IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPELLATE JURISDICTION

Civil Appeal: ABU 003 of 2009
[Appeal from High Court Civil Action: HBC 334 of 2007L]

BETWEEN : **PETER MURR**

APPELLANT
[Original Plaintiff]

AND : **GANGA GOUNDER**

RESPONDENT
[Original Defendant]

CORAM : Byrne, A.P
Inoke, J.A
Calanchini, J.A

COUNSEL : Q. Bale for the Appellant
D. S. Naidu for the Respondent

DATE OF HEARING : 13th May 2010

DATE OF JUDGMENT : 21st October 2010

INTRODUCTION

1. Peter Murr, his wife and two daughters occupied Ganga Gounder's house at 13 Waqa Circle, Nasoso, Nadi under a tenancy agreement entered into by Mr Murr's employer and Mr Gounder on 16 November 2004. The initial tenancy was for 15 months from 15 November 2004 which was subsequently extended to 14 March 2008 at an increased rental.

2. On **18 August 2006**, the house burnt to the ground destroying all of the Murr family's possessions.

3. On **22 October 2007**, Peter Murr sued his landlord for damages for negligence in the High Court at Lautoka. The learned trial Judge did not accept that Ganga Gounder was negligent and dismissed Mr Murr's action in a judgment delivered on **8 December 2008**. Mr Murr now appeals to this Court. He wants the judgment set aside and reversed in his favour.

4. This appeal raises the issue of whether a landlord satisfies his duty of care to his tenant under a tenancy agreement by simply engaging a competent contractor to carry out work on the rented premises.

THE JUDGMENT ON APPEAL

5. Mr Gounder is an owner-builder. Mr Murr met Mr Gounder when the house was near completion. They made an agreement that Mr Murr was to live in the house when completed and Mr Gounder was to install one air conditioner in the master bedroom. A second air conditioner in the second bedroom was installed towards the end of October 2005. It gave trouble within the next month. The installers tried to fix it under warranty three times. On the third visit a component was replaced and the trouble ceased. When the initial tenancy expired a new tenancy with essentially the same conditions was entered into. The rental for the new term was increased and Mr Gounder promised to supply and install two new air conditioners in the remaining two bedrooms. Mr Gounder engaged an electrical contractor, A H Electrical, to do the installation.

6. The learned trial Judge found as a matter of fact that the air conditioner in bedroom number two was "**the primary source and most probable cause of the fire**". His Lordship also found that the plaintiff had "**discharged its burden ... that the source and**

cause of the fire was some defects in the electrical system of the premises." His Lordship also accepted the evidence of the Fiji Electricity Authority inspector that the four air conditioners were installed without approval and certification of the Authority in breach of Regulation 47(1) of the **Electricity Regulations** made under the **Electricity Act [Cap 180]**.

7. The learned trial Judge considered the statement of claim as pleading a claim based on breach of the landlord's obligations under the tenancy agreement in three different ways, each giving rise to separate causes of action. The first cause of action was that the landlord negligently failed to ensure peaceful possession pursuant to clause 10 of the tenancy agreement. The second cause of action was that the landlord negligently failed to keep the premises in good order and condition and repair throughout the term of the tenancy pursuant to clause 13 of the tenancy agreement. The third cause of action was the landlord failed negligently to comply with the lawful requirements of **Regulation 47** of the **Electricity Regulations**. His Lordship however concluded that there were actually only two causes of action, negligent breach of the landlord's duty of care under the tenancy agreement and negligent breach of statutory duty.

8. The learned trial Judge held that the first cause of action failed because the landlord had satisfied his duty of care under the tenancy agreement by engaging a qualified contractor. His Lordship relied on **Northern Sandblasting Pty Ltd v Harris [1995-97] 188 CLR 313** as decisive on this point.

9. His Lordship also dismissed the second cause of action even though he found that the landlord was in clear breach of Regulation 47 because he came to the conclusion that the Electricity Act and Regulations did not give the tenant a private right of action in tort.

