IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.452/83

BETWEEN D.G. BULLICK (OUTFITTERS) LIMITED
a duly incorporated company having its registered office at Hamilton, property owner

Appellant

A N D DON AGENCIES LIMITED
a duly incorporated company having its registered office at Christchurch, manufacturer

Respondent

Hearing: 10 April 1984

Counsel: R. Wilson for Appellant
W.J. Scotter for Respondent

Judgment: 26-7-84

JUDGMENT OF GALLEN J.

The issue for determination in this appeal is set out in the decision of the learned District Court Judge as follows:-

> "Is the defendant (the respondent), a tenant for a term of years of the factory premises, answerable under its lease of those premises, to the plaintiff (the appellant) for damage caused from a fire originating in the tenant's premises and caused by its negligence?"

The learned District Court Judge, after a consideration of the authorities which had been referred to him, concluded that

the respondent was not liable and the appellant appeals from that decision.

The factual situation out of which the appeal arises is as follows. The appellant is the owner and lessor of premises and the respondent is the tenant and lessee of those premises under and by virtue of a deed dated 22 September 1972. On 27 May 1980, the premises were damaged by fire. The appellant seeks to recover the cost of reinstatement from the respondent, alleging that the fire and consequent damage were caused by negligence for which the respondent was responsible. Although the respondent does not concede that it was negligent, the question has been argued both in the District Court and before me on the assumption that the appellant would be able to establish such negligence. The relevant clauses of the deed are:

> "2. THAT the Lessee will throughout the said term keep and maintain the interior of the demised premises and all the Lessor's fittings fixtures and other improvements therein or connected therewith in the same good order condition and repair as the same now are (fair wear and tear without default or neglect of the Lessee and damage by fire earthquake tempest aeroplane and inevitable accident alone excepted) and will yield and deliver up the same unto the Lessor in the like good order and condition at the end or sooner determination of the said term (excepting as aforesaid) and that the Lessee will notify the Lessor of any apparent defect in or about the demised premises likely or in any way tending to do cause or permit damage to the demised premises whether arising from fair wear and tear or otherwise.

11. THAT the Lessor will during the said term insure and keep insured the demised premises against damage by fire and the plate glass windows against breakage to the full insurable value thereof.

14. THAT if in case of fire tempest earthquake or aeroplane accident the demised premises shall at any time during the said term be partially destroyed or damaged but not so as to be unfit for carrying on the business of the Lessee in their then damaged state the Lessor will subject to the provisions of Clause 16 hereof at its own cost reinstate and repair the same and from the day of such damage until the day on which the demised premises shall be reinstated and repaired the rent hereby covenanted to be paid shall abate pro rata according to the nature and extent of the damage existing from time to time and if any dispute shall arise between the Lessor and the Lessee in regard to the amount of the abatement to be made in the said rent or to the period for which the said rent or any part thereof shall abate the same be referred to the arbitration of one arbitrator if such one person is agreed to by the parties hereto and if one such person cannot be agreed upon then by two arbitrators and an umpire appointed pursuant to the provisions of The Arbitration Act 1908 and the costs of arbitration shall be borne by the parties hereto in equal shares.

15. THAT if in case of fire tempest or earthquake or aeroplane damage the demised premises shall at any time be destroyed or so damaged as to be unfit for carrying on the business of the Lessee in their then damaged state or in case of ordinary wear and tear the demised premises shall at any time be

certified by two architects one appointed by each party hereto or in the case of disagreement between the two architects by an umpire appointed by them to be past repair and unfit for the business purposes of the Lessee or in case of the happening of such damage as is mentioned in Clause 14 hereof the Hamilton City Council or other authority for the time being having jurisdiction in that behalf shall refuse permission to the Lessor to reinstate or repair the damaged building then this Lease and everything herein contained and implied shall absolutely cease and determine and rent shall be payable up to the date of such destruction or damage only but this shall be without prejudice to the right of either party against the other in respect of any antecedent breach or non-performance of any covenant condition or agreement herein contained or implied.

