premises;

b) the solitary guard was inadequate for the purposes;

c) the guard must have failed in his duty because he did not ground the lifts and must have

been himself asleep at the material time

Clause 2(b) that the plaintiffs relied on reads as follows:

> 'subject to Clause 3(3), the monthly service charge of Dollars Four Thousand Six Hundred and Fifteen and Cents Eighty ($4,615.80) for the cleaning, lighting, upkeep, maintenance and repair of the common parts of the Building and for the maintenance, upkeep and operation of the services supplied and used in the Building (hereinafter referred to as the 'service charge').'

3 The theft was carried out by unknown persons. There was no evidence as to how the stolen items were packed or taken out of the building compound. Two police officers involved in the case were called as witnesses for the plaintiffs but they were unable to provide any information other than what the parties themselves knew. It was a well-planned theft. The burglars knew precisely what they wanted and how to get them. Tech Pacific (S) Pte Ltd was not a random target. It was selected from the many tenants in the huge building. The stolen goods were specific and selected products, not the usual plunder of cash and jewellery. There were photographs of what remained in the plaintiffs' premises after the theft, but those were not helpful in this regard. What is significant is that there was evidence from the second defendants' warehouse manager, Bek Eng Lee, that cargo movement in and out of the building continued even after 7pm. This evidence was accepted by Mr Rao. The last employee of the plaintiffs left that night between 10pm and 10.45pm. There is contradictory evidence from the plaintiffs in that a police report (admitted as PB32) made by their operations manager Ernest Enver (who did not testify at trial) stated that his staff on the third floor of Seiclene House left the building about 10.45pm. The plaintiffs' loss adjustors interviewed the staff and they told him that they left at 10pm. One employee gave evidence, and that was Illya Zahri (who said that he left at 8.30pm). There was no evidence as to how visitors into the building were tracked or recorded. Evidence was also adduced to show that the plaintiffs' premises were protected by a Chubb Alarm System. If armed, the plaintiffs' manager would be notified directly when a break-in occurs. The alarm system was inspected after the theft and no inherent fault or malfunction was detected. The reasonable conclusion to be drawn is that the system was either not armed or not properly armed. The plaintiffs' employee who was charged with the duty of arming the system declared that he had armed it on the night in question. If that were so, then he obviously did not arm it properly.

4 The first defendant entered into a contract with the second defendants to provide three security guards to the Seiclene House. Two of the guards were for daytime duty and one for the night. The scope of duty under that contract were specified as follows:-

> '1. Prevent unauthorised personnel from entering the premises.
>
> 2. To control and ensure a smooth functioning of activities within the premises.
>
> 3. Control and record all visitors and vehicles moving in and out of the premises.
>
> 4. Control traffic moving in and out of premises and to ensure the vehicles are properly parked.
>
> 5. To ensure that the building is empty before grounding the lifts at 2200 hrs.
>
> 6. To ensure that doors to the entrance of the premises are securely locked up.
>
> 7. To patrol the buildings at half-hourly intervals and punched in the clocking device at

designated checkpoints.'

On the facts and evidence that I had set out above, the plaintiffs prayed to make the first and second defendants liable for the theft. Before considering the merits of their claim, it is important to be mindful that two key features stand out in this action. First, the damage was caused by third parties (the thieves). Secondly, the negligence and breach of duty alleged against the defendants were for an omission that is, the failure to protect the plaintiffs' premises and goods. I shall elaborate on latter point shortly.