THE GROUNDS OF APPEAL

10. The Grounds of Appeal are:

1. **That his Lordship erred in fact and in law in holding that the principles of law that seems to apply to this case do not impose any liability on the Respondent/Defendant for damage suffered by the Appellant/Plaintiff in this case.**

2. **That having accepted on the evidence before him the inference that the source and cause of the fire was some defects in the electrical system of the premises, his Lordship erred in fact and in law in not proceeding to hold that the Respondent, as the landlord, was liable to the Appellant as his tenant for breach of the contractual non-delegable duty of care he owed to the Appellant under the Tenancy Agreement to ensure that the Appellant, as tenant, would enjoy quiet and safe possession of the premises during the tenancy.**

3. **That his Lordship erred in fact and in law in failing to direct himself to place sufficient emphasis on the public interest and policy that demands:**

   a) **in the absence of relevant specialised legislation in Fiji;**

   b) **in respect of a tenant who is shown not to have contributed in any way to the cause of the fire which destroyed the premises; and,**

   c) **in respect of a residential property let to a tenant under a contract of tenancy –**

      that such a tenant is protected against risks of damage to his person and his property where such risks are reasonably within the landlord's ability and control to avoid.

4. **That his Lordship erred in fact and in law in holding that the Appellant, as a tenant under a contract of tenancy in which he is assured by the Respondent, as landlord of quiet, safe and peaceful enjoyment of the leased premises upon fulfilling his contractual obligations under the contract, is otherwise not entitled to any remedy for total loss of property in the leased premises from fire for reasons which are within the reasonable means of the Respondent to avoid and/or control.**

5. **That having concluded on the evidence before him that the fire could have been avoided by the Respondent if he had complied with his statutory obligations as owner and consumer under the Fiji Electricity Regulations, his Lordship erred in law and in fact in failing to hold that such statutory non-compliance amounted to a negligent failure by the Respondent to protect the Appellant as his tenant from the risk of personal harm and/or damage to property during the period of the tenancy.**

6. **That his Lordship erred in fact and in law in failing to award the Appellant with the quantum of damages accepted by his Lordship as having been suffered by the Appellant as a result of the destruction by fire at the Respondent's premises.**

SUBMISSIONS

11. Mr Bale submitted that the landlord owed a non delegable duty of care to keep his tenant and property safe. The evidence in this case supported a finding that the landlord did not satisfy that duty. He also submitted that the learned trial Judge was wrong in concluding that the Electricity Act and Regulations did not give the Plaintiff a private right of action in tort.

12. Mr Bale also submitted that the Plaintiff was entitled to claim under the **Occupier's Liability Act [Cap 33]**. This was not pleaded or raised at the trial so we dismiss the submission.

13. In reply, Mr Naidu submitted that the Plaintiff's claim in this case was "akin to remote claim for damages by a passenger who suffered a heart attack whilst travelling in his car". He disputed the learned trial Judge's finding that the air conditioner was the cause of the fire. He submitted that it was not a reasonable inference that could be drawn from the evidence.

CONSIDERATION OF SUBMISSIONS AND GROUNDS OF APPEAL

14. We do not agree with Mr Naidu's submission that the learned trial Judge was wrong in drawing an inference that the air conditioner was the cause of the fire. The evidence of the only eyewitness and the expert reports clearly support the drawing of such an inference. We accept the learned trial Judge's findings of fact.

GROUNDS 1, 2 & 4

15. Grounds 1, 2 and 4 raise the issue of whether a landlord owed his tenant a non-delegable duty of care under the tenancy agreement to ensure that his tenant enjoys quiet and safe possession of the premises during the tenancy.

16. The learned trial Judge considered the High Court of Australia decision in **Northern Sandblasting Pty Ltd v Harris [1997] HCA 39; (1997) 188 CLR 313; (1997) 146 ALR 572; (1997) 71 ALJR 1428 (14 August 1997)** as decisive in this case. The facts of **Northern Sandblasting Pty Ltd** are summarised in the judgment of Brennan CJ as follows. On 4 June 1987, Mrs Harris asked her 9-year old daughter, Nicole Anne Harris (the respondent), to turn off an outside water tap that was supplying a garden sprinkler. Nicole, who was in bare feet standing on wet grass, was electrocuted when she went to do so. She suffered severe brain damage which leaves her in a vegetative state. By her next friend she brought action in the Supreme Court of Queensland against Mr Briggs, an electrician who had repaired a stove in the house, The North Queensland Electricity Board ("the Board"), Northern Sandblasting Pty Ltd ("the landlord") which is the owner of the premises, and her parents, Mr and Mrs Harris, who were the tenants of the premises. The claim against Mr and Mrs Harris was abandoned. Wisely so, as Derrington J observed. At trial, his Honour found Mr Briggs to be guilty of negligence and he gave judgment against him, assessing Nicole's damages at the sum of $1,204,429.82. His Honour acquitted the Board and the landlord of negligence. On appeal to the Court of Appeal against his Honour's judgment dismissing

