KELANG PEMBENA KERETA-KERETA SDN BHD v MOK TAI DWAN [2000] 1 MLJ 673

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COURT OF APPEAL (KUALA LUMPUR)

NH CHAN, ABU MANSOR AND HAIDAR JJCA

CIVIL APPEAL NO J–02–791 OF 1995

22 December 1999

Case Summary

Land Law — Lease — Covenants and conditions — Duty to maintain roof of premises — Roof found to be structurally defective and beyond repair — Whether duty to replace roof on lessee

Land Law — Lease — Subleases — Breach of — Whether landlord induced sub-tenants to breach sub-tenancy with lessee

Kelang Pembena Kereta-Kereta Sdn Bhd ('KPKK') granted a lease of an industrial land together with five blocks of premises ('the demised premises') to Mok Tai Dwan ('Mok').Under cl 5(e) of the lease, Mok shall be at liberty to sublease the demised premises. Mok subsequently entered into several sub-tenancy agreements with several companies. Clause 4(g) of the lease imposed on Mok as lessee to keep the demised premises in tenantable repair at all times during the term of the tenancy, fair and wear excepted. Clause 4(k) imposed on Mok to repair and maintain, inter alia, the roofs of the demised premises. KPKK witness admitted in his report that he made a visual inspection of the building and found it in a tenantable condition. This would be in line with Mok's evidence that he was not allowed to take his contractors in before signing the lease. In the event, without making any technical or structural inspection, all parties had thought that the roof was just in a bad condition and could be repaired. However, it was only after the constant and repeated complaints from Mok's sub-tenants regarding leaking problem that structural inspections were carried out. The report confirmed that the roof was structurally defective and was beyond repair. Two actions were filed in the High Court. The issues which both parties requested the judge to determine at the trial were, inter alia: (i) whether, on the facts and on the proper construction of cll 4(g), (h) and (k) of the lease, the duty to replace the roof was on Mok or on KPKK; and (ii) whether, on the facts, there was inducement to breach the sub-tenancies by KPKK as the landlord and whether KPKK was liable to Mok for damages under this head. KPKK appealed against that part of the judgment (see [1996] 1 MLJ 586) of the judge wherein he held that it was the duty of KPKK to replace and pay the cost of replacing the roofs of the demised premises. Mok appealed against that part of the judgment of the judge wherein he held that KPKK was not liable to Mok for inducing breach of contract of Mok's tenancy agreements with his sub-tenants.

Held, dismissing the appeals:

(1) On the evidence, it was clear that the cause of the roof failure was due to structural defects and excessive corrosion and not the fault [*674]

of Mok. Clearly, Mok could not possibly envisaged this structural defects when he took possession of the demised premises. After giving due consideration to the submissions of counsel for both parties and the grounds of judgment of the judge, the court agreed that on the facts and on the proper construction of sub-cll 4(g), (h) and (k) of the lease, the trial judge was correct in finding that the duty to replace and pay the costs of replacing the roofs to the demised premises was clearly on KPKK. The appeal of KPKK was dismissed (see pp 680D–F, 681H–I).

(2) There was evidence that KPKK entered into direct tenancy agreements with Mok's sub-tenants. From the dates of the tenancy agreements, it seems clear that the direct tenancy agreements were executed by KPKK after the termination of the main lease.Hence, the issue of KPKK inducing the sub-tenants of Mok to breach the sub-tenancy agreements with him did not arise (see p 684C–F).

(3) The court was satisfied that on the evidence before him, the judge had not misdirected himself on the facts and the law applicable thereto. In the circumstances, there were no grounds for the court to disagree or interfere with his decision. Mok's appeal was therefore dismissed (see pp 685H–686A).

