In the Advice of the Suspension case the Supreme Court said that the advice suspending the start a medical practice should be recognized as an administrative disposal. And in the Land Readjustment case the Supreme Court amended the previous decision, which had said the rezoning plan of the land was merely a blueprint and therefore had not effect of invading the individuals' rights and interests, and then said the plan of the land readjustment constituted an administrative disposal.

3. Law of Property and Obligations

Sanwa Sogo-Kikaku Kabusikigaisya v. Cooperative of Obama Ekimae Department Store et al.

Supreme Court 2nd P. B., January 19, 2009
Case No. (ju) No. 102 of 2007
63 (1) Minshu 97; 230 Saikosaibansho Saibanshu Minji 57; 1475 Saibansho Jiho 5; 1862 Kinyu Homu Jijo 33; 1289 Hannrei Taimuzu 85; 2032 Hanrei Jiho 45; 1321 Kinyu Shoji Hanrei 58

Summary:

Where the lessee who had run a karaoke establishment at the space in the leased building was prevented from running the business at the establishment space due to the lessor's failure to perform the obligation to repair in connection with the flood that occurred at the establishment space, and suffered damage equivalent to business profits, under the factual circumstances shown in (1) to (3) below, it is unacceptable under the rule of reason, as of the time when this action was filed to seek compensation for damage from the lessor at the latest, that the lessee claims compensation from the lessor for the entire damage, without taking any measures to avoid or reduce the damage, such as reopening the karaoke establishment business at another place, and the damage suffered by the lessee after the time when the lessee is considered to have been able to take such measures cannot entirely be regarded as "damage which would ordinarily arise" set forth in Article 416, paragraph (1) of the Civil Code:
(1) even if the lessor performed the obligation to repair, it is difficult to

expect that the lessee could have maintained the lease contract for a long period of time because, by the time of the flood, the building had existed about 30 years since its construction, and it was in need of a major repair due to aging;
(2) the lessor manifested, immediately after the flood, the intention to cancel the lease contract by reason of aging of the building, and by the time when this action was filed, about one year and seven months after the flood, the plan to reopen the business at the establishment space had become a less feasible attempt; and
(3) there is no reason to think that the lessee's business of running the karaoke establishment at the establishment space cannot be carried out at places other than the establishment space, and in addition, the lessee received insurance money for the damage to the karaoke sets, etc. caused by the flood.

Reference:

Article 416, Paragraph (1) and Article 606, Paragraph (1) of the Civil Code

Facts:

(1) In this case, X, the plaintiff and appellee is a stock corporation which engages in businesses such as running a karaoke establishment. Y1, the defendant and appellant, is a business cooperative established under the Small and Medium-Sized Enterprise Cooperatives Act. On August 31, 1996, Y1 was dissolved by a resolution of a general meeting, and Y2, the defendant and appellant, who had been its representative director, assumed the office of liquidator of Y1.
(2) On October 1, 1967, Y1 constructed the building (hereinafter: the "Building"), and obtained ownership thereof. On March 5, 1992, Y1 leased to X a part of the Building which is on the first basement floor, for the term until March 4, 1993, at a monthly rent of 200,000 yen, for the purpose of using it as an establishment (hereinafter the part of the Building: the "Establishment Space" and this lease: the "Lease Contract"). The Lease Contract was subsequently renewed by extending the term from March 5, 1993, until March 4, 1994, and further extending the term of the lease expired from March 5, 1994, until March 4, 1995. The lease expired

on March 4, 1995. Despite this expiration, X continued to run the karaoke establishment at the Establishment Space, with no agreement on a further renewal being reached.

(3) In the Building, since around September 1992, floods frequently occurred at the Establishment Space, which were sometimes caused by toilet leaks on the third floor of the Building. However, the cause of floods was often not identified, such as the flood coming from the side of Room No. 7 at the Establishment Space.

(4) On February 12, 1997, due to defects or temporary failure of the control system of the drainage pump within the septic tank sump pit installed on the first basement floor of the Building, dirty water spouted out from points such the joint between the floor surface and the drain pipe of the wash basin installed at the side of Room No. 8 at the Establishment Space, and water also flowed from Room No. 7, causing the Establishment Space to be flooded 30 to 50 centimeters above the floor level (hereinafter: the "Flood"). On the first basement floor of the Building, dirty water also spouted out from the same place on February 17, causing the Establishment Space to be flooded to the same level. After the Flood, X was no longer able to run the karaoke establishment at the Establishment Space.

(5) Y1, by means of a document dated February 18, 1997, manifested to X the intention to cancel the Lease Contract by reason of the aging of the Building, etc. and demanded surrender of the Establishment Space. The said document reached X sometime around that date. Although Y2 had been requested by X, since immediately after the Flood, to repair the Building so that X would be able to reopen the karaoke establishment, Y2 refused to meet such request and demanded that X should leave the Establishment Space, arguing that the Lease Contract was cancelled instantly by such manifestation of a intention to cancell.