Nicole's claim against the landlord, a majority of the Court (Fitzgerald P and McPherson JA, Pincus JA dissenting) allowed the appeal. Judgment was entered for the plaintiff against the landlord for damages in the amount assessed by Derrington J. The landlord appeals by special leave against the judgment of the Court of Appeal."

17. Brennan CJ held that the circumstances of this case did not give rise to a non-delegable duty of care which made the landlord liable for the negligence of Mr Briggs, an independent contractor. His Honour gave his reasons as follows:

> **Mr Briggs was an independent contractor. The general rule to be applied when a plaintiff suffers by reason of an independent contractor's negligence in performing a task at the request of a defendant was stated by Dixon J in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*[15]:**
>
> > **" In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorized the doing of the act which amounts to a tort. The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal."**
>
> **When this rule applies, no vicarious liability for the independent contractor's negligence is imposed on a defendant who requested the performance of the task in the course of which the relevant negligent act was done or the relevant negligent omission was made. In such a case, there is no basis for sheeting home to the defendant either liability for the independent contractor's tort or responsibility for the independent contractor's act or omission[16].**
>
> **However, if the defendant is under a personal duty of care owed to the plaintiff and engages an independent contractor to discharge it, a negligent failure by the independent contractor to discharge the duty leaves the defendant liable for its breach. The defendant's liability is not a vicarious liability for the independent contractor's negligence but liability for the defendant's failure to discharge his own duty[17]. The duty in such a case is often called a "non-delegable duty".**
>
> In principle, no *duty* owed by A to B can be delegated to C. If it were otherwise, the mere delegation would discharge A's duty to B. The difference between a duty and its discharge appears clearly in the speech of Lord Blackburn in *Hughes v Percival*[18] where, in reference to the duty owed by the defendant to his neighbour in making use of the party-wall between them, his Lordship said:
>
> > "But I think the law cast upon the defendant, when exercising this right, a duty towards the plaintiff. I do not think that duty went so far as to require him absolutely to provide

> that no damage should come to the plaintiff's wall from the use he thus made of it, but I think that the duty went as far as to require him to see that reasonable skill and care were exercised in those operations which involved a use of the party-wall, exposing it to this risk. If such a duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself, and, if they so agreed together, to take an indemnity to himself in case mischief came from that person not fulfilling the duty which the law cast upon the defendant; but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled."

In *Kondis v State Transport Authority*[19], in the course of reviewing earlier cases, Mason J observed:

> "On the hypothesis that the duty is personal or incapable of delegation, the employer is liable for its negligent performance, whether the performance be that of an employee or that of an independent contractor."

Although the duty is personal to the defendant, the term "non-delegable" does not mean that the defendant cannot get another to discharge the duty. As Lord Hailsham of St Marylebone said in *McDermid v Nash Dredging Ltd*[20] in reference to an employer's duty to his employee, "non-delegable" means "only that the employer cannot escape liability if the duty has been delegated and then not properly performed". The problem is not so much to classify a duty as delegable or non-delegable as to identify the content of the duty. However, there are some categories of relationship that give rise to a duty to perform certain tasks that cannot be discharged merely by employing an independent contractor to perform them. As the majority judgment in *Burnie Port Authority v General Jones Pty Ltd*[21] observed:

> "It has long been recognized that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor."

Thus the "non-delegable" duty of an employer was stated by this Court in *Ferraloro v Preston Timber Pty Ltd*[22] in these terms:

> "The employer's duty, *to whomsoever it falls to discharge it*, is to take reasonable care to avoid exposing his employee to an unnecessary risk of injury and the employer is bound to have regard to a risk that injury may occur because of some inattention or misjudgment by the employee in performing his allotted task." (Emphasis added.)