5 I shall first consider the plaintiffs' claim in contract. Their counsel, Mr Rao, submitted that by cl 2(b) of the lease agreements the second defendants were obliged to provide security services. This claim is without merit because the natural reading of cl 2(b) does not include nor can it be read to include security services. Moreover, the clause was silent as to what form of security the second defendants were obliged to provide and most, if not all, the allegations by the plaintiffs as to the security they were entitled under the lease had to be implied. There is no reason to do so unless the principal term is clear. Clause 2(b) provides the consideration for the imposition of the service charge. 'Security Services' was not specified in the list of services provided and cannot be smuggled into the term under the cover of the words 'services supplied and used in the Building'. The reference to 'cleaning, lighting, upkeep, maintenance and repair of the common parts of the Building' specify what the tenant is entitled to receive for paying the service charge. Anything else that the landlord might provide out of the funds collected would be out of goodwill and which contractually, the tenant would not be entitled to demand. Even if the tenant were entitled to security services by virtue of this clause, they would only be entitled to the services as provided at the time the contract was signed. There was no evidence that the landlord were obliged to provide more than one guard each night. Hence, contractually, even if cl 2(b) may be read as requiring a guard to be provided, then there was no breach since a guard was in fact provided. It would be an extravagant reading of cl 2(b) to require specific modes of security, additional guards, and the mode in which they were to carry out their duties. It would be too great a strain on the natural language in cl 2(b).

6 I shall now refer to the plaintiffs' claim in negligence. The tort of negligence gained ascendancy with *Doughue v Stevenson* [1932] AC 562 a case cited so often that one might be forgiven for taking the classic passage of Lord Atkin for granted although occasionally, a case is presented on facts in which the Atkinian jewel is shown in remarkably brilliant and attractive light. Although this is not such a case, it is a sufficiently important example of the need to isolate cases of 'pure omission' from 'acts of negligence'. The duty of care is owed by one person to another not to do any act as will foreseeably cause harm to that other. The Atkinian formulation referred to 'acts or omissions' but it is well established that the omissions there referred to were omissions to do such act as to ameliorate the harm or lessen the danger first created by his act. Hence it is said that a man who creates a danger owes a duty to take measures to prevent his Atkinian neighbour from being harmed. An omission to do so is a tortious omission. Pure omissions, on the other hand, generally create no duty; otherwise, a person would be compelled at law to be a good Samaritan. (See *Smith v Littlewoods Organisation Ltd* [1987] 2 AC 241, 247). Thus, I may owe a duty to a man who leaves his goods in my house to secure them reasonably and keep them safe from foreseeable damage. But I owe no such duty to a man to whom I had leased my house or a room in my house, unless by an express term in our lease that I should be so obliged. The clearest distinction between a culpable omission and a 'pure omission' can be gleaned from the facts in this case. Restricting access by unauthorised persons to the building was one of the contractual duties of the first defendant's guards. A breach of this term will occur when he allows persons whom he had not ascertained to be authorised to enter the building, but, the mere fact that some unauthorised person or persons had slipped past him is not in itself a culpable omission on his part. The fact is that a solitary guard was given the task of discharging a guard's duty in a building as large as the Seiclene House. If he was at

the gate he cannot be faulted in not knowing that someone is on the second floor. In short, he cannot be in two places at once. Thus, an omission of this kind is not a culpable omission in itself. There must be sufficient proof that the standard of care was not met. That has to be distinguished from a mere failure to apprehend the thieves. A general duty to apprehend thieves or an absolute duty to prevent theft goes beyond the contractual duty and is too widely cast. Hence, the mere omission of a guard to apprehend a thief whom he did not know was in the building is a 'pure omission'. On the other hand, the plaintiffs' employee Illya Zahri (PW3) was the person charged with the duty of arming the Chubb alarm. He left the premises without arming the alarm when there were other employees of the plaintiffs still in the building. There was a direct duty on his part to a positive act namely, to arm the Chubb alarm and to do it properly. A failure to do either is a culpable omission. Consequently also, it had not been proved to my satisfaction that the negligence (if any) of the defendants led to the theft. The burden in this regard remained with the plaintiffs.