(6) In January 1997, an inspection company conducted an inspection of the Building to investigate the equipment and the conditions thereof in preparation for a major remodeling. The building diagnostics report prepared by said company stated as follows: (i) there is concern about the likelihood of an unexpected failure or other problems occurring to the power system, and an overall replacement is required so as to meet the power demand after the remodeling; (ii) the water supply system is as a

whole seriously eroded with rust and is likely to cause leakage if it is used in the current condition, and therefore it seems to be difficult to continue to use the system, including its accessories; (iii) as for the drainage system, the drain pipes are considered to be in need of an overall replacement, and other facilities such as wastewater pipes and tanks should be investigated upon remodeling, and repair, cleaning and other measures will be required according to the specifications thereof. Thus, prior to the occurrence of the Flood, the Building was in need of a major remodeling and equipment replacement due to aging, but the Building had not deteriorated to the extent that it would be difficult to use it even for the time being without an immediate major remodeling and equipment replacement, and the whole of the Building, including the Establishment Space, was not in an unusable state due to decay or similar reasons.

(7) X, since there was no hope of reopening the business at the Establishment Space, filed this principal action on September 14, 1998, to seek compensation for damage from lost business profits, etc., alleging that Y1 had the obligation to repair the Building so as to enable X to reopen the business (hereinafter: the "Obligation to Repair") but did not perform it. Against this allegation, Y1 denied the existence of the Obligation to Repair, and on September 13, 1999, Y1 manifested to X the intention to cancel the Lease Contract for reasons including X's non-payment of rents, and demanded surrender of the Establishment Space.

(8) On May 27, 1997, under the insurance contract concluded with A to cover equipment and fixtures, X received insurance money for the damage to the karaoke sets, etc. caused by the Flood, namely, 31,096,946 yen as insurance money for damage, 5,000,000 yen as insurance money for extraordinary costs, and 1,019,700 yen as insurance money for cleaning costs, none of which covered lost business profits.

(9) In this case, X filed this principal action to claim damages from Y1 for a default or warranty against defects, alleging that X suffered damage from the loss of business profits by being prevented from carrying out business in the Building due to the Floods, and also claimed damages from Y2 under Article 709 of the Civil Code or Article 38-2, paragraph (2) of the Small and Medium-Sized Enterprise Cooperatives Act (prior to the revision by Act No. 87 of 2005). Against these claims, Y1 made a counterclaim to seek surrender of the Establishment Space, etc. from X, alleging the

Lease Contract had been terminated by reason of cancellation.
(10) The court of prior instance dismissed Y1's counterclaim against X to seek surrender of the Establishment Space, etc., on the grounds that both of Y1's manifestations of the intention to cancel the Lease Contract were void, and partially upheld X's claim against the appellants to seek damages, holding as follows. (i) Y1 assumes the obligation to make necessary repairs in order to enable X to continue to use and profit from the Establishment Space as the lessee after the occurrence of the Flood, but failed to perform such obligations. Y2 was grossly negligent, as set forth in Article 38-2, paragraph (2) of the Small and Medium-Sized Enterprise Cooperatives Act, in performing his/her duties as Y1's representative in relation to the non-performance of the Obligation to Repair. (ii) Since X was unable to run the karaoke establishment at the Establishment Space since the day of the Flood, he/she is entitled to claim compensation for damage from Ys due to having lost the business profits that he/she could have earned during the period of four years and five months, from March 12, 1997, one month after the day of the Flood, until August 11, 2001, the last day of the period for compensation that X seeks, which totals 31,042,607 yen (7,028,515 yen per year).

Opinion:

Partially *quashed* and *remanded*, partially *dismissed*.
(1) Where the lessee of an establishment for a business use is unable to run business at the establishment due to the lessor's default, it is appropriate to construe that the lessee, by regarding any damage from the loss of business profits that he/she has suffered due to such impossibility to run business, as damage that would ordinarily arise from a default, is entitled to claim compensation from the lessor for such damage under Article 416, paragraph (1) of the Civil Code.
(2) However, according to the facts mentioned above, the following circumstances can be found in this case: (i) since around September 1992, floods frequently occurred at the Establishment Space, and the cause of floods was often not identified; (ii) by the time of the Flood, the Building had existed about 30 years since its construction, and although the Building, before the Flood occurred, had not deteriorated to the extent that it was unusable due to decay or similar reasons, it was in need of a