The question whether a defendant who employs an independent contractor to perform a given task is liable as for a breach of the defendant's own duty in the event of negligence on the part of the independent contractor in performing the task is not answered by pointing to the independent contractor's negligence[23]. The independent contractor's negligence is material only in showing the non-discharge of any duty that may have been imposed on the defendant. The basic question is whether any and what personal duty was imposed upon the defendant in the circumstances of the case. Apart from well-established relationships that give rise to non-delegable duties[24], it is not easy to distinguish between the circumstances which give rise to a duty that is discharged by the selection of a competent independent contractor to undertake a particular task and the circumstances which give rise to a duty that can be discharged only by the non-negligent performance of the task. Mason J essayed a definition of the material

relationships that would give rise to a non-delegable duty in *Kondis v State Transport Authority*[25]:

> "[T]he special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised."

In cases where this special duty is imposed on a person in relation to a particular task, that person is under a duty not only to use reasonable care but to ensure that reasonable care is used by any independent contractor whom he employs to perform that task[26]. Moreover, if the task which an independent contractor is employed to perform carries an inherent risk of damage to the person or property of another and the risk eventuates and causes such damage, the employer may be liable even though the independent contractor exercised reasonable care in doing what he was employed to do, because the employer authorised the running of the risk and the employer may be in breach of his own duty for failing to take the necessary steps to avoid the risk which he authorised. In *Burnie Port Authority v General Jones Pty Ltd*[27], following Stephen J in *Stoneman v Lyons*[28], I noted that the employer of an independent contractor would be personally liable:

> "if the risk of damage arises from the way in which the work will necessarily be done or from the way in which the employer expects that it will be done[29], for in each of those situations the incurring of the risk is authorized by the employer. But the employer is not liable merely because it is foreseeable that the independent contractor might, on his own initiative, adopt a careless way of doing the work. If liability were imposed on an employer in that situation, the employer would become a virtual guarantor of the independent contractor's carefulness."

Cases of special relationships aside, the duty of care that arises when a task to be performed does not carry an inherent risk of damage to the person or property of another may be discharged by the engaging of a competent independent contractor to perform it. Whether a task does or does not carry an inherent risk of damage to another's person or property is a question of fact to be determined in the light of common experience.

In the present case, when Mrs Harris advised the landlord that the stove was not working, the landlord appears to have accepted that it was its contractual duty to get the stove repaired. The work could be undertaken only by a licensed electrician[30]. The repair could not be undertaken by the landlord's unlicensed servants. The fact that negligence on the part of Mr Briggs might foreseeably cause injury to Nicole or to some other member of the tenants' family or to the tenants' visitors was not enough to impose a "non-delegable" duty of care on the landlord. Nor was the relationship between the landlord and the tenants and their family sufficient to impose on the landlord a non-delegable duty of care in effecting repairs to the premises or to equipment in the premises that were needed because of ordinary wear and tear during the tenancy or because of some other reason apart from the landlord's own default. The repair of the stove did not carry any inherent risk of injury unless it were negligently done. There was no want of due care on the part of the landlord in selecting Mr Briggs to repair the stove. Apart from the landlord's duty to exercise reasonable care in the selection of a licensed electrician to repair the stove, no further duty in respect of the repair of the stove arose from the circumstances. I would therefore reject the submission that the landlord is liable in damages to Nicole by reason of the failure by Mr Briggs to ensure that the earth wire did not foul the active wire attached to the stove hotplate.

18. However, His Honour did find the landlord liable on another ground:

> **I would hold a landlord to be under a duty of care in respect of the demised premises requiring the same standard of care as is required of occupiers towards those who enter occupied premises by consent and for reward, the landlord's duty of care being -**
>
> > **(i) limited to defects in the premises at the time when the tenant is let into possession; and**
> >
> > **(ii) owed to the tenant and to those who, to the knowledge of the landlord, are intended to occupy the premises under and for the purposes of the tenancy.**
>
> **The standard required of the landlord is the standard stated by McCardie J in *Maclenan v Segar.* The duty does not extend to defects in the premises that are discoverable only after the landlord parts with possession.**
>
> **In accordance with this principle, I would hold the landlord in the present case to have owed a duty of care to the tenants and to their children to see that the premises at the time the tenants went into possession were as safe for their habitation as reasonable care and skill on the part of anyone could make them, excluding defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair or maintenance of the premises. The premises were unsafe by reason of a defect which would have been manifest on a simple inspection, namely, the lack of connection between the major earth wire and the neutral link. That defect was easily remediable. The landlord is thus liable for breach of its duty of care owed to Nicole.**