Bahasa Malaysia summary

Kelang Pembena Kereta-Kereta Sdn Bhd ('KPKK') telah memberikan pajakan tanah perindustrian bersama-sama dengan lima blok premis ('premis tersebut') kepada Mok Tai Dwan ('Mok'). Di bawah fasal 5(e) pajakan tersebut, Mok bebas untuk menyewa semula premis tersebut. Mok kemudian memasuki beberapa perjanjian sewaan semula dengan beberapa syarikat. Fasal 4(g) pajakan tersebut mengenakan tugas ke atas Mok sebagai penerima pajakan untuk mengekalkan premis di dalam keadaan baik pada semua masa semasa tempoh sewaan, kecuali jika ia usang secara munasabah. Fasal 4(k) mengenakan tugas ke atas Mok untuk membaiki dan menyeleng-garakan, antara lain, bumbung-bumbung premis tersebut. Saksi KPKK mengaku di dalam laporannya bahawa beliau telah membuat pemeriksaan visual bangunan tersebut dan mendapati ia dalam keadaan yang boleh disewa. Ini adalah selaras dengan keterangan Mok bahawa beliau tidak dibenarkan untuk membawa masuk kontraktor-kontraktornya sebelum menandatangani pajakan tersebut. Dalam keadaan di mana, tanpa sebarang pemeriksaan struktur atau teknikal, semua pihak-pihak telah berpendapat bahawa bumbung hanya di dalam keadaan yang buruk dan boleh dibaiki. Namun, hanya selepas aduan yang kerap dan berulang-ulang daripada penyewa kecil Mok berkenaan dengan masalah kebocoran, pemeriksaan struktur telah dijalankan. Laporan mengesahkan bahawa bumbung adalah defektif dari segi struktur dan tidak boleh dibaiki. Dua tindakan telah difailkan di Mahkamah Tinggi. Isu-isu di mana kedua-dua pihak meminta [*675]
mahkamah untuk memutuskan semasa perbicaraan adalah, antara lain: (i) sama ada di atas fakta dan juga penafsiran yang betul fasal-fasal 4(g), (h) dan (k) pajakan tersebut, kewajipan untuk meng-gantikan bumbung adalah di atas Mok atau KPKK; dan (ii) sama ada, di atas fakta, terdapat dorongan untuk memecahkan sewaan kecil oleh KPKK sebagai tuan punya dan sama ada KPKK adalah bertanggung-an kepada Mok untuk ganti rugi di bawa perkara ini. KPKK merayu bahagian penghakiman hakim (lihat [1996] 1 MLJ 586) di mana beliau memutuskan bahawa ia adalah tugas KPKK untuk menggantikan dan membayar kos untuk membaiki bumbung-bumbung premis tersebut. Mok merayu terhadap bahagian penghakiman hakim tersebut di mana beliau memutuskan bahawa KPKK tidak bertanggungan kepada Mok kerana mendorong pemecahan kontrak perjanjian sewaan Mok dengan penyewa-penyewa kecilnya.

Diputuskan, menolak rayuan-rayuan tersebut:

(1) Berdasarkan keterangan, adalah jelas bahawa punca kegagalan bumbung adalah disebabkan oleh kecatatan struktur dan hakisan berlebihan dan bukannya salah Mok. Jelas Mok tidak boleh membayangkan kecatatan struktur ini apabila beliau mengambil posesi premis tersebut. Selepas memberikan pertimbangan yang sewajarnya kepada hujahan-hujahan peguam untuk kedua-dua pihak dan juga alasan penghakiman hakim tersebut, mahkamah bersetuju bahawa di atas fakta-fakta dan juga penafsiran yang sebenar fasal kecil 4(g), (h) dan (k) pajakan tersebut, hakim yang membicara adalah betul di dalam penemuannya bahawa tugas untuk mengganti dan membayar kos mengantikan bumbung-bumbung premis demis tersebut adalah jelas di atas KPKK.Rayuan KPKK adalah ditolak (lihat ms 680D–F, 681H–I).

(2) Terdapat keterangan bahawa KPKK memasuki terus perjanjian penyewaan dengan penyewa kecil Mok. Dari tarikh-tarikh perjanjian penyewaan, adalah jelas bahawa perjanjian penyewaan terus telah dilaksana oleh KPKK selepas penamatan pajakan utama. Oleh itu, isu KPKK mendorong penyewa-penyewa kecil Mok untuk memecahkan perjanjian penyewaan kecil dengannya tidak timbul (lihat ms 684C–F).

(3) Mahkamah adalah berpuas hati bahawa berdasarkan keterangan di hadapannya, hakim tidak tersalah arah berdasarkan fakta-fakta dan undang-undang yang terpakai. Di dalam keadaan-keadaan tersebut, tidak terdapat alasan untuk mahkamah untuk tidak bersetuju atau menganggu keputusannya. Rayuan Mok ditolak (lihat ms 685H–686A).]

