Biokyd Chemio Sdn Bhd v Ng Gok Khun [2020] MLJU 2627

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HIGH COURT (KUALA LUMPUR)

MOHD FIRUZ JAFFRIL J

SUIT NO WA-12BNCVC-121-10 OF 2019

26 August 2020

(Nik Hussain & Partners) for the plaintiff.

(Ng Kee Way & Co) for the defendant.

Mohd Firuz Bin Jaffril J:

JUDGMENT

[1]This present appeal before me arose from the decision given by the Sessions Court on 10.10.2019 at the end of a full trial.

[2]The appeal was heard on 10.7.2020. Having reviewed the Memorandum and Record of Appeal, the judgment of the Sessions Court and the submissions of counsel for both parties, I had on 14,08.2020 allowed the appeal with costs.

[3]Dissatisfied with my above decision, the Respondent/Plaintiff duly appealed to the Court of Appeal via a Notice of Appeal dated 9 September 2020. The following are my grounds of judgment For purposes of convenience the parties herein shall be referred to in their original capacity as in the Sessions Court proceedings.
Background

[4]The relevant factual matrix relating to the appeal can be observed from the following chronology of events:

No	DATE	EVENT

1	01.09.2011	-The Plaintiff entered into a Tenancy Agreement with the Defendant whereby the Plaintiff agreed to rent out a 1½ storey factory with address at No. 420, Jaian Nilai 7/16, Kawasan Perindustrian Nilai, Negeri Sembilan ("The Premise").
		- The terms and conditions of the Tenancy Agreement are as follows:-
		-Rental: RM 1,200.00
		-Tenure of tenancy: Commencing from 01.11.2011 and expiring on 31.10.2013.
		-Option to Renew: 2 years.
		-Purpose: Manufacturing of Wood Coating & Adhesives Related Only.
2.	25.11.2014	-Upon the expiry of the 1st Tenancy Agreement and pursuant to the Option to Renew, vide a letter dated 25.11.2014 from the Defendant, the Plaintiff agreed to extend the tenancy for a further term of two (2) years commencing on 01.11.2014 and expiring on 31.10.2016 at a monthly rental of RM 1,800.00.
3.	18.10.2016	-Upon the expiry of the 2nd Tenancy Agreement and pursuant to the Option to Renew, vide a letter dated 18.10.2016 from the Defendant, the Plaintiff agreed to extend the tenancy commencing on 01.11.2016 at a monthly rental of RM 2,100.00.
4.	17.04.2017	-Fire occurred at the Premise on 17.04.2017 at 4.10 a.m.
5.	31,05.2017	-The Defendant wrote a letter to the Plaintiffs employee, Ms. Chong, informing that the Defendant did not buy any insurance for the assets and stock. The Defendant also informed the Plaintiff that he had moved to a new office.
6.	02.08.2017	-The Defendant through Messrs. Low & Partners issued a copy of the letter to the Plaintiff alleging that the Plaintiff had breached the Tenancy Agreement in which the Plaintiff had failed and / or negligent and / or omitted to repair the Premise within 90 days from 17,04,2017.
7.	10.01.2019	-The Plaintiff filed the Writ and Statement of Claim against the Defendant.
8.	10.10.2019	-The Plaintiffs claim against the Defendant was aflowed by the learned Session Court Judge, Tuan Harmi Thamri bin Mohamad after full trial.
9.	23.10.2019	-The Defendant subsequently filed an appeal against the decision pronounced by Tuan Harmi Thamri bin Mohamad in suit WA-B52NCVC-21-01/2019.

Issues For Determination:

[5]Based on the Memorandum of Appeal and the written submissions fifed by parties, the issues for purposes of the present appeal can safely be surmised as follows:

(i) Did the Plaintiff pleaded the requisite elements of negligence in his Statement of Claim?

(ii) Whether the Tenancy Agreement dated 1.9.2011 between the Plaintiff and the Defendant was in force at the time of the fire?

(iii) Was the Defendant negligent and thereby causing the fire to the premise?

(iv) Whether the Defendant is liable to make good the premise pursuant to Clause 3(f) and/or Clause 6(b) of the Tenancy Agreement after the premise was damaged due to fire?