19. Toohey J also dismissed the appeal but on different reasoning:

> **In the Supreme Court of Queensland it was only Fitzgerald P who would have held the appellant liable at common law for breach of a non-delegable duty. He did so first by acknowledging the correctness of what had been said in *Parker v Housing Trust* and then by the application of what were described as proximity factors and policy considerations. By reference to these factors and considerations and in the light of recent decisions of this Court, Fitzgerald P held that the appellant owed a special responsibility to the respondent to ensure that reasonable care was taken by the electrician in repairing the stove. That responsibility was not met and the appellant was liable to the respondent. I reach the same conclusion by much the same path.**
>
> The starting point for this conclusion is the existence of a general duty owed by the appellant to the respondent to take reasonable care to protect her from injury in the carrying out of the repair work on the stove. While accepting the existence of such a duty, the appellant contended that it had discharged the duty by engaging a licensed electrician. In support of that contention the appellant relied upon s 322 of the *Electricity Act* 1976 (Q) which prohibits anyone who is not the holder of a certificate of competency or a permit from doing electrical work. On what footing, it asks, can it be held liable for work which it could not do itself and which it did through

a person qualified and permitted to do the work? That person was an independent contractor, not an employee of the appellant for whose negligence the appellant would be vicariously liable.

There has been criticism of the concept of a non-delegable duty in the law of tort[86]. And there has been criticism of the expression itself on the footing that one cannot delegate a duty imposed by law; rather the question is whether the duty is personal or whether it can be discharged by engaging someone else to perform what has to be done[87]. There is force in these criticisms but the concept is now part of the law as the expression is part of its vocabulary. It is the operation of the concept in the circumstances of the present appeal that is critical.

In *Burnie Port Authority v General Jones Pty Ltd*[88] Mason CJ, Deane, Dawson, Toohey and Gaudron JJ adopted a passage in the judgment of Mason J in *Kondis v State Transport Authority*[89] where his Honour identified some of the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable and said that the common element in those cases was that:

> "the person on whom [the duty] is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised".

After referring to this passage, the majority said[90]:

> "It will be convenient to refer to that common element as 'the central element of control'. Viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person."

The passage from the judgment of the majority in *Burnie* relates assumption of responsibility to special dependence or vulnerability, though not in a way that confines responsibility to those relationships. Certainly the presence of one or other points to an assumption of responsibility and it is the assumption of responsibility which imposes on a person a personal, that is non-delegable, duty of care. Foreseeability itself will not generate this special duty of care. It is "the relationship of proximity giving rise to the non-delegable duty of care".

In *Bryan v Maloney*, where the issue was the duty of care owed by the builder of a house to a subsequent purchaser, Mason CJ, Deane and Gaudron JJ said[91]:

> "[T]he question whether the requisite relationship of proximity exists in a particular category of case is more likely to be unresolved by previous binding authority with the consequence that the 'notion of proximity ... is of vital importance'". (footnote omitted)

In *Hill v Van Erp*, where a solicitor was held liable in negligence to a beneficiary under a will, I said of proximity[92]:

> " Attention is focused on established categories in which a duty of care has been held to exist; analogies are then drawn and policy considerations examined in order to determine whether the law should recognise a further category, whether that be seen as a new one or an extension of an old one."

Much the same approach is demanded here because of the situations in which a personal responsibility has been held to exist.

In *Kondis*[93] Mason J identified some of those situations: hospitals, school authorities, employers, and possibly invitors[94]. He also referred to cases in which a person has been held liable for damage caused through the interference with the rights of an adjoining landowner due to the negligence of an independent contractor[95]. His Honour then said[96]:

> " The decision in *Meyers v Easton*[97] appears to rest on a slightly different footing."

In that case a landlord had, at the solicitation of his tenant, undertaken to renew the roof of his house. Stawell CJ said[98]:

> "Where one person becomes liable to perform, or undertakes the performance of, a duty to another, it is quite immaterial ... whether he performs the duty himself or employs an agent, or an independent contractor to perform it. The liability ... for the proper performance of the duty, adheres to the person who undertook it; he cannot get rid of it."

