

CANADA / JUDGMENT

T. Eaton Co. v. Smith et al.

[1978] 2 SCR 749

COURT

Supreme Court of Canada

DECIDED

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T. Eaton Co. v. Smith et al.

Collection

Supreme Court Judgments

Date

1977-05-17

Report

[1978] 2 SCR 749

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Ontario

Subjects

Lease

Decision Content

Supreme Court of Canada

T. Eaton Co. v. Smith et al., [1978] 2 S.C.R. 749

Date: 1977-05-17

The T. Eaton Company Limited, May Catharine Vickers, Executrix of the Estate of William F. Friel (deceased) (Plaintiffs) Appellants;

and

Albert E. Smith and Reginald E. Tuck by his executors Evelyn Tuck, Doris Reid, Reginald Tuck and William Nelson Hinton (Defendants) Respondents.

1977: February 28; 1977: May 17.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Landlord and tenant—Insurance—Fire insurance—Tenant's negligence—Subrogation—Right of landlord's insurer against tenant—Landlord's covenant to insure—Effect of option to purchase—Tenant's covenants to repair.

The appellant The T. Eaton Company Limited (Eaton's) rented contiguous premises from the two respondents and used them for business purposes as a department store. Owing to the negligence of an employee of Eaton's, the buildings were destroyed by fire. The respondents' insurers paid the amounts of the loss to the respondents and, exercising their claimed subrogation rights, brought action against Eaton's to recover these amounts. The issue was whether the insurers were precluded by the terms of the lease from asserting such a claim in view of the fact that the landlords had each covenanted in the two leases to insure the premises against fire. The Courts below held that the insuring obligation did not pass to the landlords the obligation to cover the tenant against the risk of loss from a fire caused by the tenant's negligence and that the insurers could accordingly assert their claim.

Held (Martland, Ritchie and de Grandpré JJ. dissenting): The appeal should be allowed.

Per Laskin C.J. and Judson, Spence, Pigeon, Dickson and Beetz JJ.: The exception of fire in a standard repairing covenant does not exculpate a tenant from liability for damage caused by its negligence. The appellant Eaton's, therefore, can only escape liability if the landlords' covenants to insure enure to its benefit. In *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.*, [1976] 2 S.C.R. 35, this Court considered a situation where a lease contained repairing covenants similar to those found in this case. There the tenant had covenanted to pay the insurance premiums and it was held that the tenant could take advantage of its payment of the premiums and was thus protected against risk of loss caused by its negligence. Similarly here the tenant can take advantage of the covenant given by the two landlords; there was no need for such a covenant if it was only for their benefit.

The covenant therefore runs to the benefit of the tenant unless the option to purchase provisions contained in the leases provide an explanation consistent with the risk of fires being on the tenant. But neither the clause providing that the risk of loss after exercise of the option and before closing remain on the landlords nor the reference to the option in the clause dealing with the consequences of damages to the premises offer such an explanation.

The matter at hand is not whether the insurers are being unjustly deprived of their subrogation rights but whether, in the circumstances of this case, the tenant is entitled to claim the benefit of a policy which the landlord covenanted to provide. This is not a case where a covenant exonerates one contracting party from liability to the other for the former's negligence and the so-called "exculpatory clause" cases do not apply. The issue in this case was not dealt with in this Court's judgment in *United Motors Service Inc. v. Hutson*, [1937] S.C.R. 294.

Per Martland, Ritchie and de Grandpré JJ., dissenting: A conclusion that the landlords' covenant to insure must be either a waiver of their recovery rights in cases of negligence or an undertaking to obtain insurance for negligently caused fires in favour of the parties to the lease would constitute an exception to the general rule of liability for negligently caused fire. Such a conclusion cannot be reached unless it is clear that such was the intention of the contracting parties, and that no other reading of the contracts is possible.

On the question of intention, it must be remembered that the appellant Eaton's prepared the lease, that any doubt must be resolved against it, that Eaton's was fully cognizant of the legal rule embodied in the *Hutson* case, and that Eaton's is a large sophisticated entity with a background of legal knowledge. The silence of the leases on the issue of liability for damage by fire caused by the negligence of the tenant does not establish a meeting of the minds sufficient to change the general law. And such a change cannot be imputed on the ground that the insurance covenant cannot have any other purpose since that covenant does indeed have such a subject matter. The insurance covenant benefits the tenant in that a funding mechanism is provided to support the option to purchase; it is also an assurance of the landlords' capacity to rebuild a structure and permit resumption of the lease in the event of fire.