The Trial Court's Grounds and Conclusion

[6]At the end of the trial, the learned Sessions Court Judge ('trial Judge") found the case in favour of the Plaintiff, The following is a summary of his findings:

(i) that the terms of the Tenancy Agreement dated 1.9.2011 were still valid and enforceable against the Defendant when the rented Premise caught fire;

(ii) Under Clause 3(f) of the Tenancy Agreement the Defendant is obligated to take care of the Premise whereby at the end of the tenancy the Defendani was to handover possession of the Premise in good repair condition *(see page 11 fast paragraph until the 1st paragraph of page 12 of the RRT)*|

(iii) that the Defendant had failed to take care of the premise for failing to procure insurance coverage in order to protect the Plaintiffs asset an and property;

(iv) there is no provision in the Tenancy Agreement which requires the Plaintiff to obtain insurance coverage for the premise;

(v) that the fire was not an incident which coutd not have been avoided;

(vi) that there was a duty of care on the Defendant to take care of the equipment and wiring of the Premise:

(vii) that the Defendant had breached Clause 3(f) by their failure to return the premise in "good repair condition, fair, wear and tear excepted" despite the fact that the Premise had burnt down by virtue of Clause 6(b) of the Tenancy Agreement (see *page 18 to 19 of the RRT);*

(viii) that the Plaintiff was entitle to claim damages for breach of contract (see *page 19 of the RRT);* and

(ix) that the Plaintiff's damages are to be assessed by way of a separate proceedings (see page *20 of the RRT).*

Principles for appellate intervention

[7]In the course of arriving to a decision on the present appeal before me, I am guided by the following authorities:

(i) In *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 it was held that an appellate court wiJI not readily interfere with the finding of facts arrived at by the trial court, A heavy burden is Imposed on Defendant who wishes to set asice a finding of facts of the trial judge;

(ii) In *Johari bin Khalid & Anor v Mohamed Zamri bin Khaiid* [1985] 1 MLJ 142, the Federal Court held as follows:

> *"We appreciate that this appeal is mainly involved with the finding of facts by the court below and as such we should be sfow or reluctant to disturb the finding unless it coutd be shown that the finding cannot be sustained having regard to the evidence.";*
>
> In *China Airlines Ltd v Maitran Air Corp* [1996] 2 ML J 527 Dzaiddin FCJ at page 526 held as follows:
>
> "... there is a dear authority also from the House of Lords -and followed by the Privy Council - which says that a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial Judge's finding of fact and form an independent opinion than in the case of the former. That authority is the speech of Lord Reid in House of Lords' decision in *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326 followed iater by the Privy Council in the Singapore case of *Tay Keng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 *at p. 94. At p 329, his Lordship stated:*
>
> *Wat (or Thomas) v Thomas* [1947] 1 All ER 582 *was a con sisterial case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more of the witnesses has been in dispute, and where a decision on these matters has led the trial Magistrate to come to his decision on the case as a whole. If hat be right, then I see no reason to doubt anything that was said by Lord Thankerton. But in cases where there is no question of credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as a good a position to evaluate the evidence as the trial Magistrate, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.* (Emphasis added.)"

Court's Analysis and finding

[8]As stated at the beginning of this judgment, I did find merits in the appeal. Hence, the appeal was dujy allowed. The following paragraphs contains, my analysis of each of the issues for determination.

Did the Plaintiff plead the requisite elements of negligence in his Statement of Claim?

[9]Upon review of the Plaintiffs Writ of Summons and Statement of Claim dated 29.1.2017, I do agree with the Defendant's contention that the Plaintiff had failed to plead the requisite elements of negligence as well as the particulars of negligence tn his Statement of Claim (see pages 205 to 207 of the Appeal Record). This in itself should have prompted the learned Trial Judge to struck out the suit at the ea rl iest i nstance (see the then Su preme Court decision in *Yew Wan Leong v Lai Kok Chye* [1990] 1 CLJ 1113*),*

[10]Be that as it may, as evidence on the issue of negligence was adduced and dealt with in full by both the parties

herein An full at the Court below, it can be viewed that such failure on the part of the Plaintiff did not prejudice the Defendant, In this regard, I am guided by the decision of the Federal Court in the case of *Gurbachan Singh s/o Bagawan Singh & Others v Veifasamy s/o Pennusamy & Others* [2014] MLJU 1137 *which inter alia states as Follows:*