Stawell CJ's statement was an echo of what had been said by Blackburn J in *Mersey Docks and Harbour Board v Gibbs*[99] who in turn adopted the language of Williams J in *Pickard v Smith*[100]. Williams J said that "no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment". But, he continued:

> "That rule is, however, inapplicable to cases ... in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned."

The language is consistent with the assumption of a particular responsibility referred to in *Kondis* and in *Burnie*. In *Burnie* that responsibility was held to arise from the central element of control exercised by the defendant.

In the present case the appellant undertook to have the stove repaired and engaged an electrician for that purpose. There is an analogy with *Meyers v Easton*. Unless the repairs were carried out with reasonable care and skill, there was a risk of serious injury, even death, to the occupants of the premises. That risk was reasonably foreseeable. "In the realm of negligence, causation is essentially a question of fact, to be resolved as a matter of common sense."[101] The negligence of the contractor was clearly a cause of the injury to the respondent.

It is true that the appellant was forbidden by law to do any of the work itself, other than through a licensed electrician. But that is no answer to the respondent's claim if there was a personal duty of care on the appellant. The prohibition applied equally to the occupiers. In any event a statutory obligation to employ a licensed electrician to effect electrical work does not modify a personal duty of care, just as in the case of an employer's duty to provide safe premises and plant for employees. Importantly, by statute there was implied in the tenancy agreement an obligation on the landlord to "maintain the dwelling-house in good tenantable repair and in a condition fit for human habitation"[102]. And in so far as the arrangement constituted a short term lease, there was an obligation on the lessor implied by statute to maintain the premises "in a condition reasonably fit for human habitation"[103].

20. Gaudron J also dismissed the appeal on similar reasoning:

> **It is now recognised that relationships which give rise to a special non-delegable duty to ensure that care is taken are marked by the central features of control, on the one hand, and vulnerability, on the other[126]. The relationship between a hospital and patient[127], between school authority and pupils[128], and employer and employee, in relation to the provision of a safe system of work[129], are examples. Control is also a central feature of the relationship that exists between occupier and invitee[130]. And as already indicated, because a landlord is in a position to control the state in which premises are leased, he or she is, at the beginning of a lease, in a position analogous to that of an occupier.**

21. Dawson and Kirby JJ held that the landlord did not owe a non-delegable duty of care. In doing so their Honours did not disagree with the concept of a special relationship giving rise to a non-delegable duty but rather that they refused to extend it to a landlord and tenant relationship in so far as the landlord ensuring that the electrical installation to the premises is safe. Their Honours held that the landlord had discharged his duty of care by engaging a competent independent contractor.

22. We think the learned trial Judge misapplied the relevant principle as held by the majority in **Northern Sandblasting Pty Ltd**. The installation of air conditioners was a central part of the tenancy agreement. Ultimately, and as a matter of practice, it was the responsibility of the landlord to have the installation checked and approved by the Electricity Authority. He is the person in control over the safety of the electrical installation. The learned trial Judge found as a matter of inference that the electrical contractor did not use the correct cabling and correct power point for the air conditioner in bedroom 2. His Lordship also concluded that the "electrical installation, i.e. the house wiring and the air conditioner in bedroom 2 was not safe".

23. We find that the landlord owed a non-delegable duty of care to his tenant in this case. He is responsible and liable for the negligence of his contractor. The appeal succeeds on these grounds.

GROUND 3

24. This Ground raises questions of public policy which we think is best left for the law-maker to decide.

GROUND 5

25. This Ground raises the question of whether the Electricity Act and Regulations give a tenant a private right of action against his landlord who commits a breach of those provisions. The learned trial Judge held that those provisions were breached. That finding is unchallenged. But His Lordship held that the provisions did not give the tenant a private right of action.

