

Sie Choon Poh trading as Image Galaxy v Amara Hotel Properties Pte Ltd
[2003] SGHC 198

Case Number : Suit 914/2002

Decision Date : 05 September 2003

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : Navinder Singh (Navin & Co) for the plaintiff; Adeline Chong and Rajendran Kumarasan (Harry Elias & Partnership) for the defendants

Parties : Sie Choon Poh trading as Image Galaxy — Amara Hotel Properties Pte Ltd

Landlord and Tenant – Covenants – Repair – Whether landlord exempted from breach of covenant to repair

Civil Procedure – Pleadings – Failure of defendants to plead negligence and give particulars of negligence – Non-joinder of issue – Whether defendants precluded from relying on contractual defence of negligence

1 The plaintiff, trading as Image Galaxy, was at the material time a tenant of the defendants' shopping centre located at Amara Hotel under a lease agreement dated 28 July 1999. The shop unit was known as #03-11 ("the premises"). The plaintiff operated a printing shop business at the premises. The floor on top of the premises housed a large food court. The piping of the food court which disposed of the waste water ran above the false ceilings of the third floor units, including the false ceiling of the premises.

2 Under the lease agreement, the defendants as the landlord undertook, inter alia, to maintain all common areas in good repair and to give the plaintiff quiet enjoyment of the premises. The relevant covenants of the defendants were as follows:

"9. LESSORS' COVENANTS

9.1

9.2 Quiet Enjoyment

To permit the lessee duly paying the rent and any other sums payable hereunder and observing and performing its several covenants and stipulations herein contained to have quiet enjoyment and exclusive possession of the demised premises during the said term without any interruption by the Lessors or anyone claiming under or through or in trust for the Lessors save as specifically herein provided.

9.3 Management & Operation of the Complex

The Lessors shall conduct manage and operate the Complex during the term of this Lease and will pay the maintenance and service charge of the Complex not otherwise stated herein as being payable by or being the responsibility of any lessees or other occupant of any part of the Complex.

9.4 Maintenance of the Complex

The Lessors shall maintain and keep in repair the Common Area during the term of the Lease

inclusive of the exterior walls (other than shop fronts) and all parking spaces roads pavements water drainage lighting and other common facilities and services Provided Always that the manner in which such areas and facilities shall be maintained and the expenditure thereon shall be at the absolute discretion of the Lessors."

3 It is also relevant to note that there was an exemption of liability clause in the lease agreement. Clause 8.1 of the lease agreement read as follows:-

"Negligence

The Lessees agree to occupy use and keep the demised premises at the risk of the Lessees and hereby release the Lessors and their contractors and invitees in the absence of any gross negligence on the part of the Lessors their servants or agents from all claims and demands of every kind in respect of or resulting from any accident damage or injury occurring in the Complex or the demised premises and the Lessees expressly agree that in the absence of any such negligence as aforesaid the Lessors shall have no responsibility or liability for any loss damage or injury suffered by the Lessees (whether to or in respect of the Lessee's person property or business conducted by the Lessees) as a result of any breakage leakage accident or event in the Complex or the demised premises."

4 At about 5.00pm on 19 April 2001, waste waters entered into the premises from the false ceiling. The waste waters, being effluents from the outlets in the food court situated one floor above the premises, leaked from the perforated T-junction of the pipe. As a result, the equipment, carpet and other assets of the plaintiffs were soiled and damaged.

5 The plaintiff appointed Mr Steven Ong to investigate the cause of the incident. Mr Ong found that the subject pipe and the T-junction was in a state of disrepair due to lack of maintenance. It was found to be in a severely corroded state, as shown by the photographs.

6 The plaintiff re-delivered possession of the premises to the defendants. In July 2001 the plaintiff returned the keys of the premises to the defendants and I was told that there was a pending action in the Subordinate Courts in which the defendants are seeking from the plaintiff (a) arrears of rent; and (b) damages for early termination of the lease. The Writ of Summons was filed in Subordinate Courts on 23 May 2002 and it preceded this action in the High Court.

7 I now turn to the pleadings, which have to be considered more fully because the outcome of this case hinged on the failure of the defendants to aver specifically and in terms that the bursting of the pipe and T-junction was due to their (the defendants') negligence.

8 After reciting the undisputed facts, the plaintiff by paragraph 10 of his statement of claim averred that "in breach of the covenants contained in the lease (i.e. the covenants to maintain and keep in repair and to give quiet enjoyment) the defendants had failed to keep the waste water pipes in the Common Area of the premises in good and proper condition or in a state of proper repair,..."