> ft is frite law that the parties are bound by their pleadings and the trial of a suit must confine to the pleadings. The court is not entitled to decide a suit on a matter that has not been pleaded (See: *Yew Wan Leong v Lai Kok Chye* [1990] 1 CLJ (Rep) 330*)*
>
> However, in some instances, evidence adduced during the hearing can overcome the defects in pleadings as long as the other party is not taken by surprise. More so if 'Such evidence when given without any objection by the opposing party will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading' (See: Superintendent of Lands and Surveys, 4th *Division & Anor v Hamit b Matusin & 6 Ors* [1994] 3 CLJ 567*).*

Whether the Tenancy Agreement dated 1.9.2011 between the Plaintiff and the Defendant was in force at the time of the fire?

[11]Under this heading, the Defendant contended that the Plaintiff cannot rely on the provisions of the Tenancy Agreement dated 1,9.2011 to impose an obligation on the Defendant to make good and repair the premise under Clause 3(f) thereof which provides:

> *"At* me *expiration or sooner determination of this agreement to yield up the Premise with the fixtures thereto in good repair condition, fair wear and tear expected'.*

[12]In contending so, the Defendant relies on Clause 7 of the Tenancy Agreement when read with Schedule 1 (b) of the same states that the tenancy can only be renewed for a further period of two years only. Once the Tenancy Agreement expires, any extension was only on a month to month basis wherein the terms of the Tenancy Agreement no longer applies and the Defendant's sole obligation is to pay rental of RM2100.00 per month.

[13]The Trial Judge's finding on this issue can be found at pages 8 to 10 of the Rekod Rayuan Tambahan ("RRT"). it would be sufficient for me to state that I have no reason to disagree with his finding. Based on the Defendant's letter dated 02.08.2017 to the Plaintiff alleging that that the Plaintiff was in breach of the Tenancy Agreement by failing to repair restore and/or rebuild the Premise within 90 days from 17.04.2017 *(pursuant to Clause 6(d)),* the Defendant is estopped from contending that the Tenancy Agreement is no longer valid and non-enforceable.

[14]In addition, such contention by the Defendant tantamount to the loathful act of approbating and reprobating. The Defendant cannot on the one hand, issue a letter of demand against the Plaintiff trying to enforce the terms of the Tenancy Agreement and on the other hand, when confronted by the Plaintiff who also seeks to enforce the terms of the same Tenancy Agreement, takes the position that the Tenancy Agreement has expired (see *Public Back*

Berhad v Paramjit Singh Gill [*2015 1MLJ 414*], *Tahan Steel Corp Sdn Bhd v Bank islam Malaysia Bhd [2004] 6 MLJ 1* and *Lissenden v CAV Bosch Ltd [1940] 1 All ER 425"). **Was the Defendant negligent and thereby causing the fire to the premise?***

[15]In dealing with trie issue of negligence, the Trial Judge found as follows:

a. that the Defendant had failed to take care of the premise for failing to procure insurance coverage in order to protect the Plaintiffs asset an and property (see *page 12 beginning paragraph 2 of the RRT);*

b. there is no provision in the Tenancy Agreement which requires the Plaintiff to obtain insurance coverage for the premise (see *page 14 of the* RRT);

c. that the fire was not an incident which could not have been avoided *(see page 14 fast paragraph of the RRT);*

d. that there was a duty of care on the Defendant to take care of the equipment and wiring of the premise (see *page 17 of the RRT);*

[16]In a cause of action based on negligence, the Plaintiff has to prove the following elements:

(i) that there exists a duty of care between the Plaintiff and the Defendant;

(ii) that the Defendant did breach such duty of care;

(iii) that the loss or damage suffered by the Plaintiff is attributed to the Defendant's breach of such duty of care; and

(iv) that the damage was not too remote or unforeseeable such that the Defendant is liable for its occurrence

(see *Friedman, Gerald Henry Louis, The Law of Torts in Canada, Vol. 1, Toronto, Carsweel 1989 at 317 referred with approval by our* Federal Court in the case of *Tan Wei Hong & Ors v Malaysia airlines System Bhd & Ors* [2018] 2 CU 84*).*

[17]Upon my review of the terms and conditions of the Tenancy Agreement, I am satisfied beyond the shadow of doubt that the Defendant owes a duty of care to the Plaintiff. Even the Defendant does not dispute this (see *paragraph 15 of the Defendant's Written submission dated 3rd March 2020).*

[18]Notwithstanding the existence of such duty of care, I however cannot agree with the Trial Judge's finding that the Defendant did breach such duty of care. My reasons for holding so can be found in the following paragraphs.