16. NOTWITHSTANDING anything contained in paragraph 14 hereof if the demised premises shall at any time be partially destroyed or damaged as mentioned in that paragraph and if in the opinion of the two architects one appointed by each party or in case of disagreement by an umpire appointed by the two architects as aforesaid (the appointment of an umpire (both in this case and in the case of Clause 15) being made prior to the two architects commencing their investigation) it shall be economically injudicious or unsound to effect reinstatement or repair then the Lessor shall not be bound to effect the same."

The question is one which in one form or another has occasioned a considerable amount of judicial disagreement.

First, it is clear that in the absence of provisions to the contrary in the agreement between them, a lessor has the right to sue for damage caused by the negligence of his lessee and in particular for fire damage caused by such negligence, see Marlborough Properties Limited v. Marlborough Fibreglass Limited (1981) 1 N.Z.L.R. 464. The problem which then arises is what will constitute an agreement avoiding this particular liability?

The principle also depends upon the law relating to exculpatory clauses, see Canada Steamship Lines Limited v. The King 1952 A.C. 192. There are a series of Canadian cases to which counsel referred. The first of these was United Motor Service v. Hutson (1937) 1 D.L.R. 737. In that case, the tenant was guilty of negligence and the decision is particularly concerned with subrogation rights. In the decision of Kerwin J. however, matters relevant to these proceedings were discussed. The learned Judge traced the development of the principles from the Statutes of Marlebridge and Gloucester. There was a repairing clause obliging the lessee to repair, the liability being subject to the exception in respect of "reasonable wear and tear and damage by fire, lightning and tempest......only excepted". There was a reinstatement clause and the lessor was responsible for the payment of insurance premiums. It was held that the tenant was liable for damage by a fire caused through its negligence and that the clauses of the lease did not provide any exemption. In the case of Ross Southward Limited v. Pyrotech Limited (1975) 57 D.L.R. (3d.) 248, the

Supreme Court of Canada was concerned with a case where the landlord claimed as a result of alleged negligence of the tenant. The tenant was obliged to repair subject to an exception relating to fire, but the lessor was obliged to pay insurance premiums. The Court by a majority considered that the obligation of the lessor to pay the insurance premium distinguished the situation from that in Hutson's case (supra), but there was a strong dissenting judgment by de Grandpre J.. The next case was T. Eaton Company v. Smith (1979) 92 D.L.R. (3d.) 425. The Supreme Court of Canada again considered a case where there were standard repairing covenants and again an obligation to insure rested on the lessor. The Court by a majority again decided this was sufficient to negative the liability of the lessor for negligence. Again there was a dissenting judgment from de Grandpre J. supported by Ritchie J..

In New Zealand in Marlborough Properties Limited v. Marlborough Fibreglass Limited (supra), the Court of Appeal was concerned with a lease which required the lessee to meet insurance premiums. There were divided responsibilities for repair in the covenants of the lease, the lessor having the obligation to keep the exterior in good repair subject to the usual exception; the lessee being responsible to repair the interior subject to the exception of "......fair wear and tear and damage by fire flood lightning storm tempest or earthquake (all without neglect......of the Lessee)". The Court held that

those provisions of the lease which imposed a liability to insure upon the lessee, were in context sufficient to raise a necessary implication that the lessee having paid premiums for insurance cover, would not be liable in damages for fire damage occasioned by negligence. The decision was a majority decision.