7 In the present case, the relationship between the plaintiffs and the second defendants was purely contractual. The premises that were burglarised had been leased to the plaintiffs who had the complete and exclusive control and occupation of it. It is not difficult to see that in such circumstances, the landlord cannot be responsible for the goods in the tenant's premises. What requires deeper consideration is the question as to whether the landlord who might have retained full control of the common corridors owes a duty of care to its tenants such that thieves and unauthorised persons are not permitted to step into those corridors. Again, it is superficially attractive to think in terms of a positive duty to do so. But upon reflection, a multitude of conceptual and practical problems apply to diminish the initial attraction of such a rule. Any such rule would have increased the existing law not incrementally, but by a leap so large that its application to many fact situations can only be tenuous. Would such a rule apply only in respect of warehouses, or ought it apply to office and other buildings as well? What sort of distinction should be made? Should the rule apply only after working hours, and if so, must it not be made sufficiently flexible to accommodate the different hours depending on the type, nature, and specific building? If such a duty is imposed, what are the limits to the imposition of reasonable observance? Must there be one guard for every 1,000 square metres of corridor space? Or one guard for every point of ingress into the building? The factual distinctions of such requirement will virtually be distinguishable from building to building such that the diversity of factual conditions is sufficient to destroy the notion of a single workable principle with minimal exceptions. In coming to these conclusions, I am mindful that we may be entering the age of tight security (and might perhaps have already done so). The common law rules are amenable to some flexibility in this regard and, in some instances, a stricter interpretation of the duty of care required from those who provide security services may be warranted. There is insufficient evidence in this case to justify any extension of the common law principles. The plaintiffs merely failed to adduce adequate proof of the act or acts of negligence of the guard. The plaintiffs' counsel suggested that the second defendants ought to have employed more security guards. That is more a commercial, rather than legal, question. The general security and access into the building must be one of the standard items a prospective tenant would have enquired. If he is not satisfied with the existing arrangements, he would have to negotiate for more secure measures. In the process of such negotiations, the landlord would be entitled to increase the rent or auxiliary charges in consideration.

8 Can the same be said of the first defendant's situation? She offered no evidence because she had no knowledge of how the theft was carried out or what her employee was doing at the time. Her liability depends on the liability, if any, of her employee the solitary guard on duty at the material time. The first defendant had no contractual relationship with the plaintiffs. Her contract was with the second defendants. The evidence against the first defendant was sparse. Mr Rao, in fact, relied on *res ipsa locquitur* because he could not explain how the theft took place. Neither did he know where the guard was or what he was doing at the material time. The liability of a security guard in

negligence is similarly based on a breach of his duty to take care and does not include pure omissions. A short explanation is necessary here. A guard's duty, of course, is to guard and he fails in his duty if he allows a stranger to take away that which he was guarding. What was he guarding in the present case? It was, on the evidence before me, the building known as Seiclene House. That was a huge building. The police officers who testified at trial said that it took about twenty minutes for a guard to walk around the building. Given the fact that only one guard was on duty at night, the fact that the thieves entered without his knowledge and carried out the theft is not in itself evidence of negligence. That would impose too onerous a duty on the shoulders of any one man or woman. The plaintiffs had to prove the negligent act on the part of the guard. The pleading averred that the guard abandoned his post and fell asleep on duty. I suppose that the plaintiffs mean either of three situations. First, they could be saying that the guard abandoned his post and went to attend to something else that had no connection with his work, for example, to see a film with his friends or to visit his dentist. For the avoidance of doubt, I would not, regard going to the toilet as 'abandoning his post'. Secondly, the plaintiffs could mean that the guard was at his post but fell asleep on duty. Thirdly, they could mean that the guard abandoned his post and went somewhere to sleep. In this third situation, going to the toilet to sleep could be construed as abandoning his point. However, the plaintiffs adduced no evidence as to what the guard did that night. It cannot be assumed that he had abandoned his post or had fallen asleep. If as the evidence showed, it would have taken twenty minutes to walk around the building, the thieves could have entered when the guard's back was turned. A guard who did not detect intruders is not by that failure alone, negligent. The specific factual situation or context is important. A guard who watches over the ingress through a single door may have no excuse if an intruder enters through that door. A guard who has the watch over the Seiclene Building is vulnerably exposed to exploitation by intruders. It is unreasonable to find him liable without proof of any positive act of negligence and that will only serve to amplify the exposure of such guards. For these and foregoing reasons, I am of the view that the allegations that the second defendants did not have a proper system of security, or were negligent in not maintaining that system, have not been proved.