[19]Firstly, the Trial Judge erred In finding and concluding that the Defendant had failed to take care of the premise for failing to procure insurance coverage in order to protect the Plaintiffs asset an and property *(see page 12 beginning paragraph 2 of the RRT), A* close scrutiny of the Tenancy Agreement shows that there is no provision which requires the Defendant as Tenant to procure such insurance coverage to protect the Plaintiffs asset and

property. Under Clause 3(k) of the Tenancy Agreement, the only insurance coverage that the Defendant was required to procure was in respect of their own goods, machinery and/or chattels from loss or damage by fire.

[20]Secondly, the Trial Judge erred when he concluded that there ts no provision in the Tenancy Agreement which requires the Plaintiff to obtain insurance coverage for the premise (see *page 14 of the RRT).* I find so as Clause 6(b) and Cfause 6(c) states as follows:

> Clause ***6(b)***
>
> *"In the event that such partial damage is due to the fault or neglected of the Tenant, his servants, employees, agents, visitors or licenses, without prejudice to any other rights and remedies of the Landlord and without prejudice to the right of subrogation of the Landlords insurers, the damage shall be repaired by the Tenant immediately without any abatement of rent."*
>
> Clause ***6(c)***
>
> *No penalty shall accrue for reasonable delay which may arise by reason of adjustment of insurance on the part of the Landlord and/or Tenant or any other cause beyond the parties' control.*
>
> The wordings *"without prejudice to the right of subrogation of the Landlord's insurers* ' in Clause 6(b) "as underlined above, envisages that the Premise was to be insured by the Landlord himself.
>
> The wordings *u*by reason of adjustment of insurance on the part of the Landlord and/or Tenant" in Clause 6(c) as underlined above, envisages that both the Landlord and Tenant will be procuring their own respective insurance coverage. In light of such express provisions, I also find that it cannot be implied that the Defendant/Tenant owes a duty of care to procure insurance coverage to protect the Plaintiff's asset and property.

[21]Thirdly, the Trial Judge erred when he concluded that the fire was not an incident which could not have been avoided (see *page 14 last paragraph of the RRT).* In arriving to this conclusion, the Trial Judge relied on the following evidence of SD-1 and SD-2 during cross examination (see page 15-16 of the RRT).

> *Pemeriksaan Balas SD2:-*
>
> *Peguam Plaintif: Same uh. So, in your answers to question 8 I summarize that you have trying to tell the court this factory or defendants only operate from Monday to Saturday where by the operation hour is from 8.QQ am to 6.00 pm. Am I right?*
>
> *SD2 : Ya*
>
> *Peguam plaintif: Ok So, can I says that during the fire occurring the factory is not running?*
>
> *SD2 : Ya*

Peguam plaintif: Yes. And from Saturday 6.00pm until Monday 4.00am is more than 24hour?

SD2 : Yes,

Peguam plaintif: Yes. And there was no one present in the say premise at the period of time since the company totally not in operation?

SD2 : Yes.

Peguam plaintif: Correct. Because that just now you were given the testimony that you were not present during the fire. Am I right?

SD2 : Yes.

Peguam plaintif: Ok. Now, I'm asking about your knowledge. I'm talking about your knowledge. Did your company switch off the main electricity Peguam plaintif of the distribution board when the company is not operating?

SD2 : We normalfy we switch on because we do not operate. We do not switch off the main. Peguam plaintif: You didn't switch off?

SD2 : Yes.

Peguam plaintif: You didn't switch off?

SD2 : Yes. Normally if not operating we just have the lighting. Because we need the lighting. Ya.

Peguam plaintif: So, your answer is that even though this factory it didn't operate more than 24 hours you didn't switch off the electricity Peguam Pfaintifiies of the distribution board, Did you agree?