Notes

For cases on covenants and conditions, see 8 Mallal's Digest (4th Ed, 1999 Reissue) paras 2257–2259.

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For a case on sub-leases, see 8 Mallal's Digest (4th Ed, 1999 Reissue) para 2295.

Cases referred to

Brew Brothers Ltd v Snax (Ross) Ltd and Anor [1970] 1 QB 612 (refd)

Felton & Anor v Brightwell & Anor [1967] NZLR 276 (refd)

Greig v Insole [1978] 3 All ER 449 (refd)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 (refd)

Post Office v Aquarius Properties Ltd [1985] 2 EGLR 105 (refd)

Ravenseft Properties Ltd v Davstone (Holdings) Ltd [1980] 1 QB 12 (refd)

Sleafer v Lambeth Metropolitan Borough Council [1959] 3 All ER 378 (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113 (refd)

United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182 (refd)

Appeal from

Originating Summons No 24–737 of 1993 and Code No 22–357 of 1993 (High Court, Johor Bahru)

DP Naban (Nitin V Nadkarni and KA Gan with him) (Lee Hishamuddin) for the appellant.

CV Das (Trevor George de Silva with him) (Zaman & Co) for the respondent.

HAIDAR JCA

(delivering judgment of the court): Two actions were filed at the High Court, Johor Bahru. They are:

(1) Case No 22–357–1993 — a writ action by Mok Tai Dwan ('Mok') against ***Kelang Pembena*** Kereta-kereta Sdn Bhd ('KPKK').
(2) Case No 24–737–1993 — an originating summons by KPKK against Mok and eight other defendants.

In the writ action against KPKK, Mok prays for the following orders:

(a) an injunction to restrain KPKK from inducing the sub-tenants from breaching their lease agreements with Mok;
(b) an injunction to restrain KPKK from terminating the lease agreement between them;
(c) that the lease agreement between Mok and KPKK is valid;
(d) that KPKK appoint a contractor to change the roof of Block C and repaint Block A, B, C and D;
(d)(i) that the purported termination or forfeiture of the said lease by letter dated 13 September 1993 be declared invalid;

(e) costs; and

(f) other reliefs that the court deems fit.

In the originating summons against Mok and eight other defendants (sub- tenants of Mok), KPKK prays, inter alia, for the following orders:

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(i) that Mok and all the sub-tenants quit and vacate the property within 24 hours;

(ii) that Mok pay arrears of rental for January to August 1993 amounting to RM739,200;

(iii) that Mok and the sub-tenants pay KPKK mesne profits and/or damages;

(iv) interest at 8%pa from 25 August 1993 until payment;

(v) costs; and

(vi) any other relief.

Mok filed a counterclaim against KPKK claiming that KPKK wrongfully procured breaches of their sub-tenancies with him as follows:

(a) by communicating directly with his sub-tenants;

(b) by offering his sub-tenants direct tenancy relationship; and

(c) by signing direct tenancy agreements with one or more of his sub-tenants.

Mok counterclaimed for:

(1) damages in the form of loss of rentals;

(2) damages for wrongful forfeiture and cancellation of lease;

(3) damages for breach of agreement;

(4) damages for tort of wrongfully inducing breaches of contract; and

(5) a refund of all expenditure, etc incurred by him.

Both these actions were heard together with the consent of all the parties.

At the outset of the trial, counsel for KPKK withdrew the proceedings against the third defendant, Bensons Metal Products Sdn Bhd.

In the course of the trial the parties, by consent, agreed that the issue of liability should be tried first and that the quantum of damages was to be assessed later, depending upon the outcome on the liability issue.

The issues which both parties requested the learned judge to determine at the trial are:

(i) whether, on the facts and on the proper construction to cll 4(g), (h) and (k) of the lease agreement dated 10 August 1989, the duty to replace the roof was on Mok or on KPKK;

(ii) whether the letter of forfeiture of 13 September 1993 was justified on the facts and under the terms of the lease agreement; and

(iii) whether, on the facts, there was inducement to breach the sub-tenancies by KPKK as the landlord and whether KPKK is liable to Mok for damages under this head.

