Privy Council Appeal No. 11 *of* 1965

Utah Construction & Engineering Pty. Limited and another – *Apellants*

v.

Janos Pataky – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH OCTOBER 1965

Present at the Hearing:
LORD REID
LORD MORRIS OF BORTH-Y-GEST
LORD GUEST
LORD PEARCE
LORD PEARSON
(*Delivered by* LORD GUEST)

This appeal raises a short but by no means easy point relating to the validity of a Regulation made in New South Wales under the Scaffolding and Lifts Act, 1912–1960.

The appeal is by leave of the Full Court of the Supreme Court of New South Wales from the order of the Full Court of the Supreme Court of New South Wales. By this order the verdict and judgment of Asprey J. in the Supreme Court in so far as it related to the second count of the respondent's declaration was set aside and a new trial ordered.

The action was brought by the respondent against the appellants in which he sought to recover from the appellants damages for injuries received by him whilst working as an employee of the appellants. In the first count the respondent alleged negligence at common law by the appellants as employers and in the second count the respondent alleged a breach by the appellants of a duty imposed upon them under and by virtue of the second paragraph of Regulation 98 which purported to be made under the Scaffolding and Lifts Act 1912–1960. Asprey J. found a verdict for the appellants upon both counts. Upon the hearing of the appeal from the judgment of Asprey J. brought by the respondent to the Full Court the respondent did not pursue his appeal in so far as it related to the verdict and judgment to the appellants on the first count of the declaration, that is on common law negligence. His appeal was allowed by the Full Court of the Supreme Court in so far as it related to Asprey J.'s verdict and judgment on the second count of the declaration and a new trial was ordered.

The question arising upon the appeal is whether the second paragraph of Regulation 98 made under the Scaffolding and Lifts Act 1912 (as amended) is a valid exercise by the Governor of New South Wales of powers granted by the Act to him to make Regulations.

The appellants were contractors engaged on tunnelling operations as part of the works known as the "Snowy Mountains Scheme" carried out in the Snowy Mountains region. The respondent was employed as an Assistant Surveyor by the appellants in a tunnel which was in course of construction. The respondent met with an accident on 7th July 1962 whilst working at or near the face of a tunnel being constructed into a mountain when a rock fell from the roof of the blasted out area upon the respondent.

The procedure for the excavation of the tunnel followed a regular cycle of operations described in detail by Asprey J. It is only necessary to say that after the blasting operations the miners " bar down " with steel bars from the tunnel roof and sides the blasted out area of loose rock. When this has been done a mucking machine is brought into the tunnel and the muck pile which consists of rubble on the tunnel floor is removed by the mucking machine and placed in trucks by which means it is taken back out of the tunnel. After these operations are completed the Assistant Surveyor goes to the face and marks the face of the tunnel where drill holes are to be made for the laying of explosives when the cycle is repeated. It was when he was engaged on this operation that the respondent met with his accident.

Asprey J. held that there was no evidence to show that the barring down had not been done efficiently or that it had not been properly supervised.

At the trial counsel for the respondent tendered the second paragraph of Regulation 98 made under the Scaffolding and Lifts Act 1912–1960 which reads as follows:—" 98 . . . . Every drive and tunnel shall be securely protected and made safe for persons employed therein . . . . " Asprey J. rejected the tender of this regulation on the ground that it was *ultra vires* of the Scaffolding and Lifts Act, 1912. Before the hearing of the respondent's appeal to the Full Court from Asprey J.'s verdict, the Full Court in *Scarlett v. Utah Construction and Engineering Pty. Limited* 82 W.N. (N.S.W.) 74 had dismissed a demurrer taken by the defendant in that case to a count in a declaration based upon a breach of the duty imposed by the second paragraph of Regulation 98 and thus upheld the validity of the Regulation.

It was conceded by counsel for the appellants upon the hearing of the appeal before the Full Court that the decision of Asprey J. in rejecting the tender of Regulation 98 could not stand if the Full Court saw fit to follow the previous decision of the Full Court in *Scarlett*'s case. In the result the Full Court followed the decision in *Scarlett*'s case and allowed the respondent's appeal and held that Regulation 98 was *intra vires*. The present appeal is in effect an appeal against the decision in *Scarlett*'s case.

