Epolar System Enterprise Pte Ltd and Others v Lee Hock Chuan and Others [2002] SGHC 214

Case Number : Suit 127/2002

Decision Date : 16 September 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Gn Chiang Soon and Sivakolunthu (Gn & Co) for the plaintiffs; Cheong Yuen Hee and Cheong Aik Chye (instructed counsel) with Govinda Gopalan (Lim & Gopalan) for the defendants

Parties : Epolar System Enterprise Pte Ltd — Lee Hock Chuan

Civil Procedure – Jurisdiction – Submission of no case to answer at close of plaintiffs' case – Election not to call evidence on defendants' behalf – Defendants' applying for leave to make submission without being put to election – Whether to allow application

Evidence – Proof of evidence – Findings of fact – Whether findings of fact from another trial can serve as evidence of primary facts in separate and independent trial

Tort – Negligence – Duty of care – Duty of owner to third party to make periodic checks on electrical system in premises – Whether such duty exists in law – Whether duty of care includes acts of omission

Tort – Nuisance – Negligence – Plaintiffs' failing to plead damage – Plaintiffs not specifying nature and type of damage – Need to prove type and nature of damage in claims involving nuisance and negligence – Distinction between damage and damages

Tort – Nuisance – Private nuisance – Need to prove interest in land – Whether interest as occupier sufficient – Whether interest as owner sufficient where owner not in occupation of land – Whether necessary for owner to prove possession or right of immediate possession – Whether necessary for owner to prove damage to reversionary interest

Judgment

Cur Adv Vult

GROUNDS OF DECISION

1. This is a sequel to Suit No. 1777 of 1999, a case concerning a fire that occurred on 20 February 1999 at Senang Crescent. In the trial of Suit No. 1777 of 1999 the owners and occupiers of No. 23 Senang Crescent sued the owners of the next door premises, No. 25 (the first defendants), the tenants who occupied the top floor of No. 25 (the second defendants), and the sub-tenants of the second defendants who occupied the lower floor of No. 25 (the third defendants). The causes of action in that suit were based on negligence as well as under the rule in *Rylands v Fletcher*. The claim against the first and second defendants were dismissed at the close of the plaintiffs' case. It was found that no liability attached to the owners and tenants in law on the case pleaded. The claim against the third defendants (who elected to call evidence) was allowed. The plaintiffs there appealed against the dismissal of their claim against the first and second defendants. The third defendants appealed against the finding of liability against them. Both appeals were subsequently dismissed by the Court of Appeal.

2. In the present action, the first, second, and third plaintiffs alleged that they were the occupiers of No. 21, 35 and 37 Senang Crescent respectively at the material time, namely 20 February 1999. These were the premises behind No. 23 and No. 25. The fourth, fifth and sixth plaintiffs alleged that they were the owners of No. 21, 35 and 37 of Senang Crescent respectively.

The defendants in this action were the owners of No. 25 (the first defendants in the previous suit). Their tenants, and more importantly, the sub-tenants who were found liable in Suit No. 1777 of 1999 were not joined as parties in the present Suit. Mr. Gn, counsel for the present plaintiffs (and who also represented the plaintiffs in Suit No. 1777 of 1999) informed the court that the sub-tenants are not being sued because they have no means of making payment should they be found liable. Mr. Gn also stated that the present claim was brought by way of subrogation by the insurance company of the plaintiffs. The causes of action in the present action are based on the rule in *Rylands v Fletcher*, negligence and nuisance. At the outset, counsel withdrew the claim based on the rule in *Rylands v Fletcher*. For completeness, it should be noted that in the previous action in Suit No. 1777 of 1999 the plaintiffs there did not sue in nuisance.

3. In view of the connection with the facts in Suit No. 1777 of 1999, counsel were asked if they could agree facts and evidence to expedite the trial. However, counsel after conferring with each other, were only able to agree that there was a fire at No. 23 and No. 25 Senang Crescent on 20 February 1999 and that the fire started at the front yard of No. 25.