Neither the judgment of this Court in *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.*, [1976] 2 S.C.R. 221 nor that in *Pyrotech* govern the outcome of this case but rather the principle found in *Hutson* applies. Furthermore, equity should not intervene to protect a party in circumstances, as here, where that party is strong enough to fend for itself.

[*Ross Southward Tire Ltd. v. Pyrotech Products Ltd.*, [1976] 2 S.C.R. 35, applied; *Canada Steamship Lines Ltd. v. The King*, [1952] A.C. 192, *United Motors Service Inc. v. Hutson*, [1937] S.C.R. 294 distinguished; *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.*, [1976] 2 S.C.R. 221, *General Accident Fire & Life Assurance Corp. Ltd. v. Traders Furniture Co.* (1965), 401 P. 2d 157 (Ariz.) and *New Hampshire Ins. Co. v. Fox Midwest Theatres, Inc.* (1969), 457 P. 2d 133 (Kans.). *Winkler v. Appalachian Amusement Co.* (1953), 79 S.E. 2d 185 (N.C.), *General Mills Inc. v. Goldman* (1950), 184 F. 2d 359, *Shell Oil Co. of Canada Ltd. v. White Motor Co. of Canada Ltd.* and *Ziegler* (1957), 8 D.L.R. (2d) 753 and *Norman v. J.L. Edwards Motor Sales Ltd.* (1958), 15 D.L.R. (2d) 211 referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario dismissing an appeal from a judgment of Parker J. Appeal allowed[1], Martland, Ritchie and de Grandpré JJ. dissenting.

W.L.N. Somerville, Q.C., and G. Chira, Q.C., for the appellants.

W.H.O. Mueller, for the respondents. The judgment of Laskin C.J. and Judson, Spence, Pigeon, Dickson and Beetz JJ. was delivered by

THE CHIEF JUSTICE—This appeal is brought to test the application of the judgments of this Court in *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.*[2] and *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.*[3] to a case which was decided at trial before the foregoing two judgments were delivered, but which came before the Ontario Court of Appeal afterwards. That Court considered the *Cummer-Yonge* decision of this Court in its reasons, but not the decision in *Pyrotech*, although, as counsel for the appellant noted in his argument, that case too was urged upon the Ontario Court of Appeal.

The appellant was a tenant of two contiguous properties under leases granted by the respective owners, the respondent Smith and one Tuck, now deceased and represented in the proceedings by his executors. It was the finding of the Courts below that the destruction by fire of the buildings on the two properties was the result of the negligence of an employee of the tenant. This finding of negligence is not contested. The respective amounts of the loss were agreed upon at \$110,400 and \$35,000, and these amounts were paid by insurers to the two landlords who had carried fire insurance on their properties, apparently to their full insurable value.

Exercising their claimed subrogation rights, the insurers brought action against the tenant in the names of the landlords to recover the amounts of the loss. The simple question before this Court is whether they are precluded by the terms of the two leases from succeeding in their claim, having regard to the fact that the landlords had each covenanted in the leases to insure the premises against fire. The exact covenant in the Smith lease is as follows:

27. AND THE LESSOR covenants with the Lessee that he will, throughout the currency of this lease and any extension thereof, hereunder keep the buildings upon the said premises insured against loss by fire in an amount not less than One Hundred and Ten Thousand Dollars (\$110,000.00). [Fire insurance in the amount of \$120,000 was carried by Smith.]

And in the Tuck lease, the comparable covenant reads:

25. AND the Lessor covenants with the Lessee that he will, throughout the currency of this lease and any extension thereof, hereunder keep the buildings upon the said premises insured against loss by fire in an amount not less than their full insurable value.

The Courts below held that the foregoing clauses did not destroy the subrogation rights of the insurers because the tenant remained liable for the fire loss caused by the negligence of its servant notwithstanding the covenant to insure given by the respective landlords and carried out by them. In short, the holdings below were that the insuring obligation did not pass to the landlords the obligation to cover the tenant against the risk of loss from a fire caused by the tenant's negligence. In the Court of Appeal, the *Cummer-Yonge* case in this Court was distinguished, largely because (1) there was not in that case, as there was here, a covenant to repair which fixed the tenant with liability for fires arising by reason of his negligence; (2) there was no such relationship in this case as there was in the *Cummer-Yonge* case between the

covenant to repair and the landlord's covenant to insure; and (3) there were certain option to purchase clauses in the two leases in this case which gave subject matter to the insuring obligation, and no such clauses were present in the Cummer-Yonge case.