SD2 : Ya.

Pemeriksaan balas SD1:-

Peguam plaintif: Yes. Ok, my soalan, ayoo I forget soaian nak tanya. Ok I teruskan soalan saya Tuan, memandangkan I put it that way, ok Puan ada handle more than 500 kes kebakaran ok, pad a pandangan Puan sekiranya saya off kan semua elektrik saya saya off the main power switch saya off, adakah kebakaran ini akan berfaku? Saya

totally off main electricity.

SD1 : Main switch?

Peguam plaintif: Yes. OffDB, OB ada satu switch on offkan ? Saya

offkan adakah akan berlakukan kebakaran ini?

SD1 : Tidak.

Also refer to Appellant's written submission at para 28 page 15-16:

This gap on whether there was a human error element was put to the respondent during cross-examination; he ***knew from the get-go that he did not have the evidence to support his allegation*** *that the Fire was caused by the Appellant (or use the terms during the trial; to support his allegation that the Fire was due to human error):*

At page 271 (Record of Appeal, Part D, Volume 3):

PD: No, my question is very specific, whether there is any statement make by Bomba is human error, just yes or no Mr. Ng. ***If don't have you just say don t have, I'm tricking you to answer any question. Just read the page at 87 or any page that you can find. Because you are putting the blame on the Defendant, I have to you question ya, I hope you understand. So can you please tell me from page 87Is there any human error stated in the report?***

SP1: ***No.***

PD: ***Do you have any expert report before us to say that this fire is caused by human error, do you have anything before this court, since you are making eligathn its human error. Yes or no?***

SP1: ***No.***

PD: So what is the basis that you say that the fire was caused by human error. What, where is your basis? What I have

SP1: written out to this tenant actually is original Premise without any extension beside the factory.

PD: No, y question is, human error where is you basis to say human error, since there is not in Bomba report, there is no expert report. You have basis of to come to this court to claim that it was a human error, the fire. You have or you don't have? ***Anything to show us that it was a human error that caused the fire?***

SP1: ***I don't have evidence.***

[22] I am of the view that the likelihood of fire being caused by the heat resistance malfunction due to the negligence of the Defendant as found by the Trial Judge too remote based on the following reasons:

(i) the factory was not in operation for more than 24 hours at the time of the fire (see the testimony of SD-2 at page 362-363);

(ii) with the factory not in operation, it cannot be said that the resistant heating was damaged due to prolonged use of electricity at the factory. At the time of the incident, only the lighting to the Premise was on;

(iii) it is also not reasonable to expect the Defendant to switch of the DB board on the basis that if the Defendant did take steps to switch off the DB board, the fire incident could have been totally avoided;

(iv) the fire resulted from a spark caused by resistance heating. Resistance heating itself is a natural process in all wiring electrical systems. Even normal usage of electricity will cause resistant heating. When there is no added load on the usage of electricity, the system will coot off on its own. In a situation where there is extreme heat, a spark can occur. The internal copper wiring used in the electrical cabie is not visible. This means it wouid not be possible for the Defendant or any of their employees, servants or agents to spot any da mage to the internal copper wiring or to know that resistance heating will cause a spark to ignite. Jn this regard, the crux of SDTs testimony on the issue of 'resistant heating" and negligence is re-produced beiow:

At page 289 of the RRT:

SD1: Dia sebenamya resistance heating ini mengambil proses yang iama sebenamya, ia bukan daiam masa yang singkat, jadi biia ada eiektrik flow *akan daiam jangka masa yang iama yang kita sendiri tidak tahu, jadi akan beriaku kesan oxide pada pendawaian tu Mart: Ok*

SD1: Biia ber/akunya kesan oxide pada pendawaian itu, jadi akan beriaku kepanasan pada pendawaian tersebut, jadi biia behaku kepanasana, pada suatu suhu yang kepanasan yang meiampaujadi akan beriakunya resistance heating ini, jadi disituiah akan beriaku cetusan nyaiaan, biia beriakunya cetusan nyaiaan, apa sahaja bahan mudah menyaia dt tempat kejadian tu jadi dia akan menyebebkan kemerebakan kebakaran tah.

