

CANADA / JUDGMENT

Madill v. Sommer Building Corpn.

[1978] 1 SCR 999

COURT

Supreme Court of Canada

DECIDED

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Madill v. Sommer Building Corpn.

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Report

[1978] 1 SCR 999

Judges

Laskin, Bora; Spence, Wishart Flett; Pigeon, Louis-Philippe; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Quebec

Subjects

Lease

Decision Content

Supreme Court of Canada

Madill v. Sommer Building Corpn., [1978] 1 S.C.R. 999

Date: 1977-06-14

J.A. Madill (Plaintiff) Appellant;

and

Sommer Building Corporation (Defendant) Respondent.

1976: October 28; 1977: June 14.

Present: Laskin C.J. and Spence, Pigeon, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Landlord and tenant—Stored wares damaged—Lessor not at fault—Damage contributed to by third party not an agent of lessor—Exclusion of liability clause—Insurance Act, R.S.Q. 1964, c. 295, s. 115(a), as amended by 1965 (Que.), c. 75, s. 4—Civil Code, arts. 1054, 1612 and 1614.

The trial judge held that respondent was contractually and delictually liable for damage caused to its tenant since no provision in the lease relieved the lessor in the case of damage caused by a defective radiator. The Court of Appeal reversed this judgment, stating that the exclusion of liability clause exonerated the lessor from all damage sustained by the lessee, regardless of the cause.

Held: The appeal should be dismissed.

If respondent is to incur any liability, it can only be as a result of its proven fault, as the person who had the thing under his care or as the lessor. The evidence in no way establishes any fault, intentional or unintentional, on the part of respondent or one of its agents. Respondent retained the services of a plumbing contractor and it is his intervention that caused the damage to occur. Since the plumber was not its agent, respondent is not liable for his fault. Respondent also cannot be held liable as the person who had the thing under his care or as the lessor because of the exclusion of liability contained in the lease. The law does not prohibit the exclusion of quasi-delictual liability or of liability resulting from the act of the thing. The clause in question exonerates the lessor from all damage sustained by the lessee, regardless of the cause, including damage caused by water and steam.

The Glengoil Steamship Co. v. William Pilkington (1897), 28 S.C.R. 146; R. v. Canada Steamship Lines Ltd., [1950] S.C.R. 532, rev'd. [1952] A.C. 192; Quebec Railway Light, Heat and Power Company v. Vandry,

[Page 1000]

[1920] A.C. 662, referred to; M. and W. Cloaks Ltd. v. Cooperberg, [1959] S.C.R. 785, distinguished.

APPEAL from a decision of the Court of Appeal of Quebec allowing an appeal from a judgment by Cousineau J. of the Superior Court. Appeal dismissed.

Michael A. Gagnon, for the appellant.

Archibald MacDonald, Q.C., for the respondent.

The judgment of the Court was delivered by

BEETZ J.—The primary issue is the interpretation of an exclusion of liability included in a lease concluded by Sommer Building Corporation (“Sommer”), lessor, and J. Kaufman Limited (“Kaufman”), lessee. Kaufman used the leased premises to store furs. These furs were damaged by steam from a radiator. Lloyd’s, Kaufman’s insurer, is subrogated in its rights. J.A. Madill, plaintiff in continuance of suit, is the attorney for Lloyd’s and is authorized by s. 115(a) of the Insurance Act, R.S.Q. 1964, c. 295, as amended by 1965 (Que.), c. 75, s. 4, to exercise its rights at law.

The trial judge summarized the facts as follows:

[TRANSLATION] In October 1965, defendant was the owner of a building known as the Sommer Building ... and J.R. Kaufman was the lessee of premises located on the ground floor of the said building...

... the lessee used one of the leased rooms to store furs. This room was not heated and the radiators therein were not used by the lessee because the furs had to be kept cold.

On or about October 5, 1965, one of the radiators in the said room where these furs were stored developed a leak and Mr. Edelson, an employee of defendant, who went to the premises after being informed by the lessee, stopped the leak and told the lessee that a plumber would come to carry out the necessary repairs. On October 8, 1965, a plumber engaged by defendant did some work on the said radiator. Nothing in the evidence shows what kind of work was done since this plumber was not heard in court. After this work had been done,

[Page 1001]

towards the end of the day, the premises were closed for the weekend. On the morning of the following Monday Mr. Cohen, an employee of J. Kaufman Ltd., discovered that steam was escaping from the radiator, and that the room and the goods stored there had sustained considerable damage. Upon being notified of this situation, defendant sent one of its employees, who closed the valve on the radiator, which had been left in the open position. These facts were, moreover, admitted by defendant.