The Smith and Tuck leases contained what I may call the three standard repairing covenants, namely, the covenant to repair, the covenant to repair on notice and the covenant to leave or yield up in repair; and each was qualified by the phrase "reasonable wear and tear and damage by fire, lightning, tempest, riot, civil commotion, structural defects, acts of God and the Queen's enemies only excepted". Although the common exception of "reasonable wear and tear and damage by fire, lightning and tempest only excepted" was extended by including other exceptions, nothing in this case turns on them. It is settled law that the exception of fire in a repairing covenant does not exculpate a tenant from liability for a fire caused by its negligence or that of a person for whose negligence it is vicariously liable. If it can escape this liability in the present case, it can only be on the basis that the landlord's covenant to insure is a covenant that runs to the benefit of the tenant, lifting from it the risk of liability for fire arising from its negligence and bringing that risk under insurance coverage.

Had the landlord insured without giving a covenant to that effect in the lease, the tenant's risk of liability for fire resulting from negligence would be unquestionable; and if the landlord collected from his insurer, the latter would have an equally unquestionable right of recovery from the tenant in a subrogated action. The contention of the respondents is that the insuring covenant in the present case does not alter that result because, as I understand the submission of the respondents, the covenant to insure has subject matter without relating it to coverage against the risk of fires caused by the tenant's negligence. The appellant, although recognizing the differences in the repairing and insuring covenants of lessee and lessor respectively in the Cummer-Yonge case, urges that where the covenant to insure is not at large but is, as in this case, a covenant with the lessee that the landlord will keep the buildings on the premises insured against loss by fire, it must be given effect against liability for fires arising from the tenant's negligence because otherwise, as a covenant expressly running to the benefit of the tenant, it would have no subject matter.

Counsel for the appellant seeks to draw support from the judgment of this Court in the Pyrotech case where the lease contained repairing covenants similar to those in the present case. There the tenant was also under a covenant to pay insurance premiums immediately when due, and did pay them on being billed by the landlord. This Court held that the effect of this insurance obligation was to entitle the tenant to protection against the risk of loss by fire caused by its negligence, and this notwithstanding the repairing covenants which, if they stood alone, would have saddled the tenant with liability for losses from such fires. In short, the tenant was entitled to the advantage of its payment of insurance premiums for a policy under which indemnity was given for loss by fire, including fire arising from some person's negligence, be it that of the tenant or someone else. Counsel asked this Court to apply the principle here in respect of a covenant to insure given by the two landlords for the benefit of the tenant. There was no need for the covenant, so it was contended, if it was only for the benefit of the two landlords.

I think this contention should prevail unless there is another explanation for the landlords' covenant to insure which would dispel it. In my opinion, the resolution of the issue in this case depends on whether the option to purchase provisions of the Smith and Tuck leases provide a sufficient explanation of the reason for the insuring obligation assumed by the landlords to leave the risk of fires on the tenant under the repairing covenants where the fires are the result of its negligence.

Before turning to the option to purchase provisions, it is well to note, as was noted in *Cummer-Yonge and Pyrotech*, that the matter at hand is not whether the insurers are being unjustly deprived of their subrogation rights (as they would be if there was some attempt by landlord and tenant to agree on alleviation of the tenant's liability for a fire resulting from its negligence after the fire occurred). It is whether, in circumstances where, by the lease, the tenant is under an obligation to repair, and where its obligation to repair does not extend to repairing damage from accidental (as contrasted with negligent) fires, it is entitled, as between it and the landlord, to claim the benefit of a fire insurance policy (providing indemnity for loss arising from fires negligently caused), which the landlord had covenanted with the tenant to provide.

I do not think, strictly speaking, that it is correct to assess the question at hand by reference to the so-called "exculpatory clause" cases, such as *Canada Steamship Lines Ltd. v. The King*[4]. This is not a case where one has to consider whether there is some provision exonerating one contracting party from liability to the other for the former's negligence. Rather is it a case where a supervening covenant has been given and taken to cover by an insurance policy the risk of loss from a fire caused by negligence. An insurer could not refuse to pay a claim for loss by fire merely because the fire arose from the insured's negligence. I can see no reason why its position can be any better against a tenant, whose negligence caused loss by fire, if the lease with the landlord makes it clear that a policy was to be taken out by the landlord to cover such fires, and a policy is written which does so. In short, the insurer can claim only by subrogation under the lease.