The Scaffolding and Lifts Act, 1912–1960 contains provisions relating to " excavation work " since an amendment to the principal Act effected by Act No. 38 of 1948. " Excavation work " is defined in Section 3 as follows:—

> " ' Excavation work ' includes any work in connection with:—
>
> (*a*) excavating for or preparing foundations for a building or structure,
>
> (*b*) tunnelling,
>
> (*c*) the sinking or digging of any shaft or well, and
>
> (*d*) excavating for water, sewerage, drainage, gas or electricity supply;
>
> but does not include an excavation less than five feet in depth measured from the top of the excavation."

The words " Tunnelling " and " Tunnel " are not defined. References to " excavation work " occur in Section 4A(*b*), 6, 6A, 13, 15, 18 and Section 19(*c*) and 22. The only Section of the Act relied upon by the respondent and the Full Court in considering the validity of the second paragraph of Regulation 98 was Section 22. No other provision of the Act gives any power to make Regulations and no Section of the Act by itself imposes any duty to carry out the provisions of the Regulations. So far as is material this Section is as follows:—

> " 22(1). The Governor may make regulations not inconsistent with this Act prescribing all matters which are required or authorised to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act.
>
> (2) Without limiting the generality of the powers conferred by sub-s. (1) of this Section, the Governor may make regulations . . . .
>
> (*g*) relating to . . . .
>
> (iv) the manner of carrying out building work, excavation work or compressed air work;

(v) safeguards and measures to be taken for securing the safety and health of persons engaged in building work, excavation work or compressed air work, or at or in connection with conveyors, cranes, hoists, lifts, plant, scaffolding or gear; . . . . . .

(4) A regulation may impose a penalty not exceeding One hundred pounds for any breach thereof."

Before the Full Court section 22(1) of the Scaffolding and Lifts Act, 1912–1960 was rejected as affording validity for Regulation 98. In their Lordships' view the Full Court were right in so doing. It was contended that Regulation 98 could be justified as being within the power to make regulations under section 22(1) for prescribing all matters which are necessary or convenient to be prescribed for carrying out or giving effect to the Act. The only section which, it was argued, it was necessary to give effect to by Regulation 98 was section 15. Their Lordships have no hesitation in rejecting this contention. Section 15 *inter alia* gives power to an Inspector where it appears to him that the manner of carrying out any excavation work would be dangerous or that regulations in regard to excavation work are not being complied with to give such directions to the contractor as he thinks necessary to prevent accidents or to ensure compliance with the Regulation. The person directed must carry out the direction under pain of a penalty for non-compliance. The person directed is given a right of appeal to the Minister. By no possible stretch of imagination could Regulation 98 be justified by section 22(1) read in conjunction with section 15. Their Lordships adopt with approval the statement in the judgment of the High Court of Australia in *Shanahan v. Scott* 96 C.L.R. 245 at p. 250 relating to the construction of a provision similar to section 22(1) of the Scaffolding and Lifts Act 1912–1960 to the following effect:—

" The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends."

Their Lordships now pass to section 22(2)(*g*)(iv) and (v). Sub-paragraph (iv) empowers the Governor to make regulations " relating to the manner of carrying out excavation work ". The relevant portion of Regulation 98 provides " Every drive and tunnel shall be securely protected and made safe for persons employed therein ". The expression " manner of carrying out " the work plainly envisages a system of working and does not in their Lordships' view justify a regulation imposing an absolute duty of protecting the drive and tunnel or an absolute duty of ensuring the safety of persons employed in the drive or tunnel. The relevant portion of Regulation 98 does not prescribe the manner of doing the work. Sub-paragraph (iv) therefore cannot in their Lordships' opinion empower the making of the relevant portion of Regulation 98.

A more difficult question is whether the relevant portion of Regulation 98 is authorised by Section 22(2)(*g*)(v) which empowers the Governor to make regulations " relating to the safeguards and measures to be taken for securing the safety and health of persons engaged in excavation work ". The appellants argued that the power conferred by this paragraph related only to the means for achieving an end and not to the creation of the end itself. In other words that the sub-paragraph did not authorise a regulation prescribing that a tunnel must be safe but authorised only regulations stating specific means which persons bound by the regulation were required to adopt. Their Lordships are of opinion that these arguments are sound. First as to " safeguards ", this indicates some provision of a material kind whereby the place is made safe and which can be specifically stated. The expression " measures to be taken for securing the safety of persons " may be wider. But if the question is posed by the contractor " What measures am I to take ? " the answer must be that he is not told what measures he is to take. He is directed to secure the