Salvator Manuri, a plumbing and heating estimator, was called in by plaintiff to investigate the possible causes of this damage. After removing the panel covering the radiator, he discovered that a plug was missing from the top of the radiator and that this necessarily allowed the steam to escape... After explaining in detail how a radiator in which steam is circulating operates, Mr. Manuri, who has thirty years’ experience in plumbing and heating, stated that a plumber who does work on this type of steam radiator should ensure that the steam was circulating normally, with no leaks, by turning on the heating system.

In its defence, Sommer cited the exclusion of liability that will be considered later. In addition it argued the fault of a third party, the plumber, who was employed by a plumbing contractor and over whom it had no control. The trial judge held that neither the provisions of the lease nor the

intervention of a third party sufficed to relieve Sommer of its contractual and delictual liability. Though he does not actually say so, it appears that what the trial judge meant in this case by delictual liability is the liability placed upon a person who has a thing under his care by art. 1054 of the Civil Code, for damage caused by the act of that thing. The Court of Appeal considered that it was not established that the escape of steam had been caused by the autonomous act of the thing. The Court of Appeal therefore did not give an opinion on whether Sommer produced evidence that relieved it from its liability under art. 1054 of the Civil Code. The Court of Appeal based its judgment solely on the exclusion of liability, which it did not interpret in the same way as the trial judge, and concluded that this clause relieves Sommer both from its contractual and from its delictual liability.

[Page 1002]

I must say from the outset that I agree with the conclusions of the Court of Appeal and with its interpretation of the exclusion of liability.

If Sommer incurred any liability, it could only be as a result of its proven fault, as the person who had the thing under his care (art. 1054 of the Civil Code), or as the lessor (arts. 1612 and 1614 of the Civil Code).

It is important to keep in mind first of all that the evidence in no way establishes any fault, intentional or unintentional, on the part of Sommer or one of its agents. Sommer was informed that water, not steam, was escaping from a radiator, and retained the services of a plumbing contractor. An employee of this contractor worked on the radiator. The escape of steam occurred after the plumber left, during the weekend while no one was present. The only possible conclusion is that the intervention of the plumber caused the damage to occur. It was this intervention that left the radiator in a condition that made it inevitable that steam would escape. Counsel for the appellant did not dispute this point. Since the plumber was not its agent, however, Sommer is not liable for his fault. In my view in this case Sommer was not obliged to supervise the plumber under penalty of itself committing a fault: it relied completely on a competent contractor for work that did not involve any particular danger. Finally, the evidence discloses that Sommer tried the heating system before the winter season without inspecting the radiators; when a lessee notified it of a defect, as required by a clause in the lease, Sommer arranged to have the necessary repairs done. I do not see this as negligence on the part of Sommer.

If no proven fault can be attributed to Sommer, the possibility remains that it is liable as the person who had the thing under his care, or as the lessor. Because of the exclusion of liability, it is not necessary to decide this question. Neither is it necessary to distinguish between the liability of the lessor and that of the person who has the thing under his care: the obligations imposed on Sommer by its lease are surely not greater than

[Page 1003]

the liability placed upon it by art. 1054 of the Civil Code. At least, I have not understood this to be the argument. An exclusion neutralizing the liability provided for in art. 1054 of the Civil Code would also neutralize the contractual liability of the lessor in this case.

Such an exclusion probably cannot be made in respect of intentional fault—gross negligence and neglect were also mentioned. It is, however, possible to exclude quasi-delictual liability, although the cases require such an exclusion to be explicit. (*The Glengoil Steamship Co. v. Pilkington*[1], *The King v. Canada Steamship Lines Ltd.*[2], at p. 550.)

In addition, there is nothing to prevent a valid exclusion of liability resulting from the act of the thing. This liability is not based either on fault or on a presumption of fault; its nature is such that one may be exonerated from it by proving, not that no fault has been committed, but as provided in art. 1054 of the Civil Code, that the person concerned was unable to prevent the act that caused the damage: *Quebec Railway Light, Heat and Power Company v. Vandry*[3], at pp. 676 and 677. Quebec law differs on this point from contemporary French law, which does not provide for the possibility of exoneration.

The exclusion at issue in the case at bar reads as follows:

21. The Lessor shall not be responsible for any damage which may be caused, nor shall the Lessee be entitled to claim any diminution of the rent, should it become necessary from any cause whatsoever to stop the operation of the elevators, heating or lighting apparatus or plumbing for the purpose of effecting any repairs thereto, or to any of the engines, boilers, or machinery appertaining thereto, but in such case the Lessor shall cause such repairs to be effected with the utmost expedition; nor shall the Lessor be responsible for any damage which may be caused to the Lessee or the employees, agents, officers or directors of the latter, or to any licencees, invitees or any customers or other persons having business with him or them, or to trespassers in the building arising from or through the use made by them or any of them, of such elevators, or any of its