The option to purchase clauses in the two leases differ only as to the period within which the option to purchase could be exercised and, of course, as to the price payable in each case, but both contain the following stipulation:

...The said premises shall be and remain at the risk of the Lessor until closing. Pending completion of the sale, the Lessor will hold all insurance policies and the proceeds thereof in trust for the parties as their interests may appear and in the event of damage to the said premises, the Lessee may either have the proceeds of the insurance and complete the purchase or may cancel the agreement of sale and purchase. Upon the completion of the purchase from the Lessor by the Lessee of the said lands and buildings, this lease and all covenants therein contained shall be void and of no effect...

What this stipulation does is to protect the tenant as purchaser from bearing the risk of loss by fire which would otherwise have passed to it on the exercise of the option and before closing. In such circumstances, the risk of loss until closing being on the landlord as vendor, I do not see

how the fact that the proceeds of any insurance policies are to be held for the benefit of the tenant-purchaser if it wishes to take them as purchaser, modifies the effect of the lessor's covenant to the lessee to keep the premises insured in respect of the leasehold term. If anything, it reinforces the view that the tenant is to have the benefit of insurance arising from the landlord's obligation to insure the premises.

There is a reference to the option to purchase in that clause of the two leases—a standard clause that is the same in both leases—that deals with the consequence of damage to the leased premises by any of the occurrences listed as exceptions to the repairing covenants, which include damage by accidental fire. It is provided that if the premises are repairable within sixty days the landlord must repair with reasonable speed, and rent is to abate in the meantime, either completely if the premises are wholly unfit for occupancy, or proportionately to the extent to which they are so fit during the execution of repairs. However, if, as a result of damage by any of the occurrences aforesaid, the premises are rendered unfit for occupancy and are not repairable with reasonable diligence within sixty days, then the lease is terminated from the date of destruction, unless the tenant within twenty days thereafter has exercised its option to purchase in which event the proceeds of insurance policies on the premises are payable to the tenant.

Again, I see nothing here that gives meaning to the landlord's covenant to insure unrelated to the leasehold term; indeed, the existence of insurance is contemplated during the subsistence of the lease. At worst from the tenant's standpoint, the reference to insurance proceeds in the foregoing clause does not control the general effect of the landlord's covenant to insure, a covenant independently fixed in the lease. If the only significance of the covenant was in respect of the option to purchase, the reasonable expectation would be to find it tied to the option to purchase. There is no such tie here.

The result I would reach here is consistent with the weight of authority in the United States, and I refer to my discussion of some of the cases there in my reasons in the *Cummer-Yonge* case[5], at p. 224. Two cases, more recent than those I cited in *Cummer-Yonge*, which reach the same exonerating result in favour of the tenant where the landlord has covenanted to insure are *General Accident Fire & Life Assurance Corp. Ltd. v. Traders Furniture Co.*[6] and *New Hampshire Ins. Co. v. Fox Midwest Theatres, Inc.*[7] The matter is treated as follows in 51C *Corpus Juris Secundum* (1968), at p. 1003:

...Where the covenant requires the lessor to maintain insurance to provide against loss by fire or storm, it has been construed as protecting both parties, especially where it further provides that the lessor is to use as much of the proceeds as is necessary for reconstruction in the event of fire or storm, and the lessee can rely on the covenant even if the fire was caused by his negligence, or the negligence of his employees. Under such a covenant, the lessor's obligation to effect and maintain insurance has been held a contractual obligation and to constitute a part of the consideration for the lessee's obligation to pay the rent stipulated in the lease...

Only one case, *Winkler v. Appalachian Amusement Co.*[8], is cited as going the other way and it is a case to which I referred in my reasons in *Cummer-Yonge*.

The two additional cases above-cited rely in large part on *General Mills Inc. v. Goldman*[9] referred to by me in the *Cummer-Yonge* case. There, even though there was no express covenant by the landlord to insure it was held that because on the evidence the landlord was to assume the cost of fire insurance, the tenant was entitled to the benefit thereof, and the fact that he had covenanted to yield up in repair, loss by fire excepted, reinforced the conclusion that the risk of loss by fire, even though caused by the tenant's negligence, came under the insurance coverage.