After hearing the parties, the learned judge made the following orders as per the order by the Court dated 22 November 1995 enclosed in the additional appeal record:

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(a) KPKK to replace and pay the cost of replacing the roofs to the premises known as No 64, Jalan Langkasuka, 80350 Johor Bahru erected on the land held under QT(R) 1917, Lot No TLO 1995 in the Township of Johor Bahru;

(b) KPKK is not liable to Mok for inducing breach of contract of Mok's tenancy agreements with his sub-tenants;

(c) KPKK is not liable to Mok in damages or at all as a result of KPKK inducing the aforesaid breach of contract; and

(d) The issue of whether the letter of forfeiture dated 13 September 1993 issued by KPKK to Mok was justified on the facts of the case and under the terms of the lease agreement dated 10 August 1989 is to be decided after the determination of the quantum of costs of repair of the roof to the aforesaid premises which was incurred by Mok, which is to be tried at a date to be fixed by the court.

KPKK appealed against that part of the judgment of the learned judge wherein he held that it is the duty of KPKK to replace and pay the cost of replacing the roofs of the said premises (Civil Appeal No J-02-791 of 1995).

Mok, in turn, appealed against that part of the judgment of the learned judge wherein he held that KPKK is not liable to Mok for inducing breach of contract of Mok's tenancy agreements with his sub-tenants (Civil Appeal No J-02-854 of 1995).

We heard the arguments of the parties on 25 March 1999 in respect of both appeals as agreed, wherein we reserved judgment. We now proceed to give our decision and the grounds thereof.

We do not propose to set out the facts in full as they are sufficiently set out by the learned judge in his judgment. We will refer to the facts in so far as they are relevant to the issues before him.

Civil Appeal No J-02-791 of 1995

A lease agreement dated 10 August 1989 ('the lease') was executed between KPKK and Mok in respect of the lease of industrial land held under QT (R) 1917 Lot No TLO 1995 in the township of Johor Bahru ('the said land') together with five blocks of building collectively referred to as No 64, Jalan Langkasuka, 80350 Johor Bahru ('the demised premises'). KPKK granted a lease of the said land for a term of six years commencing 1 October 1989 and terminating on 30 September 1995. It was agreed that the monthly rental for the first 36 months shall be at RM84,000 and thereafter at RM92,000. There was also an option to renew the said lease for another two years.

The demised premises were initially used as a car-assembly plant which ceased operations sometime in 1986 or 1987. The said premises were then left unoccupied until 1989 when the said premises were rented out to Mok. It is not disputed that under cl 5(e) of the said lease, Mok shall be at liberty to sublease or sublet the said premises. Mok subsequently entered into several sub-tenancy agreements with the second to nine defendants as cited in the originating summons.

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Be that as it may, the dispute between KPKK and Mok is centred on the interpretation of cll 4(g), (h) and (k) of the said lease. It would be useful therefore to reproduce the relevant sub-cll of cl 4 of the said lease which read:

> (g) to keep the demised premises in proper sanitary condition and in tenantable repair at all times during the term of this tenancy, fair wear and tear excepted;
>
> (h) to permit the Lessor or his agent with or without workmen at all reasonable times to enter upon and examine the condition of the demised premises and to give the Lessee written notice to effect any reasonable repairs thereto in a proper and workmanlike manner, provided if the Lessee shall fail to comply with such notice within a reasonable time, then the Lessor may effect such repairs in a proper manner and workmanlike manner, and the costs thereof shall become a debt due from the Lessee to the Lessor recoverable forthwith (fair wear and tear excepted);
>
> (k) Notwithstanding anything herein stated, to repair and maintain the roof, gutter, drainage and sewerage system, walls, floors, paintwork, water tanks, doors, windows and fencing, roadways and yards of the demised premises.

The learned judge was of the opinion that the authorities referred to and considered by him seems to suggest that the correct approach to a dispute of this nature is to ask the following questions:

(i) what was the state of the building on the date the said lease was entered into;

(ii) what is the precise term of the said lease in dispute;

(iii) what is the damage;

(iv) what is the amount of repair required;

(v) whether the disputed works amounts to 'repair' or whether it can be considered as giving the landlord a wholly different thing which he demised;

(vi) if the disputed works amounts to a replacement, would it tantamount to restoring the building in a renewed form of a greater value than it was at the commencement of the said lease; and

(vii) what is the cost of the repair.