At page 287

SD1: Giobufes ini adalah kesan fizikal yang kita dapati pada pendawaian yang mengaiami proses resistance heating ini, Resistance heating ini adafah ***satu sumber nyaiaan yang kita dapati daripada eiektrik,***

Mah: Sumber nyaiaan daripada eiektrik?

At page 306

SD1: Hah ***source of ignttion daripada eletrikaL***

PP: Ya soalan saya, saya faham. So, panes dia dari segi luar ke atau wayar daiam panas?

SD1: Resistance heating ini akan beriaku ***pada pendawaian bukan daripada kebakaran daripada tuar.***

At page 307

Mah: Macam ni, saya terangkan. Wayar warna ada, you nampakkan ada wayar merah ada wayar hitam dekat situ, daiam wayar tu wayar tu ada kuprum ke apakah ituiah. Daiam tu kan?

SD1: *Hah ok. Pendawaian yang saya ambii sebagai bahan bukti ini adafah daripada cooper lah tembaga, jadimerujuk kepada soalan tadl* ***kebakaran itu adatah daripada wayar copper itu sendiri. Wayar Copper itu yang mengaiami, biia ada electric flow, copper ituiah yang akan heat and cool, head and cool, dari situiah copper tu akan ada kesan oxide seperti yang saya cakap tadl dan akan beriakunya proses resistance heating ini.***

At page 290

SD1: Dia bahangkan, sebab proses resistance heating ni dia adaiah proses kepanasan pada pendawaian tersebut jadi ***ia akan ambit masa yang lama tuan.***

Mah: Maksudnya ***dia sendiri pa nasi ah?***

SD1: ***Ya, betui.***

Mah: Macam, maksudnya ***macam daiam wayar kita sedia ada ni memang ada kepanasan lah?***

SD1: Ya betui. Ada, maksudnya pendawaian yang kita guna ni ***setiap atiran pendawaian mest ada eiektrik flow, jadi kita guna ke tak guna mesti ada. So biia ada dia akan heat biia kita tak tambah macam ni kita tak pasang, kita tak tambah load pada dia macam kita tak pasang lampu ke a pa, so dia akan coof balik, so dia akan heat, dia akan cool. Jadi dekat situ...***

Mah: Oh, maksudnya penggunaan biasa pun akan mencetuskan nyaiaan tu ***iah?***

SD1: ***Yaf kita tak tahu ia akan beriaku biia.*** *Ya betui.*

Mah: ***Tak semestinya orang kata tahu penggunaan yang extreme.***

SD1: Ya betui, untuk proses resistance heating ni lah.

Ya.

Mah: Yang ***biasa pun ada dah?***

SD1: ***Yaf dia...***

Mah; Maksudnya ***sekarang pun ada dah?***

SD1: ***Ya boleh.***

(v) Ja batan Bomba had a l ready cl ass ifi ed t he ca se as a n a ccid ent and cannot attribute the cause of the accident to human error (see *testimony ofSD1 at page 285-286 of the Rekod Rayuan).*

PD: Ya bundle yang sama. Muka surat 87 Puan ya, yang terakhir perkataan tadi, kebakaran ini dikategorikan sebagai kes

kemafangan Accidental Fire. Soalan saya mengapakah kebakaran ini Puan mengkategorikan sebagai kes kemaiangan. Sifa Puan jelaskan.

SD1: Punca kebakaran terdapat 4. laitu yang pertama kemaiangan (Accidental Fire) yang kedua sengaja dibakar (essendary fire) yang ketiga natural, ataupun semula jadi dan yang keempat tidak diketahui ataupun unknown. Jadi saya klasifikasikan ***punca kebakaran bagi kes ini adalah kemaiangan ataupun Accidental Fire iaitu kemaiangan yang tidak disengajakan.***

Mah: Yang tidak disengajakan?

SD1 : Ya.

At page 301-302

PP: Ada niat jahatlah. Ok sekarang datang kepada kategori kemaiangan, ok Puan kemaiangan ini bermaksud bukan...f put it of opposite way of sengaja, iaitu tiada niat kejahatan. Macam for example, atau saya buat ***kategori macam saya pandu kereta, saya langgar orang tapi saya tidak sengaja. It's an accident.***

SD1: Saya tidak setuju.