Finally, I wish to say a word about the judgment of this Court in *United Motors Service Inc. v. Hutson*[10]. The case concerned a subrogated action by certain insurance companies to recover from a negligent tenant the amount of the loss suffered by a landlord by reason of a fire which destroyed the leased premises, the insurers having paid the landlord who had taken out policies of insurance to cover loss by fire. The trial judge dismissed the action and the judgment of the Ontario Court of Appeal, which reversed him, (see [1936] O.R. 225) made it evident that the ground of dismissal related to the defendant tenant's liability either in negligence or on principles of strict liability. The appellant insurers argued *res ipsa loquitur* and obtained a finding in the Court of Appeal that in the circumstances there was an onus on the tenant which it had not discharged and that, consequently, there was liability for negligence. Although *Masten J.A.* in the Court of Appeal referred to a number of clauses in the lease, including a covenant by the lessor to pay all taxes and all premiums of insurance upon the buildings, there was no consideration given to the effect of this covenant in any of the three sets of reasons delivered in the Court of Appeal.

When the case came here, the sole question (as the reasons of Duff C.J. declare) was whether the evidence justified the judgment below fastening liability for negligence upon the tenant. The Chief Justice concluded that negligence could properly be inferred in the circumstances in the absence of explanation, and the explanations advanced did not neutralize or overturn the inference. He then added some observations on *res ipsa loquitur*. *Kerwin J.*, who delivered the majority judgment, also dismissing the appeal, quoted some terms of the lease including the repairing covenants and the covenant of the lessor to pay taxes and premiums of insurance but then confined his remarks on the lease clauses to a consideration of the repairing covenants after referring to the answerability of lessees for voluntary and permissive waste in the light of The Accidental Fires Act, R.S.O. 1927, c. 146. There is thus, nothing in the *Hutson* case from which any conclusion could be drawn as to the effect of the covenant to pay insurance premiums. The point was simply not dealt with.

I would allow the appeal with costs in this Court and would vary the Order of the Court of Appeal to direct that the judgment at trial be varied to dismiss the claim of the plaintiff Smith and to reduce the damages payable to the plaintiff Tuck to \$2,800.

The judgment of Martland, Ritchie and de Grandpré JJ. was delivered by

DE GRANDPRÉ J. (dissenting)—This action arises out of a fire which occurred on February 1, 1966, in the City of Barrie. The principal appellant, The T. Eaton Company Limited ("Eatons") rented contiguous premises from the respondent, Albert E. Smith ("Smith") and the respondent Reginald E. Tuck (deceased) ("Tuck"), which premises were interconnected and used for Eatons'

business purposes as a department store. At the time of the fire, the tenancy of Eatons was held under the provisions of a lease from Smith and a lease from Tuck, both of which contained a similar covenant (no. 27 in the Smith lease and no. 25 in the Tuck lease):

AND the lessor covenants with the Lessee that he will, throughout the currency of this lease and any extension thereof, hereunder keep the buildings upon the said premises insured against loss by fire...

The last words of these clauses refer to the amount of the insurance which in effect was to be for the full insurable value of the building, a point which has no relevance here.

The action for damages negligently caused to the Smith and Tuck premises leased to Eatons was brought in the names of the landlords and it is common ground that, except to the extent of \$2,800, it was by way of subrogation by the fire insurers with whom Smith and Tuck had insured their respective premises. The Courts below have found, and the point is no longer in issue, that the fire was truly due to the negligence of an Eatons' employee, the late William F. Friel whose estate is also an appellant. The submissions addressed to us have been restricted to the contractual relationship between Eatons and its landlords and nothing will be said here about the possibility that the situation of Friel might be different from that of Eatons.

With this background, I turn to the point in issue: did the obligation to insure the premises undertaken by Smith and Tuck, when taken in the context of their respective leases to Eatons, include the obligation to insure against damage by fire negligently caused by the tenant? In other words, does the insuring covenant create an exception to the general rule of liability for negligently caused fire to the extent of the amount of insurance? To these questions, the Courts below have given a negative answer. I will say immediately that I am in agreement with them.

Like the Chief Justice, whose reasons I have had the advantage of reading, I feel that some basic principles are worth repeating:

- 1) a repairing covenant by the terms of which the tenant agrees to repair on notice "damage by fire excepted" does not exculpate the tenant from liability for a fire caused by its negligence;
- 2) the simple fact that the landlord has obtained fire insurance does not relieve the tenant of its obligation to make good the loss thus caused;
- 3) the subrogation rights of the landlord's insurers are coextensive with the recovery rights of the landlord under the lease;
- 4) if the landlord has waived its rights of recovery against the tenant in all circumstances, the insurer cannot recover from the negligent tenant; 5) fire insurance by definition provides indemnity to the insured mentioned in the policy for both accidental fire and negligently caused fire (there is no suggestion here of gross negligence);

- 6) a clear covenant between landlord and tenant that the fire insurance to be obtained by the landlord will be for the benefit of both, will constitute a bar to the subrogation action of the insurer.