For a start, we would accept the principle stated by Wilmer LJ in *Sleafer v Lambeth Metropolitan Borough Council* [1959] 3 All ER 378 at p 387 :

> It is well established that, in the absence of agreement to the contrary, the law imposes no obligation on a landlord to keep the demised premises in repair.

The relevant clause of the said lease that will have to be considered would be sub-cll 4(g) and (k). Subclause 4(g) imposes on Mok as the lessee to keep the demised premises in tenantable repair at all times during the terrn of the tenancy, fair wear and tear excepted. Subclause 4(k) imposes on Mok, as lessee, also notwithstanding anything stated therein, to repair and maintain the roofs, gutter, drainage… of the demised premises.

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KPKK' s own witness, Kim Li Wang (DW1) under cross-examination admitted in his report (D31) that he made a visual inspection of the building and found it in a tenantable condition (see p 97 of the notes of evidence). This would be in line with Mok' s evidence that he was not allowed to take his contractors in before signing the said lease. In the event, without making any technical or structural inspection, all parties had thought that the roof was just in a bad condition and could be repaired in the true sense of that term by patching etc. It was on this basis that Mok accepted the demised premises on an 'as is' position. Hence Mok was prepared to spend and did spend a sum of RM1m for repairs and renovations on the demised premises to make it habitable and tenantable.

However, it was only after the constant and repeated complaints from Mok's sub-tenants regarding leaking problem that structural inspections were carried out which disclosed that the roof was beyond repair. Alam Jurutera was commissioned by United Motor Works (the parent company of KPKK) to do a structural inspection of the roof and the report dated 20 July 1990 confirmed that the roof was structurally defective, ie roof trusses were swaying and was beyond repair.

KPKK contended that the roof was in a way damaged or dilapidated caused by chimney removals by Mok. However, it seems clear that the cause of the roof failure was clearly stated as structural defects and excessive corrosion. In any event such an important matter as saying that Mok was responsible for the roof damage, according to the counsel for Mok, should have been specifically pleaded by KPKK and opportunity given to rebut. The issue of the roof being beyond repair and needing replacement was clearly demonstrated by United Motor Works itself replacing the roof on one block of Bensons' factory and Mok replacing the roof in Block C, with each claiming the right of reimbursement from the other. It seems clear to us on the evidence that the cause of the roof failure was due to structural defects and excessive corrosion and not the fault of Mok. Clearly Mok could not possibly envisage this structural defects when he took possession of the demised premises for the reasons stated earlier on.

We now come to the next important issue, that is, whether the word 'repair' as stated in sub-cl 4(k) includes 'replacement' as contended by KPKK and disagreed to by Mok as being his responsibility.

The learned judge after reviewing the cases of *Sleafer v Lambert Metropolitan Borough Council* [1959] 3 All ER 378 and *Felton & Anor v Brightwell & Anor* [1967] NZLR 276 referred to by counsel for KPKK stated at p 31 of his

judgment ([1996] 1 MLJ 586 at p 600):

> It is my view that the cases referred to above were decided on facts which differ from the instant case. In the first case, the item in issue was merely the handle or knocker of the front door and in the second case, the item in issue was only the service line supplying the farm with electricity that needed replacement. To me, those items are only subsidiary parts of the demised premises. The facts of both cases show that only repair or part-replacement were required to put both items into good working condition — there was no need to replace the door or the whole electrical system respectively. That being so, I am of the view that the facts in the two cases cited above can be distinguished from the [*681]
> instant case wherein the issue is whether under the terms of the said lease agreement, the duty to 'replace' the roofs as opposed to 'repair' is upon the lessee, ie Mok. I do not think that one can term the replacement of the whole roof of a building as 'repair'.

In considering the approach to take to dispute of this nature, the learned judge relied on *Brew Brothers Ltd v Snax (Ross) Ltd and Anor* [1970] 1 QB 612 and *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] 1 QB 12. In respect of *Brew Brothers Ltd*, Sachs LJ at p 640 stated:

> It seems to me that the correct approach is to look at the particular building, to look at the state which it is in at the date of the lease, to look at the precise terms of the lease, and then come to a conclusion as to whether, on a fair interpretation of those terms in relation to that state, the requisite work can fairly be termed repair. However large the covenant it must not be looked at in vacuo.