PP: Ok, I will expect in Puan punya way apa maksud kemaiangan. SD1: Seperti saya jetaskan sebentar tadi, punca kemaiangan adafah punca kebakaran yang tidak disengajakan. PP: Ok, tidak sengajakan ok... SD1: Seiain daripada sengaja bakar.

PP: Ok, ***bolehkah saya cadangkan kemaiangan ini bet maksud tidak disengajakan tetapi dia juga termasuk kecuaian yang menyebabkan kemaiangan kebakaran ini beriaku,***

SD1: ***Saya tak setuju.***

PP: Dan apa maksud itu, sebab kemaiangan tidak sengaja, saya tak faham.

SD1: Kemaiangan punca kebakaran adafah kemaiangan berpunca kepada kemaiangan accidental way yang tidak disengajakan saya tak boleh membuktikan benda itu cuai ataupun tidak Based on the above testimony of SD-1, it is evident that the Defendant cannot be biamed for causing the tire to the Premise.

[23]Finally, the Trial Judge erred when he concluded that the Defendant had breached his duty of care to take care of the equipment and wiring of the premise *(seepage 17 of the RRT).* This conclusion was made without any reference to the evidence adduced at the trial.

Conversely, the testimony of SD-1 on this issue, when viewed in full (as re-produced below, shows that there is no basis to support the Trial Judge's conclusion)

PP: Puan, saya nak tanya Puan, biia Sampai kesitu, gambar 8 ini ada banyak wayar, wayar ini connect ke mana?

SD1: Di lokasi kejadian, tolong ulang soalan.

PP: Gambar 8 ada banyak wayar, saya kaiua nak kira saya pun tak dapat kira. So sorry so saya nak tanya yang ini wayar connect ke mana? ***SD1: Saya tak boieh nak tentukan sebab dah daiam kemusnahan dan wayar tu saya ambii.***

PP: Oh Puan tidak boieh mengenalpastikan wayar itu same ada connect ke tempat mana-mana tak tahulah?

SD1: *Ya betui.*

PP: Tap! boiehkah Puan setuju dengan cadangan saya itu wayar sangat messy, biia puan datang sangat messy.

SD1: Setuju.

PP: ***Dan pada pandangan Puan, wayar itu kalau herbanding dengan DB biasa, dia ada luar biasa tak, macam dari segi bilangannya, ferialu banyak keatau messy ke?***

SD1: Sebab saya terima keadaan wayar tu memang daiam keadaan yang terbakar teruk, terbakar habislah. ***Jadi saya pun tidak pasti.***

PP: ***So, Puan memang tidak tahu keadaannnya..***

SD1: Asai.

PP: Asai? ***Tak tahu?***

SD1: ***Ya tak tahu.***

PP: Puan banyak terltbat daiam kes kebakaran tak?

SD1: Sepanjang pengaiaman saya lebih daripada 500 kes.

PP: So Puan, pernah Nampak 500 kes begitu banyak DB, ***wayar ini puan kalau lihat setepas kebakaran memang tidak dapat kenaipastikan sama ada luar biasa atau tak iuar biasa?***

SD1: ***Tak dapat.***

[24]The fact that the Defendant had successfully obtained manufacturing License from Majlis Perbandaran Nilai to manufacture and process paint itself, also lend credence to the Defendant's Defence that the factory equipment and the wiring of the Premise complied with all safety requirements of the authorities concerned which included Jabatan

Bomba & Penyelamat, the Department of Enviroment. This fact was in itself accepted by the trial Judge in his grounds of judgment (see page 5 of the RRT).

[25]Based on the above findings, it is crystal clear thai the Defendant did not breach their duty of care to the Plaintiff.

Whether the Defendant is liable to make good the premise pursuant to Clause 3ff) and/or 6(b) of the Tenancy Agreement after the premise was damaged due to fire?

[26]In dealing with this issue the provisions of Cfause 3(f) and 6(b) of the Tenancy Agreement reiied upon by the learned Trial Judge is re-produced below:

Clause 3(f)

"At the expiration or sooner determination of this agreement to yield up the Premise with the fixtures thereto in good repair condition, fair wear and tear expected."