As to principles 4 and 6 above, I assume that prior to the loss, the insurer has been made aware of the waiver or of the covenant. In view of the conclusion I reach in the case at bar, I express no opinion on a point raised by respondent that, in such cases, if the insurer has not agreed before the fire to the waiver or to the covenant, the insurance may well be invalid. On this point, respondents have referred us to the reasons of Pigeon J. in *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.*[11], at p. 250:

In view of the reference to insurance, it appears to me that consideration can properly be given to the effect of the insurer's statutory right to subrogation (R.S.O. c. 224, s. 126). The consequence is obviously that the lessor is liable to lose the benefit of the policy if the fire is due to the tenant's negligence and the latter has been relieved from that responsibility. An insurer is entitled not to be deprived of the benefit of subrogation without his consent. Of course, this consequence can be avoided either by the insurer contracting to insure the tenant's interest as well as the owner's or by the insurer waiving subrogation. The necessity of such special stipulation to avoid undesirable consequences is an added reason for not lightly construing an exculpatory clause as releasing a tenant from negligence.

and to Ivamy in *General Principles of Insurance Law*, 2nd ed., 1970, p. 421, foot-note no. 9.

These principles having been recalled, I am unable, with respect, to reach the conclusion that the insurance covenant quoted at the outset of these reasons would have no meaning if it did not amount either to a waiver by the landlords of their recovery rights in case of negligently caused fires or to an undertaking by them to obtain insurance in favour of all parties to the lease for fires of that type. Under one heading or the other, such a result would constitute an exception to the general rule of liability and cannot be reached unless it is clear that such was the intention of the contracting parties and that no other reading of the entire contracts is possible.

On the aspect of intention, the following points have to be kept in mind:

- 1) as found by the trial judge, the leases were prepared by Eatons; any doubt must be interpreted against it;
- 2) the first Smith lease is dated October 5, 1954 (and it is not different in any major respect from that in existence at the time of the fire) when our Court had recently indicated that a covenant by the landlord to pay all premiums of insurance upon the tenanted buildings was not a bar to an action in recovery after a fire. *United Motors Service, Inc. v. Hutson*[12];
- 3) the second Smith lease dated March 1, 1961 and the Tuck lease dated July 28, 1960 were signed after the courts in Ontario had followed the Hutson case and had held that the lessor's covenant to pay all premiums of insurance on the building did not absolve the tenant from repairing under his covenant to repair damage to the building resulting from a fire caused by the tenant's negligence. See *Shell Oil Co. of Canada Ltd. v. White Motor Co. of*

Canada Ltd. and Ziegler[13] and Norman v. J.L. Edwards Motor Sales Ltd.[14], two cases where the tenant had also covenanted to pay any increased premiums by reason of the use of the premises;

- 4) each one of these three leases covers at least twelve pages of the appeal book and contains a minimum of twenty-nine paragraphs; the concepts of fire, liability, insurance, etc., were certainly paramount in the mind of Eatons, the drafter, as appears from the following examples taken from the 1954 Smith lease:
 - a) the word “fire” appears seven times in clause 4 alone;
 - b) a lengthy clause 8 deals with the effect of a fire on a continuation of the lease depending on the importance of the damage;
 - c) apart from the insurance covenant under examination in the case at bar, there are at least four other references to one aspect or another of insurance;
 - d) the necessary repairs due to “the carelessness of the lessee” shall be borne by it (21);
 - e) the non responsibility of the lessor in certain cases is spelled out in two clauses.

All of which must be read against a background of legal knowledge which is not surprising when dealing with a large sophisticated tenant like Eatons; specific reference is made in the leases to three Ontario statutes. So much for the intention; the silence of the leases as to the situation of the parties after a fire caused by the negligence of the tenant cannot establish a meeting of the minds to change the general law.

And such a change cannot be read into the lease on the ground that the insurance covenant cannot have any other purpose. I agree with respondents’ submission that the subject matter for the insurance covenant can be found in the need for:

- (a) a funding mechanism to support the lessee’s option to purchase the demised premises, and
- (b) an assurance of each lessor’s capacity to rebuild the structure and permit resumption or continuance of the lease in the event of fire having occurred.