In *Ravenseft Ltd*, Forbes J said at p 21:

> The true test is, as the cases show, that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised.
>
> In deciding this question, the proportion which the cost of the disputed work bears to the value or cost of the whole premises, may sometimes be helpful as a guide.

The word 'repair' was considered by Hoffmann J in *Post Office v Aquarius Properties Ltd* [1985] 2 EGLR 105, where at p 107, he said:

> … 'repair' is an ordinary English word. It also contains a timely warning against attempting to impose crudities of judicial exegesis upon the subtle and often intuitive discriminations of ordinary speech. All words take meaning from the context and it is, of course, necessary to have regard to the language of the particular covenant and the lease as a whole, the commercial relationship between the parties, the state of the premises at the time of the demise and any other surrounding circumstances which may colour the way in which the word is used. In the end, however, the question is whether the ordinary speaker of English would consider the word 'repair' as used in the covenant was appropriate to describe the work which has to be done.

Bearing in mind the authorities quoted above, this is what the learned judge answered the questions posed by him (p 54 of his judgment) (see [1996] 1 MLJ 586 at p 607):

> I think the answers to the first four questions have been answered in the instant case, viz, I have found that the roofs were in a bad condition at the commencement of the lease and that they were beyond repair and need to be replaced. I am also of the view that Mok has not breached his covenant to repair as the replacement of the roof was not within the contemplation of cl 4(g) and (h) of the lease agreement. I am of the view that if it was Mok's responsibility to replace the roofs, it is tantamount to restoring the said premises in a renewed form of a greater value than it was at the commencement of the lease and this finding can be supported by the evidence of DW1, the manager for the properties division of UMW in 1989, who stated in evidence as follows:
>
> [*682]
>
> 'I took Mr Mok to see the premises. His reaction is that the building needed to be repaired and that the roof need to be replaced or repaired. I did tell him that to repair the premises would mean that the rental would be higher as we have to offset the cost. I can't remember how much higher.'

> This would seem to suggest that if Mok replaced the roofs at his own cost, it would definitely enhance the value of the premises as it would be able to attract higher rental and that to me would amount to restoring the premises in a renewed form of a greater value than it was at the commencement of the lease.
>
> With regard to the cost of the disputed works, no evidence was adduced at the trial as to what would be the estimated costs of replacing the roofs. However, at p 193 of vol 1 of the agreed bundle of documents introduced at the trial, a letter from a company called Metro Setia Sdn Bhd dated 10 August 1990 which was addressed to Mok as a result of the latter's enquiry, could serve as a guide as to the estimated cost of replacing the roofs — that letter states that the costs to dismantle the existing roofing sheets and to install new roofing sheets for Blocks G1, G2, A, B, F and the canteen would be in the region of RM464,217.50 if colour sheets are used and in the region of RM432,202.50 if non-colour sheets are used. This, to me, is a substantial sum in relation to the lease.

The learned judge went on further to state his finding at p 58 (see [1996] 1 MLJ 586 at p 608) thus:

> Looking at the proportion which the estimated cost of the disputed work bears to the value of the lease to Mok and the expenditure that he had to bear when he undertook repairs of the said premises at the commencement of the lease, I would think that to insist that Mok is responsible to replace the roofs and bear its cost would go far beyond what any reasonable person would have contemplated under the word 'repair'. The roofs were beyond repair as stated by the engineer's report and to me the replacement of the roofs cannot be termed 'repairs' within the terms of the covenant.

On the fair wear and tear issue the learned judge stated at p 59 (see [1996] 1 MLJ 586 at p 608] thus:

> I think the evidence is clear that the roofs were beyond repair due to 'fair wear and tear' and need to be replaced and that being so, is excepted from Mok's covenant to repair. The engineer's report dated 5 March 1991 confirm that the roofs are in that condition known as 'fair wear and tear' when he stated (with regard to Block G2 of the said premises) that ' the condition of the entire roof of this building was badly rusted and corroded as well. This showed that the surrounding air had a high level of corrosiveness'.