Clause 6(b)

"In the event that such partial damage is due to the fault or neglected of the Tenant, his servants, employees, agents, visitors or licenses, without prejudice to any other rights and remedies of the Landlord and without prejudice to the right of subrogation of the Landlord's insurers, the damage shall be repaired by the Tenant immediately without any abatement of rent,"

[27]On this issue, the Trial Judge found as follows:

a. that Clause 3(f) requires the Defendant to make good the premise at the end of the tenancy *(see page **11 fast paragraph until the 1st paragraph of page 12 of the RRT);***
b. that the Defendant had breached Clause 3(f) by their failure to return the premise in "good repair condition, fair, wear and tear excepted" despite the fact that the premise had burnt down by virtue of Clause 6(b) of the Tenancy Agreement (see *page 18 to 19 of the RRT);*
c. that the Plaintiff was entitle to claim damages for breach of contract *(see page 19 of the RRT);* and
d. that the Plaintiffs damages are to be assessed by way of a separate proceedings (see *page 20 of the RRT).*

[28]Having reviewed the Trial Judge's reasoning on this issue, i am of the view that there was clear error in construing that Clause 3(f) of the Tenancy Agreement was applicable to the situation involving damage to the Premise due to fire. Reading the entire Tenancy Agreement as a whole, it is my considered view that Clause 3(f) is a general provision which only applies in a situation where the tenancy expires in a situation other than due to damage as a result of fire.

[29]My view is fortified by the existence of clear provisions in dealing with a situation where the Premise is damaged by fire. These provisions can be found in Clause 6 of the Tenancy Agreement, which is re-produced in *extenso* below:

> *"6. Damage to the Premise*
>
> (a) *if the Premise shaii be partiaiiy damaged by fire or other causes due to no fauit or neglect of the Tenant, his servants, agents, visitors or licenses such damage shaii be repaired by and at the expense of the Landlord and the Premise still can useabiy by the Tenant.*
>
> (b) *- In the event that such partial damage is due to the fault or neglected of the Tenant, his servants, employees, agents, visitors or licenses, without prejudice to any other rights and remedies of the Landlord and without prejudice to the right of subrogation of the Landlord's Insurers, the damage shall be repaired by the Tenant immediately without any abatement of rent.*
>
> (c) *No penalty shaii accrue for reasonable delay which may arise by reason of adjustment of insurance on the part of the Landlord and/or Tenant or any other cause beyond the parties' control,*
>
> (d) *If the Premise is totally damaged or rendered wholly untenantable by fire or other causes and the Premise are not restored or built, then in such an event the Landlord may, within Ninety [90j days after such fire or other cause give the Tenant a notice in writing of such decision which notice shall be given as in Clause 9 hereof and thereupon the terms of this Agreement shall expire by lapse of time upon the third day after such notice is given and the Tenant shall vacate the Premise and surrender the same to the Landlord.*
>
> (e) *If the tenant shall not be in default under this Agreement, then upon termination of this Agreement under the conditions provided in Ciause 6(d) the tenant's iiabiiity for rent shaii cease as on the day following casualty."*

[30]Whilst the 'earned Trial Judge did refer to Clause 6(b) of the Tenancy Agreement there was error in holding that both Clause 6(b) and Clause 3(f) applies hand in hand and are to be read together resulting in a flawed decision contrary to how the terms of the Tenancy Agreement are to be construed and interpreted.

[31]Having found that the fire that occurred at the premise was not due to the fault of the Defendant or any of his servants or agents (see paragraph [14] above, Clause 6(b) of the Tenancy Agreement relied upon by the learned Trial Judge is no longer applicable to impose an obligation on the Defendant to make good the Premise by repairing the damage caused by the fire.

[32]As the Premise was damage as a result of the fire (by no fault of the Defendant), as Tenant, the Defendant was right in giving notice pursuant to Clause 6(d) to vacate the Premise and surrender the same to the Landlord. In light of the fact that the Defendant had not defaulted the terms of the Tenancy Agreement, their liability for rent ceased on the day following the fire.

Conclusion

[33] In the upshot, the Defendant's appeal is allowed with costs. Having heard brief submissions by parties on the issue of costs, I am of the view that a sum of RM8,000,00 is reasonable towards the Defendant's cost for the appeal. I order so accordingly.