In this sense and for these purposes, the insurance covenant enured to the benefit of the lessee but it did not go any further. I make my own the follow- ing words taken from the judgment at trial[15] at p. 385:

In each of the Smith and Tuck leases there is an express provision providing Eatons with an option to purchase the premises at a fixed price. The insurance monies are to be held in trust in the event that Eatons exercises its option, and should the premises be damaged, Eatons would be entitled to receive the insurance money as part of the transfer of title. The intention of the clause requiring the landlord to carry insurance is obviously to protect Eatons in the event they decide to exercise their option to purchase.

I also agree with what the Court of Appeal wrote on the subject:

Finally, both leases contain option to purchase clauses in similar language. The language of clause 11(a) of the Smith lease and clause 8(a) of the Tuck lease is virtually identical and provides that if the premises are wholly or partially damaged by fire, lightning, tempest, etc., that they cannot be repaired in 60 days, then the Lessee shall have 20 days from the happening of such damage to exercise its option to purchase and if it so exercises its option 'the proceeds of all insurance policies thereon shall be paid to the lessee'. The exact clause in the Smith lease reads as follows:

11. PROVIDED that if during the continuation of this lease (a) If the building or the leased premises is wholly or partially damaged by fire, lightning, tempest, riot, civil commotion, structural defects, acts of God or the Queen's enemies so as to render the leased premises wholly unfit for occupancy, and if they shall be so badly injured that they cannot be repaired with reasonable diligence within sixty days of the happening of such injury, then this lease shall, unless the Lessee shall within twenty days of the happening of such damage have exercised its option to purchase the leased premises hereinafter provided, cease and become null and void from the date of such damage or destruction, and the said option to purchase shall be cancelled and the Lessee shall immediately surrender the premises and all interest therein to the Lessor, and the Lessee shall pay rent only to the time of such surrender and in case of destruction, or partial destruction as above mentioned, the Lessor may reenter or re-possess the premises discharged of this lease, and may remove all parties therefrom; in the event that the Lessee shall within twenty days from the happening of such damage have exercised its option to purchase the said premises, the proceeds of all insurance policies thereon shall be paid to the Lessee;

Notwithstanding the forceful argument put forward, we are unable to read into that clause an intention to release the lessee of liability for negligently caused fires. The clause must be read together with clause 31 of the Smith lease, which gives to the lessee an irrevocable option to purchase the demised premises during the term of the lease, at a stated price. The clause provides for notice of intention to exercise the option, closing date, title, adjustments, etc., and adds:

The said premises shall be and remain at the risk of the Lessor until closing. Pending completion of the sale, the Lessor will hold all insurance policies and the proceeds thereof in trust for the parties as their interests may appear and in the event of damage to the said premises, the Lessee may either have the proceeds of the insurance and complete the purchase or may cancel the agreement of sale and purchase. Upon the completion of the purchase from the Lessor by the Lessee of the said lands and buildings, this lease and all covenants therein contained shall be void and of no effect.

Clause 26 of the Tuck lease contains a similar provision. We are of the opinion that clause 11(a) of the Smith lease and clause 8(a) of the Tuck lease were meant to preserve to the lessee the right to exercise the option to purchase the premises for 20 days after a fire whether or not the fire was caused by the negligence of the lessee. They appear to be entirely irrelevant in the determination of responsibility for fires negligently caused by the lessee. It seems clear that within 20 days after

the fire, the lessee could have exercised the option to purchase and opted to receive all insurance proceeds. We fail to see how this option agreement could operate in a manner which would deprive the insurer of its subrogation rights.

The thrust of appellants' submission is that the question has been decided in their favour by this Court in *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.*[16] and in *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.*[17] I cannot accede to that proposition.

In *Cummer-Yonge*, the factual situation was so different that the Court of Appeal was right in not applying it in the case at bar. The turning point in *Cummer-Yonge* is to be found in the following words of the Chief Justice (at p. 230):

What is significant about the lease in this case is that nowhere in it is there found the usual tenant's repairing covenant, which generally reads 'to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted'. Instead, the lease (as in para. 8(10)(1)) requires the tenant to take good and proper care, and make needed repairs and replacements, except for reasonable wear and tear and damage to the building caused by perils against which the lessor is obliged to insure; and again (as in para. 8(10)(2)), the tenant must repair according to notice, and surrender the premises in the required condition of maintenance, except for reasonable wear and tear subject to the insurance provisions of the lease. The excepted liability, referable to the lessor's insurance obligation, is reinforced by para. 5, in which the words 'insurance covering all its obligations to repair', which refer to the tenant, are stroked out; and it is undeniable that ordinarily the obligations to repair would include obligations to repair damage from fire caused by the tenant's negligence. Again, para. 8(22) shows the words 'insurance upon all glass and plate glass in the leased premises and property damage insurance' stroked out in a clause otherwise referring to the tenant's obligation to effect insurance; the obligation is limited to public liability insurance.