After giving due consideration to the submissions of counsel for both parties and the grounds of judgment of the learned judge, we agree that on the facts and on the proper construction to sub-cll 4(g), (h) and (k) of the said lease, he was correct in finding that the duty to replace and pay the costs of replacing the roofs to the said premises was clearly on KPKK.

In the circumstances the appeal of KPKK is dismissed with costs and the deposit to go towards taxed costs. The order of the learned judge is affirmed.

[*683]
Civil Appeal No J-02-854 of 1995

The issue in this appeal is whether, on the facts, there was inducement by KPKK to the sub-tenants of Mok to breach their sub-tenancies with Mok and whether KPKK is thereby liable to Mok for damages.

The law regarding the tort of inducement to breach of contract is summarised in *Greig v Insole* *[1978] 3 All ER 449* at pp 484–485 thus:

> At common law, it constitutes a tort for a third person deliberately to interfere in the execution of a valid contract which has been concluded between two or more other parties, if five conditions are fulfilled:
>
> First, there must be either (a) 'direct' interference; or (b) 'indirect' interference coupled with the use of unlawful means: see per Lord Denning MR in *Torquay Hotel Co Ltd v Cousins* *[1969] 2 Ch 106* at p *138*.
>
> As to the meaning of 'interference' this is not confined to the actual procurement or inducement of a breach of contract; it can cover the case where the third person prevents or hinders one party from performing his contract even though this be not a breach: see per Lord Denning MR.
>
> Secondly, the defendant must be shown to have knowledge of the relevant contract.

> Thirdly, he must be shown to have had the intent to interfere with it.
>
> Fourthly, in bringing an action, other than a quia timet action, the plaintiff must show that he has suffered special damage, that is, more than nominal damage: see *Rookes v Barnard* [1964] AC 1129, at p 1212, per Lord Devlin. In any quia timet action, the plaintiff must show the likelihood of damage to him resulting if the act of interference is successful: see *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 at p 703, per Diplock LJ.
>
> Fifthly, so far as is necessary, the plaintiff must successfully rebut any defence based on justification which the defendant may put forward.

Slade J went on further to emphasize one point on the same page thus:

> If these five conditions are fulfilled and the defendant is shown to have had that intention to interfere with the relevant contract which is necessary to constitute the tort, it is quite irrelevant that he may have acted in good faith and without malice or under a mistaken understanding as to his legal rights; good faith, as such, provides no defence whatever to a claim based on this tort: see, for example *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239 per Lord Macnaghten.

The summary laid down in *Greig*'s case was considered by the Federal Court in *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 at p 108.

Several grounds were relied on by Mok that KPKK induced breaches of contract by dealing directly with Mok's sub-lessees. The relevant clause in the said lease is sub-cl 5(a) and it reads:

> That the lessee paying the rent herein reserved and performing all covenants on his part shall peacefully hold and enjoy the demised premises during the term of this lease (or any renewal thereof) without interruption by the lessor or any person claiming through under or in trust for him [subject however to cl 4(h) above], or by any other person whosoever and howsoever arising.

[*684]

It is not disputed that according to sub-cl 5(e) of the said lease, Mok shall be at liberty to sub-lease or sub-let the demised premises.Mok subsequently entered into several sub-tenancy agreements with several companies.

No doubt the main dispute between KPKK and Mok relates to whose responsibility it was to repair or replace the roof of the demised premises and this has been dealt with by us earlier on. The issue here is really whether there was evidence, be it documentary or oral, to show that KPKK had induced the sub-tenants of Mok to commit breaches of the sub-tenancy agreements between Mok and his sub-tenants thereby causing loss and damage to Mok as a result thereof.

Direct tenancy agreements

There was evidence that KPKK entered into direct tenancy agreements (exhs P34 A-D) with four of Mok's sub-tenants, namely:

(a) on 5 April 1995 with Superpoly Packaging Sdn Bhd (the fourth sub-tenant defendant);

(b) In July 1994 with Bensons;

(c) Metal Sdn Bhd (the former third sub-tenant defendant);

(d) In December 1994 with Kensia Industries Sdn Bhd (the seventh sub-tenant defendant); and

(e) In January 1995 with I& S Enterprise.