major remodeling and equipment replacement due to aging; (iii) Y1, by means of a document dated February 18, 1997, immediately after the Flood, manifested to the appellee the intention to cancel the Lease Contract by reason of the aging of the Building, etc. and demanded surrender of the Establishment Space, and then the appellee, since there was no hope of reopening the business at the Establishment Space, filed this principal action on September 14, 1998, about one year and seven months after the Flood, to seek compensation for damage from having lost business profits, etc. In view of these circumstances, even if Y1 performed the Obligation to Repair, it is difficult to expect that the appellee could have maintained the Lease Contract for a long period of time to use the Building, which was in need of major repair due to aging. Furthermore, it can be construed that by the time when this principal action was filed, about one year and seven months after the Flood, the plan to reopen the business at the Establishment Space had become a less feasible attempt for which there was no prospect as to when it could be accomplished. On the other hand, there is no reason to think that the appellee's business of the running the karaoke establishment at the Establishment Space cannot be carried out at places other than the Establishment Space. What is more, according to the facts mentioned above, the appellee received a total of 37,116,646 yen of insurance money on May 27, 1997, for the damage to the karaoke sets, etc. caused by the Flood, and in view of this, the appellee can be deemed to have acquired at least a considerable portion of the funds required for installing karaoke sets, etc. again.

Consequently, it is unacceptable under the rule of reason, as of the time when this principal action was filed at the latest, that the appellee claims compensation from the appellants for the entire damage, despite the fact that the appellee let him/herself suffer damage equivalent to the business profits that would have been expected from the Establishment Space, without taking any measures to avoid or reduce the damage such as reopening the karaoke establishment business at another place, and according to the interpretation of the phrase "damage which would ordinarily arise" set forth in Article 416, paragraph (1) of the Civil Code, we must conclude that in this case, the appellee is not allowed to claim compensation from the appellants for the entire damage equivalent to the business profits that would have been expected after the time when the

appellee is considered to have been able to take any measures as mentioned above.

(3) The court of prior instance, without examining matters such as when the appellee could have taken said measures or the scope of damage arising thereafter for which the appellee should be compensated, determined that the appellee was entitled to claim compensation from the appellants for the entire damage from the lost business profits for the period of four years and five months, from March 12, 1997, one month after the day of the Flood, until August 11, 2001, about three years after the filing of this principal action, while deeming such damage to have arisen from the breach of the Obligation to Repair. This determination of the court of prior instance is illegal for the erroneous interpretation of Article 416, paragraph (1) of the Civil Code, and such illegality apparently affects the judgment.

Editorial Note:

The rules on measure of damages for contract breach are laid down in Article 416 of the Japanese Civil Code. Paragraph (1) of Article 416 provides that "The purpose of the claim of the damages for breach of contract shall be to demand the compensation for damage which would ordinarily arise from the breach". And Paragraph (2) of Article 416 provides that "The obligee may also demand the compensation for damage which arise from any special circumstances if the party did foresee, or should have foreseen, such circumstances".

Since the 1950s, some scholars have argued that the duty of mitigation or the rule of avoidable consequences should be adopted also in Japan, as in the common law countries, because Article 416 of the Japanese Civil Code was written with reference to the rule of *Hadley v. Baxendale* in the common law. According to this view, if there is any possibility to avoid loss by making a substitute transaction, the claim would be allowed for the damages to compensate the price of the contract object at the moment when an obligee should have made a substitute transaction. One scholar further says that if a creditor could have avoided loss by making a substitute transaction, he/she should not be allowed to claim for specific performance at least in the case of sales, which has traditionally been considered always available to the obligee. However, those views have not

been dominant in academia or the practice of Japanese civil law.

It seems to be believed in legal academia that the Supreme Court has in this case adopted substantially the duty of mitigation or the rule of avoidable consequences, although it does not expressly say so. But there is some difference in that the Court relies on the rule of reason (*jori*), while scholars who argue for the duty of mitigation or the rule of avoidable consequences usually rely on Article 418 providing for comparative negligence. That is why some authors points out that the Supreme Court considers those rules as a general civil rule, which would apply not only in contract but also in tort cases.

Comparing with the present state of academia and legal practice, whether the decision of the Supreme Court above-mentioned is appropriate or not in the context of Japanese civil law is a difficult question. But even though it would be appropriate for the Supreme Court to adopt generally the duty of mitigation or the rule of avoidable consequences, there would be plenty of room for arguments about whether or not it is reasonable for the Court to apply those rules in this specific case indeed, because the case is a lease contract case where a substitute transaction is not always easily made like a scholar says.

This decision has an English text on the Homepage of the Supreme Court with a proviso that the translation is provisional and subject to revision. Since the above Summary and Opinion are extracts from it and Facts are drafted with reference to it, please refer to http://www.courts.go.jp/english/judgments/text/2009.01.19-2007. -Ju-.No..102.html for the details of the decision.

4. Family Law

Xs v. Ys
Supreme Court 2nd P. B., September 30, 2009
Case No. (*ku*) 1193 of 2008
61 (12) KATEISAIBAN Geppo 55; 1314 HANREI TAIMUZU 123