9 *Res ipsa locquitur* is often too liberally pleaded. Generally, where particulars of negligence are pleaded, there is no room for the application of this principle. When a plaintiff pleads that 'the thing speaks for itself' he is saying that 'I have no proof how it happened but it did and it was something that does not occur in the ordinary course of things'. Bags of sugar falling on a dock worker is the classic case on point (see *Scott v London and St. Katherine Docks Co* (1865) 3 H&C 596). When specific acts of negligence or the cause of negligence is pleaded any reliance on *res ipsa locquitur* is a self-defeating admission that he has no proof to support the pleaded acts of negligence. If a plaintiff says that the defendant was negligent because he fell asleep on duty and is unable to prove so, he cannot then say 'the thing speaks for itself'. On the facts before me, the fact that thieves had broken in does not necessarily conjure an image of a sleeping guard.

10 Lastly, I shall address the issue of the exemption clauses under cll 6(11), (12) and (13) of the lease agreement. This exercise is undertaken only for completeness sake since I found that neither defendants was liable in negligence or contract. These clauses provided as follows:

> ' LANDLORD NOT LIABLE FOR ACT
>
> OMISSION OR NEGLIGENCE ETC.
>
> (11) Notwithstanding anything herein contained the Landlord shall not be liable to the Tenant nor shall the Tenant have any claim against the Landlord in respect of any act omission or negligence of any porter attendant or other servant or employee of the Landlord in or about the performance or purported performance of any duty relating to the provision of the said services

or any of them.

LANDLORD NOT LIABLE FOR ACCIDENT, INJURIES, ETC

(12) Notwithstanding anything herein contained the Landlord shall be under no liability either to the Tenant or the Tenant's licensees servants visitors or to others who may be permitted to enter or use the Building or any part thereof for accidents happening or injuries sustained or for loss of or damage to property goods or chattels in the Building or in any part thereof whether arising from the negligence of the Landlord or of any servant or agent of the Landlord.

LANDLORD NOT LIABLE FOR INTERRUPTION IN SERVICES, NEGLIGENCE, DAMAGE, LOSS ETC.

(13) Notwithstanding anything herein contained the Landlord shall not be liable to the Tenant, nor shall the Tenant have any claim against the Landlord in respect of:

(a) any interruption in any of the services hereinbefore mentioned by reason of necessary repair or maintenance of any installations or apparatus or damage thereto or destruction thereof by fire, water, riot, act of God or other cause beyond the Landlord's control or by reason of mechanical or other defect or break-down or other inclement conditions or shortage of manpower, fuel, materials, electricity or water or by reason of labour disputes;

(b) any act, omission, default, misconduct or negligence of any porter, attendant or other servant or employee, independent contractor or agent of the Landlord in or about the performance or purported performance of any duty relating to the provision of the said services or any of them;

(c) any damage, injury or loss arising out of the leakage of the piping, wiring and sprinkler system in the Building and/or the structure of the Building and/or the premises in the Building.'

These provisions were sufficiently clear. So far as cll 6(11) and (12) are concerned, they apply only in respect of negligence caused by the landlord's servant or employee. The evidence in this case clearly showed that the first defendant was an independent contractor to the second defendants. Accordingly, cll 6(11) and (12) are irrelevant and inapplicable. In respect of cl 6(13), Mr Toh, counsel for the second defendants, misread the clause as applying to 'security services'. It does not. It referred only to 'services' and 'security services' was not enunciated as part of those services, which in cl 13(b) were in respect of those of 'a porter, attendant or other servant or employee' of the second defendants.

For the reasons above, the plaintiffs' claim against both defendants fail and is accordingly, dismissed with costs.