26. In **Kippion v Attorney-General** [1994] VUSC 1; Civil Case 120 of 1994 (1 January 1994), Mr Justice Downing of the Supreme Court of Vanuatu, although finding that there was no actionable breach of statutory duty in that case, said, for a plaintiff to succeed in a claim for breach of statutory duty he must show:

> **(a) the injury he has suffered is within the ambit of the statute.**
> **(b) the statutory duty imposes a liability to civil action.**
> **(c) the statutory duty was not fulfilled and**
> **(d) the breach of duty has caused injury.**

27. In **Butler (or Black) v Fife Coal Co Ltd** [1912] AC 149, the plaintiff was killed in a mining accident when he was overcome by carbon monoxide gas which had seeped into his work area. The provisions of the **Coal Mines Regulation Act**, 1887 (UK) imposed duties on the mine owner to conduct daily inspections of the mine before the miners went to work and to appoint a "competent person" to ascertain the condition of the mine and the presence of gas and general safety. The provisions provided that, if at any time it is found by the person for the time being in charge of the mine that by reason of inflammable gases prevailing the mine or for any cause whatever the mine is dangerous, every workman shall be withdrawn

and a competent person appointed for the purpose shall inspect the mine and make a report of its condition; and a workman shall not be readmitted into the mine until the same is stated by the appointed person not to be dangerous. It was found as fact that the seepage of poisonous gas should have been obvious to the mine managers but they failed to take steps to prevent it. The failure was in breach of the provisions of the Act. In deciding whether such failure could give rise to a claim for negligence for breach of statutory duty, the House of Lords said (per Ld Kinnear)[5]:

> **If the duty be established, I do not think there is any serous question as to civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in Atkinson v Newcastle Waterworks Co (1877) 2 Ex D 441 and by Lord Herschell in Cowley v Newmarket Local Board [1892] AC 345 solves the question. We are to consider the scope and purpose of the statue and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention. Therefore I think it is quite impossible to hold that the penalty clause detracts in any way from the prima facie right of the persons for whose benefit the statutory enactment has been passed to enforce civil liability. I think this has been found both in England and Scotland in cases in which the point was directly raised, the case of Groves v Lord Wilborne [1898] 2 QB 402 in England and Kelly v Glebe Sugar Refining Co (1893) 20 R 833 in Scotland**

See also: **Reg. v Dep. Gov. of Parkhurst, Ex p. Hague** [1992] 1 AC 146, 170

28. In the unreported decision of **Fero Tabakisuva v Sant Kumar and Eroni Tokailagi**, Civil Case No 12 of 1982 (delivered 30 July 1983) the Court of Appeal said:

> **As to statutory duty, the test of breach of duty is much stricter. It is not gauged by what a reasonable man would or would not have done; the statute or the regulation defines the required standard of conduct. What has to be determined is only whether the act complained of transgresses the provisions of the statute. Even then, no cause of action arises unless the plaintiff is among the class of persons whom the statute is designed to protect. In special classes of statutory duty, such as those created by legislation governing factories, or mines or similar places where regulations have been passed to require safety standards to be observed, it is not difficult to conclude that the worker is the person designed to be protected, and therefore he is the person to whom the duty is owed.**

29. We disagree with the learned trial Judge's finding that Electricity Act and Regulations did not give a tenant a private right of action against his landlord. These provisions regulate and ensure the safety of installations. Clearly, it can be easily seen that if they are breached, that is to say the installation is not safe or approved, the owner or occupier of the installation is likely to suffer loss. A tenant clearly falls with the class of persons that the provisions were designed to protect.

GROUND 6

30. The learned trial Judge accepted as unchallenged the Plaintiff's proof of quantum of $73,636 as the total value of all property and personal effects lost in the fire. His Lordship also found that special damages had been proved. The only special damages quantified in the statement of claim was $3,935.12 for alternative accommodation for about 3 weeks. The other special damages claimed were for sundry items purchased immediately after the fire and for travel and other expenses incurred as a matter of necessity. Mr Gounder had made an ex-gratia payment of $6,000 which Mr Murr said in his statement of claim would be taken into account in the final compensation amount. We have no doubt that special damages were incurred though not quantified. We think in the circumstances, we will not allow the claim for special damages.

COSTS

31. The Plaintiff is entitled to his costs in the High Court and in this Court. We think an award of $8,000 is a reasonable sum.

ORDERS

32. The Appeal is allowed. Judgement is to be entered in favour of the Appellant in the sum of $73,636.00.

33. The Respondent shall pay the Appellant's costs of ~~$8,000~~ $4,000 within 28 days.

Dated at Suva this 21st day of October 2010.

Hon. John Byrne, A.P

Hon. Sosefo Inoke, J.A

Hon. William Calanchini, J.A