9 In response, by para 7 of the Defence the defendants averred as follows:

"With respect to paragraph 10 of the Statement of Claim, the Defendants aver that the leakage incident on 19 April 2001 was not the result of the Defendants' default. The Defendants aver that the leak was caused whilst the defendants independent contractors (Dyna-Jet Pte Ltd) were clearing a blockage in the waste pipeline located in the ceiling of the unit #03-K2. The Defendants deny any breach of covenants of the Lease Agreement. The waste pipeline system

was designed, constructed, installed and supplied by Chan Weng Wah Engineering Pte Ltd, whom the Defendants relied upon for their skill and expertise. The Defendants had also relied on the skill and expertise of independent contractors Dyna-Jet Pte Ltd to regularly service and maintain the waste pipeline system. After the incident, the Defendants had deployed cleaners to the Plaintiff's Unit to carry out the cleaning and repairs works and to replaced the damaged ceiling boards, so that the Plaintiff could resume his business."

10 Two paragraphs later in the Defence, the Defendants purported to invoke the exemption clause recited earlier. By paragraph 9, the Defendants averred as follows:

"Further or in the alternative, the Defendants aver that by Clause 8.1 of the Lease Agreement, the Plaintiff agreed to occupy use and keep the Unit at his own risk and expressly agreed that in the absence of gross negligence, the Defendants shall have no responsibility or liability for any loss or damage suffered by the Plaintiff."

11 It should therefore be noted that on the pleadings it had always been the defence that the Defendants denied any breach of the covenant to repair: see para 7 of the Defence.

12 It should further be noted that throughout the Defendants' case, there was no pleading of any sort that they accepted (in the alternative) that they were negligent but not grossly negligent, so that they could invoke the exemption under clause 8.1. Admittedly, by paragraph 9 the defendants had invoked the exemption clause but the defendants did not particularise as to how clause 8.1 would avail them. They did not put in issue as to whether they were asserting that they were only negligent, setting out the particulars relied on, which would also have explained why they were accordingly not grossly negligent.

13 In consequence, on the state and confined ambit of the pleadings, there was no admission of negligence on the part of the Defendants. There were therefore no particulars of the negligence. In those circumstances, the plaintiff did not counter by averring, possibly in a Reply, that the defendants were in all the circumstances "grossly negligent". The concept of 'gross negligence' denotes a high degree of careless conduct such as where a defendant did not intend a particular consequence to happen but nevertheless must have been able to foresee its occurrence: see Charlesworth & Percy on Negligence, para 1-11.

14 These observations on the pleadings did not relate merely to pleading points. In practice, what had happened in this case was that the issue whether the defendants were negligent was not joined. Consequently, the defendants did not plead in Reply that the defendants were 'grossly negligent' and was accordingly precluded from relying on the exemption clause. The relevant evidence was not called to investigate the proximately accurate circumstances under which the T-junction and the pipe could have been left un-examined and neglected to such a degree of corrosion.

15 It was only on the first day of the trial that the defendants admitted before me that they were in breach of the covenant to maintain and repair.

16 I refer to *Marina Centre Holdings Pte Ltd v Pars Carpet Gallery Pte Ltd* [1997] 3 SLR 625. I should at once point out that in that case the Court of Appeal found the defendants in breach of the covenant to repair as well as negligent which was pleaded, proved and found by both the trial and appellate courts concurrently. As a matter of construction, the Court of Appeal went on to decide, quite separately and as a matter of construction, that clause 36.1(b) was "apt to cover only a breach of such covenants [to repair] involving negligence." But in the same para 39 of the judgment, LP Thean JA, as he then was, for the Court of Appeal stated that "a breach of either of these

covenants [i.e. for quiet enjoyment and the covenant to repair] **"may or may not involve negligence, depending on the circumstances"**. This statement is unassailable, if I may say so, because a breach of the covenant to repair may be deliberate, accidental, negligent or grossly negligent. The circumstances are vast and varied.

17 In my view, it was incumbent on the defendants, as a matter of proof and pleading, to assert and prove that the leakage was due to their negligence. They should have set out the particulars. Then they would have brought themselves within the exemption clause. If they had done that, it would have been up to the plaintiff to assert whether the defendants were grossly negligent to preclude the defendants from relying on the exemption clause, the burden of proof having shifted to the plaintiff to assert and prove a proposition on which they place reliance.

18 It was only on the first day of the trial that the defendants admitted that they were in breach of the covenant to repair. But they did not aver whether their breach involved negligence or not and, if so, the particulars of negligence relied upon. They simply assumed that their breach had necessarily involved negligence and not gross negligence.

19 In those circumstances, I entered interlocutory judgment in favour of the plaintiff for damages arising out of the defendants' breach of the covenant to repair. I indicated that the defendants were not entitled to rely on the exemption in clause 8.1. I ordered that damages be assessed by the Registrar. I also ordered the defendants to pay the costs of these proceedings. I finally indicated that I had not decided on the issue whether the defendants had breached the covenant to give quiet enjoyment as it was not pleaded that the damage(s) to the sensitive machinery was irreparable and irreplaceable, thereby resulting in the cessation of the business and the lawful termination of the lease.

Plaintiffs' claim is allowed with costs

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