The connection between these matters and the lessor's insurance obligations under para. 9 are very clear under the terms of subparas. (2) and (5) of para. 9. There is an express undertaking by the lessor to the lessee to insure the shopping centre, including the building which embraces the leased premises, an undertaking explicitly directed to all risk of loss or damage by fire (the emphasis is mine); and further, and of great significance is the lessor's obligation, reasonable wear and tear excepted, to repair the outer-side walls, roof, floors and foundation of the building of which the leased premises form part, and damage to the building caused by perils against which the lessor is obliged to insure. These perils include, as already indicated, all risk of loss or damage by fire.

The underlined words evidence a situation radically different from the one under consideration here. The *Pyrotech* case was urged upon the Court of Appeal which, however, did not refer to it in its reasons. Quite rightly so. As stated by the Chief Justice in that case, speaking for the majority, the question at issue was whether the risk of loss by fire, including negligence or not, passed to the landlord under a provision of the lease obligating the tenant to pay the insurance rates. In that case, the rates had been billed to the tenant and paid by it. And the issue was decided as

follows (at p. 40):

In this respect the tenant may be said to have qualified its obligation to repair beyond the normal exception of not being liable for accidental fire. It has paid for an expected benefit, as between itself and its landlord which any standard fire policy would reflect in providing indemnity to the landlord and which the policy taken out in this case did reflect. It follows, in my opinion, that it may make a difference whether, as in the Hutson case, the landlord undertakes to pay insurance premiums and whether, as in this case, it is the tenant who covenants to pay them.

If in the case at bar, there is any need for the authority of a decided case, I would find it in Hutson. There, the obligation assumed by the landlord to pay the insurance premiums upon the buildings was held insufficient to permit the tenant to escape liability for fire caused by its negligence. I cannot find any difference of substance between that obligation and the one expressed in the leases under consideration to obtain insurance. Appellants have submitted that Hutson can be distinguished on the basis that the lease did not spell out that the covenant to pay the premiums referred to insurance against damage by fire; this is tenuous indeed when the obvious type of insurance to be obtained upon a building is fire insurance.

A last word. It seems to me that behind the legal façade, what appellants are really trying to achieve is a policy statement that actions in recovery by fire insurers should be kept to a minimum and only resorted to in case of a negligence that is extreme (I have used on purpose a word that is still neutral in legal parlance). Whether or not such a policy is to be adopted cannot be our concern. One thing is sure: equity does not enter into the picture here, the tenant being strong enough to fend for itself. And I doubt that in this era of generalized liability insurance, more than a handful of tenants could find themselves paying such claims out of their own pockets.

I would dismiss the appeal with costs.

Appeal allowed with costs, MARTLAND, RITCHIE and DE GRANDPRÉ JJ. dissenting.

Solicitors for the appellants: Borden & Elliot, Toronto.

Solicitors for the respondents: Seabrook, Outerbridge, McElwain & Burk, Toronto.

[1] A motion for a rehearing of the appeal was allowed by the Court and a rehearing directed, limited to the issue of whether the co-defendant, as executrix of the Estate of the late William F. Friel, was entitled to the benefit of certain covenants to insure. Notice of Discontinuance of the Rehearing was filed on March 2, 1978.

[2] [1976] 2 S.C.R. 221.

[3] [1976] 2 S.C.R. 35.

[4] [1952] A.C. 192.

[5] [1976] 2 S.C.R. 221.

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- [6] (1965), 401 P. 2d 157 (Ariz.).
- [7] (1969), 457 P. 2d 133 (Kans.).
- [8] (1953), 79 S.E. 2d 185 (N.C.).
- [9] (1950), 184 F. 2d 359, certiorari denied (1951), 340 U.S. 947.
- [10] [1937] S.C.R. 294, aff'g [1936] O.R. 225.
- [11] [1976] 2 S.C.R. 221.
- [12] [1937] S.C.R. 294.
- [13] (1957), 8 D.L.R. (2d) 753.
- [14] (1958), 15 D.L.R. (2d) 211.
- [15] [1972] I.L.R. 381.
- [16] [1976] 2 S.C.R. 221.
- [17] [1976] 2 S.C.R. 35.
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