In Leisure Centre Limited v. Babytown Limited (Court of Appeal 133/83, judgment delivered 18 April 1984), the Court was concerned with a situation where the lessee had an obligation to keep the interior in repair, subject to the usual exception. The lessor was under an obligation to insure and there was a reinstatement clause. The lessor was under the obligation to keep the exterior in repair. The Court held that unless the liability for negligence was expressly or by necessary implication negatived in the lease, the lessee was liable for negligence and that the covenant to insure could not be divorced from the covenant to apply moneys received in reinstatement. On that basis, the obligation to insure was held to provide a fund to enable reinstatement. It could not therefore be held that by necessary implication the obligation to insure was to relieve the lessee of his obligations. Attention was drawn to the fact that the full insurable value did not necessarily correspond with the measure of damages in Tort. Reference was made to two of the Canadian cases, but both were distinguished - T. Eaton's case on the ground that there was no express covenant to reinstate and a further decision of Agnew-Surpass Shoe Stores Limited v. Cummer-Yonge

Investments Limited (1975) 55 D.L.R. (3d.) 676, on the basis that the repairing covenant was in a quite unusual form.

In this case, the lessor is obliged to insure and both the lessor and lessee have obligations in respect of repair. The clauses have been set out, supra. It has been held that the normal exception clause is not sufficient to negative the liability of the lessee for negligence, see Marlborough Properties' case (supra) at p.470. The decision in Leisure Centre Limited v. Babytown Limited (supra) is clearly binding on me and unless it is distinguishable from the facts of this case, then the appellant must be entitled to succeed.

There is one distinguishing feature. The tenant's obligation to keep in repair in this case is contained in clause 2 which I have set out above, but which for convenience I now repeat:-

> "2. THAT the Lessee will throughout the said term keep and maintain the interior of the demised premises and all the Lessor's fittings fixtures and other improvements therein or connected therewith in the same good order condition and repair as the same now are (fair wear and tear without default or neglect of the Lessee and damage by fire earthquake tempest aeroplane and inevitable accident alone excepted) and will yield and deliver up the same unto the Lessor in the like good order and condition at the end or sooner determination of the said term (excepting as aforesaid) and that the Lessee will notify the Lessor of any apparent defect

> in or about the demised premises likely or in any way tending to do cause or permit damage to the demised premises whether arising from fair wear and tear or otherwise."

The obligation of the lessee in the Leisure Centre case was in the following terms:-

> "2. THAT the lessee will keep the interior of the said building and the lessor's fixtures and fittings therein and all windows in good order repair and condition fair wear and tear and damage by fire earthquake lightning and tempest excepted......"

It will be noticed that the exception is in different terms in this case. The words "without default or neglect of the Lessee" are inserted between the references to "fair wear and tear" and "damage by fire earthquake tempest......"
It has been argued in this case that the difference is significant and that the inclusion of the words relating to default or neglect in relation to fair wear and tear, imply that default or negligence is excluded from the tenant's obligations in respect of fire, earthquake, tempest, aeroplane and inevitable accident. The inclusion of the words relied upon even in the unusual position in which they are found, does not in my view lead to a necessary implication that the liability for negligence has been negatived. The addition of the words in relation to fair wear and tear are, in my opinion, intended to restrict the exemption in the case of fair wear and

tear, but the absence of such a restriction in the case of the following words does not necessarily involve a conclusion that a tenant is not liable for negligent damage caused by fire where he would normally be liable. I do not think that words effectively intended to extend the liability of the tenant in one area, can be construed in such a way as to restrict its liability in another where the authorities have adopted such a strong emphasis on the necessary nature of any implication to exempt.

The learned District Court Judge did not have available to him the decision of the Court of Appeal in the Leisure Centre case or the decision of Barker J. at first instance in that case. He did however, have referred to him the Canadian decisions referred to above and in a carefully and closely reasoned judgment, he not surprisingly accepted generally the reasoning for the conclusions of the majority in the more recent Canadian decisions. Those decisions must now however be read subject to the decision of the Court of Appeal in the Leisure Centre case.

In view of that decision and the matters set out above, I conclude that the appeal must be allowed and it is so allowed. The appellant is entitled to costs which I fix at 250 dollars.

R.L. Gallen

Solicitors for Appellant: Messrs Swarbrick, Dixon and Company, Hamilton

Solicitors for Respondent: Messrs Harkness, Henry and Company, Hamilton