4. Mr. Gn advanced the present case on the basis of only one point. He submitted that the three fuse wires found in the fuse holder in No. 25 Senang Crescent after the fire, had been tampered with as early as 1978, but certainly before the tenants (in Suit No. 1777 of 1999) began their tenancy. His entire case was constructed on the following premises. First, the fire was caused by the escape of electricity "through the electrical fuses and found its way into the front yard of No. 25." Secondly, the fuses were tampered or up-rated. Thirdly, the defendants failed to inspect the fuse holder, or maintain proper fuses in the holder before handing the premises over to their tenants (in the case presently pleaded, the tenants referred to were the second defendants in Suit No. 1777 of 1999). The statement of claim elaborated on a number of other particulars of negligence but they fall essentially within the three broad categories that I have just set out. I shall have to revert to the plaintiffs' pleadings shortly.

5. Significantly, none of the plaintiffs gave evidence at all. The only witnesses called on their behalf were a couple of clerks to produce certified true copies of certificates of titles in respect of 21, 35 and 37 Senang Crescent, as well as a couple of loss adjusters testifying that they spoke to some of the plaintiffs who claim to be owners or occupiers of the said premises. One of them, Mr. Yeo Peck Hong admitted that he had no personal knowledge but had formed his opinion on the basis that he had seen invoices and insurance policies from the plaintiffs. The plaintiffs' evidence was mainly from Prof. Jimmy Chen and Mr. Tan Jin Thong, the two experts who gave expert evidence in the trial of Suit No. 1777 of 1999, as well as Mr. Yee Kum Choon who gave evidence in that same suit as a witness of fact, but returning in this trial to give expert evidence on the size of wires. I overruled Mr. Cheong's objection to Mr. Yee being called as such, and I am mindful of the peculiar nature of such evidence, and whether there is such a person who can be called a "wire expert". Consequently, I am of the view that the evidence will be permitted, but whether it amounts to anything is a matter for submission. Another expert, Dr. Jonathan Lloyd was called to give evidence as to the cause of the condition of the three strands of wires found in the fuse holder in 25 Senang Crescent. He was of the view that the brittleness of the wires was due to heat created by an electrical current (as opposed to direct external heat). The plaintiffs' evidence was that the measurement of the diameter of the wires was 0.71mm (and not, counsel conceded, 0.75mm as Mr. Yee Kum Choon testified in the previous trial). Also relying, in part, on the evidence of Mr. Ng Kong, a director of the Energy Market Authority, that after 1 September 1978 the old Imperial gauge wires were officially to be replaced by new metric gauge (0.75mm) wires, Mr. Gn then put the plaintiffs' case on the basis that the wires must have been changed before 1 September 1978. He next relied on the obviously hearsay evidence of Mr. Lu Hui Huang, who had occupied the upper floor of 25 Senang Crescent sometime from November 1987 to May 1994 when he moved next door to 23 Senang Crescent. He said that he

noticed that the lower floor was 'unoccupied by tenants' for a couple of weeks in July 1988 and January 1989. He admitted under cross-examination that he did not know whether the premises were let out during the period which he said the premises at 25 Senang Crescent were unoccupied.

6. Mr. Gn constructed his case on the basis of the evidence above. He submitted that three "tampered, rewired, and up-rated electrical fuses constituted [a] fire hazard". The fuses served the wire that had short-circuited in the front yard of 25 Senang Crescent. Between 1979 and 1999 the defendants were in control of the lower floor of those premises. The fire started in the front yard of 25 Senang Crescent. The defendants are therefore liable, in nuisance and negligence, because they "repeatedly let out the premises without checking and rectifying the electrical fire hazards".