safety of persons engaged in the work. But this is merely echoing the words of the section. In truth Regulation 98 does not by its terms promote the safety of persons employed. The Regulation, so far as applicable, merely restates the common law but in a form which the respondent contends imposes an absolute duty on the contractor which he is bound to comply with whether he can do it or not under pain of a penalty and civil liability for non-compliance. Their Lordships observe that doubts whether Regulation 73(3) creates a statutory duty breach of which gives rise to a right of action were expressed by Windeyer J. in *General Constructions Pty. Ltd. v. Peterson* (1962) 108 C.L.R. 251 at p. 257 which were shared by Brereton J. in *Storozuk v. Commissioner for Railways* [1963] S.R. (N.S.W.) 581 at p. 593. The relevant portion of Regulation 98 does not in their Lordships' view fall within the powers conferred by Section 22(2)(*g*)(v). It is in their Lordships' view *ultra vires* and therefore invalid.

It follows that *Scarlett*'s case was wrongly decided and Asprey J.'s judgment in the present case must be restored. The effect of such a decision on the case of *Australian Iron and Steel Limited v. Ryan* (1956) 97 C.L.R. 89 was canvassed in the course of the argument. In that case the High Court of Australia held that Regulations 73(2) and (5) were within the power conferred by section 22(2)(*g*)(v) of the Scaffolding and Lifts Act 1912–1948 (N.S.W.). Regulation 73 provides:—

> " 73. Any person who directly or by his servants or agents carries out any building work shall take all measures that appear necessary or advisable to minimise accident risk and to prevent injury to the health of persons engaged in such building work and for this purpose, without limiting the generality of the foregoing, he shall—
>
> (1) .....
>
> (2) provide and maintain safe means of access to every place at which any person has to work at any time;
>
> (3) .....
>
> (4) .....
>
> (5) keep all stairways, corridors and passageways free from loose materials and debris, building materials, supplies and obstructions of every kind;
>
> ..... "

In so far as the decision affects the validity of Regulation 73(5) their Lordships consider that the decision of the High Court is sound. Regulation 73(5) prescribes that stairways etc. are to be kept free from obstructions of all kinds. This is a definite measure or step to be taken by the contractor and may fairly be regarded to come within the powers of section 22(2)(*g*)(v). So far as Regulation 73(2) is concerned the argument sustained by their Lordships in the present case does not appear to have been presented by Sir Garfield Barwick, as he then was, appearing for the appellants. His argument, so far as appears in the report, was that Regulation 73 was invalid on the ground of uncertainty. It is true that in his judgment Williams J. pronounces generally upon the validity of Regulation 73(2) and (5), but Kitto J. refers expressly to the argument on uncertainty. Apart from these considerations, however, their Lordships observe that the opening words of Regulation 73 are not to be found in Regulation 98. The safety measures which are to be taken under Regulation 73 are such as " appear necessary to minimise accident risk ". If therefore the provision of a safe means of access to a place of work appears necessary to minimise accident risk in *Ryan*'s case their Lordships would think that the result of the case was justified and the decision is distinguishable from the present case. Moreover upon the facts of the case, breach of Regulation 73(5) would have been sufficient for the plaintiff to succeed. If, however, the opening words do not apply, then it would appear doubtful whether *Ryan*'s case so far as Regulation73 (2) is concerned can stand with the present decision.

Their Lordships' decision on the validity of Regulation 98 makes it unnecessary to consider the remaining points argued for the appellants. If the Regulation does impose an absolute liability, it is no objection that it is

imposed in a Regulation and not by statute. There are numerous examples of Regulations imposing absolute liability. On the question whether Regulation 98 gives a cause of action to a person engaged in excavation work who is injured by its breach and imposes civil liability upon the contractor in the event of breach their Lordships have no hesitation in saying that the decision in *Ryan* on this point was sound. This follows a long line of authority in England which it is unnecessary to restate.

Upon the whole matter their Lordships will humbly advise Her Majesty that the order of the Full Court of the Supreme Court of New South Wales dated 17th March 1965 should be set aside and the judgments of Asprey J. dated 2nd March 1964 and 24th June 1964 restored. The respondent must pay the costs before the Full Court and, in accordance with the undertaking given by the appellants on the granting of leave to appeal to this Board, the appellants will pay the costs of this appeal.

(92739) Wt. 8052/124 90 10/65 Hw.

In the Privy Council

UTAH CONSTRUCTION & ENGINEERING PTY. LIMITED AND ANOTHER

v.

JANOS PATAKY

DELIVERED BY

LORD GUEST

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