From the dates of the tenancy agreements, it seems clear that the direct tenancy agreements were executed by KPKK after the termination of the main lease. This is borne out by the letter dated 13 September 1993 sent by the solicitors for KPKK to Mok's solicitors. The said lease was subsequently forfeited on 22 September 1993. Hence,

the issue of KPKK inducing the sub-tenants of Mok to breach the sub-tenancy agreements with him did not arise.

Secret collateral agreement with Bensons Metal Products Sdn Bhd ('Bensons')

Before the learned judge, Mok's counsel referred to a letter dated 11 August 1989 from Bensons and addressed to KPKK and reproduced in his judgment. Incidentally, Mok's lease with Bensons was also signed on 11 August 1989.

On this issue, this is what the learned judge stated in his judgment (pp 104 to 106 of the appeal record):

> With regard to the 'secret collateral agreement' made between KPKK and Bensons, I am of the view that that agreement, if at all it was one, was too remote under the circumstances to amount to an interference or even a deliberate attempt to interfere with the sub- tenancy agreement entered into between Mok and Bensons. DW4, the general manager of Bensons, explained that Bensons' letter to KPKK dated 11 August 1989 (reproduced earlier) was merely a 'safety blanket' in case something went wrong with the main lease between Mok and KPKK. In his evidence, he explained that a sudden end to [*685]
> the main lease will cause Bensons problems in having to look for alternative premises to move their machinery and equipment.
>
> To me, that letter merely confirmed an understanding that have been arrived at by both Bensons and KPKK on the eve of the said lease — it was more like a memorandum of understanding rather than an agreement. In relation to this 'secret collateral agreement', the evidence also shows that KPKK wrote a letter to Bensons on 9 February 1993 which read:
>
> > 'We regret to have to inform you that the abovenamed Mr Mok Tai Dwan has, among other things, defaulted in the payment of rent to us since October 1992. An appropriate notice dated 11 January 1993 has been served on him requiring him to remedy his default ….
> >
> > We wish to refer to our agreed arrangement with you as contained in your letter dated 11 August 1989 (a copy of which is enclosed) and would appreciate your letting us know your intention particularly in respect of the paragraph thereof.'
>
> To me, the second letter confirms that the alleged agreement was more an understanding between the two parties and that that letter, at most, amounts to an invitation to treat on the part of KPKK — they wanted to know whether Bensons was still interested to continue renting that part of the said premises in the eventuality Mok fail to remedy his default with regard to the payment of rent. It was not a wrongful act and cannot amount to an actionable interference.

We see nothing wrong with the learned judge's finding on this issue.

Service of notice by KPKK to remedy the breach on the sub-tenants of Mok

KPKK's solicitors by letter dated 23 August 1993 sent a notice to Mok to remedy the breach with regard to the non-payment of rental and copies of the notice were delivered to several of Mok's sub-tenants including Bensons and they acknowledged receipt thereof by signing on KPKK's copy of the notice.

Mok's counsel argued that this action of serving that notice upon the sub-tenants was wrong in law. This is a non-issue really and as rightly put by the learned judge (p 108 of the appeal record) 'I cannot fathom such an argument'. The learned judge further on stated:

> DW2 have explained that they did not wait for seven days before serving that notice as they did not want the sub-tenants to be caught unaware. Furthermore, service of such a notice on the sub-tenants also do not seem to contravene s 235 of the National Land Code.Under the circumstances, I am of the view that KPKK' s action do not amount to an actionable interference.

We have no reasons to disagree with his finding.

We are satisfied that on the evidence before him, the learned judge had not misdirected himself on the facts and the law applicable thereto. In the circumstances there are no grounds for us to disagree or interfere with his decision (*Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113*; *United Asian Bank Bhd*

v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182).

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The appeal is therefore dismissed with costs. The deposit to KPKK towards the taxed costs. The order of the learned judge is affirmed. As the costs issue in the High Court is yet to be determined, we would leave this issue to be decided by the High Court (p 111 of the appeal record). Similarly, in respect of para (d) of the order of the High Court set out earlier on, as ordered by the learned judge, it is to be tried at a date to be determined by him. We will leave it at that.

Order accordingly.

Reported by Jafisah Jaafar