[Page 1004]

appurtenances, or while in or on the premises leased, or while in or on the said building, its appurtenances and entrances thereto, for any reason or cause whatsoever, and whether such damages or injuries shall happen by reason of the act, omission or negligence or otherwise of the Lessor or of any of its employees, or other persons, or otherwise howsoever; nor shall the Lessor for any reason or cause whatsoever be responsible for unavoidable delay in furnishing heat, nor for damage to property upon the premises, from water, steam or rain, or snow which may leak into, issue or flow from any part of the said building or from the pipes or plumbing work of the same, nor for damage to property from any other cause whatsoever, nor for any damage which may be caused by any defect or break in the sprinkler system, nor for any damage sustained by the Lessee, or the officers, clerks, employees or servants of the Lessee, through the acts of other tenants of the said building, or of any other persons whomsoever, nor by reason of the failure of electric power or lights in elevators, halls, lavatories, or elsewhere in the building; and all risks of any and every nature whatsoever in respect of any and all of the foregoing contingencies and

eventualities are hereby assumed by the Lessee, to the entire exoneration of the Lessor, and the Lessee shall save and hold the Lessor free, harmless and indemnified therefrom at all times. (The emphasis is mine.)

Crête J., speaking for the Court of Appeal, says of this clause:

[TRANSLATION] ... it exonerates the lessor from all damage sustained by the lessee, regardless of how or by whom caused, and in particular from damage caused by water and steam.

In my opinion this stipulation is at least sufficient to exonerate Sommer for purposes of the case at bar.

In this Court, as in the Court of Appeal, appellant contended that the exclusion of liability is limited to damage resulting from a defect in the plumbing and does not extend to damage caused by defects in the heating system.

In my view, Crête J. is correct in dismissing this distinction:

[TRANSLATION] I do not understand how the plumbing system itself could produce steam; this would be done by the heating system, as it was in the case at bar.

Since the lessee expressly exonerated the lessor from damage caused by steam, only one conclusion appears to

[Page 1005]

be possible: the exclusion of liability clause operated against him.

In addition, clause 21 must be read in the light of clause 15. The first part of this clause refers to plumbing and to steam or water pipes that the lessee may wish to alter at its own risk, which was not the case of the radiator from which the steam escaped. The last part, however, mentions plumbing and steam or water pipes already installed or to be installed:

...and the Lessor shall not for any reason whatsoever be liable for any damage arising from or through any defect in the plumbing, steam or water pipes and fittings, or electric wiring or fixtures installed or which may hereafter be installed in the said building or premises.

These reasons are sufficient to settle the issue.

One cannot help noting, however, the similarity between the circumstances of the case at bar, apart from the lease, and those of *M. and W. Cloaks Ltd. v. Cooperberg*[4]. Damage had been caused to a commercial establishment while the staff was on vacation by flooding from a reservoir that fed a steam boiler. The necessary flow of water to the reservoir was regulated by a float and a defect in the float's mechanism was the cause of the accident. This steam system had been installed a short time previously by a competent plumber and was inspected and repaired regularly. The float was contained in a closed reservoir and any defect in it would not normally have been discovered until it caused some trouble. A majority of this Court, upholding the Court of Appeal and the Superior Court, arrived at the conclusion that the person who had the thing in

his care was relieved of his liability by proving that he had been unable to prevent the act that caused the damage, the only defence allowed by art. 1054 of the Civil Code.

The main difference in the case at bar is that the cause of the damage was easy to discover and correct: it would only have been necessary to close the valve that let steam into the radiator, or to replace the plug in the opening that allowed the steam to escape. It would not follow that Sommer

[Page 1006]

was at fault in not discovering and correcting the cause of the damage. It would follow, however, that Sommer did not show that it was unable to prevent the act that caused the damage.

Moreover, the intervention of the plumber, which contributed to the damage, does not prevent the damage from being due also to the autonomous act of the thing. The plumber was no longer in control of the radiator or of the steam when the act that caused the damage occurred. His previous intervention is therefore not sufficient to exonerate Sommer,

Finally, the fact that they hired a competent contractor probably does not demonstrate that Sommer was unable to prevent the damage.

For these reasons, if I had to decide the matter, I am not sure that I would agree with the Court of Appeal that there can be no question of damage caused by the act of the thing; I would also find it difficult to say that the trial judge was wrong to find that the evidence produced by Sommer was not sufficient to establish that it was unable to prevent the act that caused the damage.

I repeat, however, that this liability, if it exists, is neutralized by the provisions of the lease.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Ogilvy, Cope, Porteous, Montgomery, Renault, Clarke & Kirkpatrick, Montreal.

Solicitor for the respondent: Archibald J. MacDonald, Montreal.

[1] (1897), 28 S.C.R. 146.

[2] [1950] S.C.R. 532 rev'd [1952] A.C. 192.

[3] [1920] A.C. 662.

[4] [1959] S.C.R. 785.

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