7. At the close of the plaintiffs' case Mr. Cheong, counsel for the defendants, applied for leave to submit no case to answer without being put to election that no evidence will be called on behalf of the defendants. He produced a Practice Note entitled *Submitting 'No Case To Answer'* which is reproduced in [1932] MLJ 61 which reports that the Registrar of the Supreme Court, in answer to an inquiry by the Law Society, replied that the Council of Judges (in Singapore) had ruled that we should adopt the same practice as that in the King's Bench Division in England, as opposed to the practice in the Chancery Division in which a defendant making a submission of no case to answer is put to election. However, Mr. Cheong conceded that in recent times, the Court of Appeal had ruled otherwise. In *Tan Song Gou v Goh Ya Tian* [1983] 1 MLJ 60, 62 the opinion of the trial judge was approved by the Court of Appeal in the following passage: "We agree with the observation of Lai Kew Chai J. that the proper practice, if counsel for a defendant wishes to make a submission of no case to answer, is for the judge to refuse to rule on it unless counsel elects to call no evidence". In the more recent case of *Central bank of India v Hemant Govindaprasad Bansal* [2002] 3 SLR 190, 196 Rajendran J was also of the view that the defendant must be put to election. Mr. Cheong submitted that the Practice Note of 1932 was not brought to the attention of the courts in the cases cited. Furthermore, he relied on Australian authorities that appear to favour the King's Bench practice in holding that the court has a discretion not to put the defendant to election. *Rasomen v Shell* (1996) 142 ALR 135 was cited in support. Notwithstanding that the Practice Note of 1932 (on a decision made in 1930) emanated from the Council of Judges, a High Court judge is bound by the decisions of the Court of Appeal. In this regard, it was not necessary for me to express any further view on this issue, and accordingly, I ruled that I would not hear a submission of no case to meet unless the defendants elect not to call evidence. Consequently, Mr Cheong declined to make a submission of no case to meet.

8. Only two witnesses were called on behalf of the defendants. The first was Mr. Lee Hock Chuan, the youngest son of the owner of 25 Senang Crescent who testified that after his father's death he took over the management of the premises. The other plaintiffs are his siblings. He testified that as far as he knew, the premises were let out to tenants ever since they were purchased in 1970. The date of purchase was not challenged but Mr. Gn pointed out that the various tenancy agreements produced by the defendants appear to overlap. He submitted that the inference must be that the previous tenant had moved out before the new tenancy took effect. This was denied by Mr. Lee. In my view, the mere overlap does not mean that the premises were left untenanted although there may be a week or two in which they were unoccupied. On the evidence, I am unable to find that there were any period of time in which the defendants had exclusive right of possession of the premises in 25 Senang Crescent, or that the premises were indeed left unoccupied for any period. The evidence from Mr. Lu is unreliable, and the inference that Mr. Gn wants me to draw from the tenancy agreements is too tenuous.

9. There are a great deal more problems in the plaintiffs' case. First, to succeed in nuisance or negligence, the plaintiff must prove damage. In this case damage was not even pleaded save that the

statement of claim prays for specific sums in respect of each plaintiff with no particulars as to the type or nature of damage. This is inadequate. A plaintiff cannot merely pray for a specific sum of money (for example, $65,487.85 for the first plaintiff in this case) without telling the defendant (and the court) what the damage was. It was left to Mr. Gn to inform me from the Bar (therefore, of no evidential value so far as the merits of the case are concerned) that the damage to the plaintiffs was not caused by direct fire but by heat caused by the fire. Counsel did not even tell me whether the resulting damage was to the premises (and if so, where) or to chattels (and if so, what). It is no answer for him to say that the registry had fixed the matter for trial on liability only with damages to be assessed at a later date. That is clearly a confusion between damage and damages. The latter is relevant only when the former has been pleaded and proved.

10. Furthermore, a plaintiff who sues in private nuisance must first prove that he has an interest in land because nuisance is a tort against land. See *The Law of Torts*, Common Law Series, 2002 Ed, Ch 22 page 901 for a detailed historical background to this tort. Whatever the plaintiff may recover from the defendant depends on the interest that he (the plaintiff) has. Hence, the licensee in *Malone v Laskey* [1907] 2 KB 141 was held to have insufficient interest in land to sue the next door occupier in nuisance. It follows that the plaintiffs must plead and adduce evidence of their respective interests in land. The case for the first, second, and third plaintiffs in this case must fail from the outset because they claim as 'occupiers'. That is clearly insufficient. The fourth, fifth, and sixth plaintiffs claim as owners. Not a single affidavit of evidence-in-chief was filed by any one of the six plaintiffs. If the owner is not in occupation, then he can only succeed if he can show that he had a right of immediate possession, or that he suffered damage in respect of his reversionary interest. See *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 312, per Lindley LJ. Nothing to this effect was pleaded nor proved. The certified true copies of title deeds produced by the solicitor's clerk only prove ownership at best, but, as I said, mere ownership is not sufficient, especially where, as in this case, it is not known who had possession or right to immediate possession of the premises known as 21, 35, and 37 Senang Crescent. The certificates also show that the properties were mortgaged at the material time.

11. Thus, the claim by the fourth, fifth and sixth plaintiffs must also fail. The plaintiffs' basis for asserting that the defendants are liable in negligence in not checking or maintaining the fuse holder must fail on the case as presented by Mr. Gn - which was that the defendants had a window period in which they had the right to exclusive possession (although Mr. Gn used the term 'having possession and control'). Even if the defendants had exclusive possession at a relevant time, there is yet another fundamental reason why the plaintiffs' claim in negligence must fail. There is no basis for finding a duty of care on the part of an owner, to third parties, to make periodic checks on the electrical system of his premises. The duties and obligations of the landlord are owed to his tenant. To succeed in negligence against the landlord, a third party has to prove a specific duty of care. Generally, the duty of care in negligence does not include acts of omission, which is essentially the case presented by Mr. Gn against the defendants. Thus, his reliance on *Virco Metal Industrial Pte Ltd v Carltech Trading & Industries Pte Ltd* [2000] 2 SLR 201 is misplaced because the facts are entirely different. The faulty power switch there was installed by the defendants in that case. In the present case, the breach of duty alleged was in failing to find out that there was a faulty fuse. There is more. Mr. Gn adduced no evidence to show that the fuse holder was faulty and that it was that fuse holder that caused the fire. I had asked if parties were able to agree facts at the beginning of this trial, but no material facts were agreed other than that a fire started in the front yard of 25 Senang Crescent on 20 February 1999. That being so, the plaintiffs were obliged to prove their case with evidence. Mr. Gn sought to rely on the findings of fact in the grounds of judgment in Suit No. 1777 of 1999. The findings of fact are not evidence in this regard - it is merely the opinion of a court as to what facts he thought existed in the case upon which he was trying. They cannot be used as evidence to prove primary facts that are incumbent upon a party to prove in another trial. In a separate and

independent trial, evidence, unless agreed, must be properly adduced to prove what the parties have to prove.

12. Finally, I must address the point in respect of what Mr Gn called the 'fresh evidence'. I am inclined to agree with the opinion of Mr. Mullen that we cannot conclude that the three fuses were installed prior to 1978 just by examining the measurement alone. Even if the measurement was correctly taken, of which there is some doubt, especially since the measurement had been taken in the previous trial and put to the court (by the same experts for the plaintiffs) to be of a different gauge, one cannot draw the inference that it must have been installed prior to 1978. Assuming that the regulations required new metric gauge wires after 1 September 1978, old wires that were still in stock might still have been used as Mr Mullen also observed. The plaintiffs' witnesses confirmed that such changes can be performed by any handyman and no inspection or testing is required to be made by the authorities concerned. In any event, even if the wires were installed prior to 1978, they would have been approved wires then. There is no evidence that the regulators required all such wires to be changed to the new metric ones. Hence, it is also entirely plausible that the wires might already have been changed in 1970 when the defendants bought the premises. There is also no evidence that the three fuses were in contravention of any statutory regulation or guideline. In any event, Mr. Gn concedes that the plaintiffs' case was not made on the basis of a negligent act of installation, but on an omission to check. I have already stated above that there is, in my opinion, no such duty in law applicable to the facts of this case.

13. For the reasons above, the plaintiffs' claim is dismissed with costs to be taxed if not agreed.

Sgd:

Choo Han Teck

Judicial Commissioner

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