



JUDICIAL COMMITTEE OF THE  
IN THE PRIVY COUNCIL No. 23 of 1968

ON APPEAL FROM THE FEDERAL  
COURT OF MALAYSIA

B E T W E E N

LEONG BEE & CO. (suing as a firm) Appellants

-and-

LING NAM RUBBER WORKS (sued as a  
firm) Respondents

CASE FOR THE APPELLANTS

Record

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1. This is an appeal from a judgment of the Federal Court of Malaysia (Ong F.J.Aslam Shah J. and Ahmad J.) dated 26th January 1968 which allowed with costs the Respondents appeal from a judgment of the High Court in Malaya at Johore Behru (Azmi J.) dated 1st October 1966, whereby the Appellants had been awarded \$87,135.82 damages for negligence and costs

pp.94-101

pp.72-78

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2. The Appellants, in their statement of Claim dated the 15th April, 1964, claimed damages for destruction by fire of their premises at 85A Jalan Scudai, Tampoi, Johore Behru, which adjoined premises owned and occupied by the Respondents at 73-79 Jalan Scudai, on which a fire broke out on 2nd February 1964. Damages were claimed by reason of the strict liability of the Respondents for the escape of a dangerous thing, and alternatively under six heads of negligence, of which the first three alleged negligence in relation to the state of the premises before the fire started, and the last three alleged negligence in permitting the fire to spread to the Appellants' premises. The defence, apart from admitting the fire, denied all the material allegations.

pp. 3-5

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pp. 5 -6

3. The trial of the action in the High Court in Malaya at Johore Behru lasted for six days between the 1st March and the 8th August, 1966.

Record

Expert evidence was called for the Appellants to establish that the fire had started on the Respondents' premises which was a rubber factory, which had contained various objects of inflammable material, including rubber and heavy oils, and that the fire had spread to the Appellants' premises, which were a store for motor spares. The experts had not been able to establish the cause of the fire but a fire officer said that it might have one of two possible causes, a burning cigarette end or an electrical short circuit; the witness said that he had arrived at 5.44 a.m., when the fire had got out of control; it had probably started as a small fire about an hour before, and would have been burning vigorously for half an hour. No alarm had been received from the watchman at the factory; after the fire the firemen had found one fire extinguisher in the factory, which had not been used. The same witness said that in his view all the buildings were fire hazards. Detailed evidence was then given of an extensive valuation of the Appellants goods which had been damaged by the fire.

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4. The Respondents called a machinery expert who had inspected and approved electrical machinery at their premises; a public health inspector was also called who had approved the premises; and a licence to carry on the factory, from the local authority, was proved; a partner in the firm said that at the material time the only process carried on in the factory was vulcanising at a temperature of 300°. Work was stopped at 9 p.m. and the only person on the premises at night was the watchman. T.P.Bart, the watchman, gave evidence and said that he had been lying awake inside the office at about 5 a.m. when he had heard a shout from outside the factory to the effect that fire had broken out; he had got up and run into the factory next door and saw the fire in an advanced state with the roof already falling in; his duties as a watchman on the premises required him to make periodical rounds at night to see that there was no thief and no fire on the premises.

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5. Judgment was given by Azmi, J. on 1st October, 1966, when he awarded the Appellants damages of ₹87,135.82 and costs.

Record  
pp.72 - 78

10 Azmi J. began his judgment by saying that both counsel had agreed that although nuisance had not been separately pleaded, a claim under that head was open to the Appellants; he then found, on the evidence, that the fire had started in the Respondents' premises. On the issue of nuisance, the chemist called by the Appellants had stated in his report that he had found certain substances near the origin of the fire, some of which were inflammable, but, on the facts, the learned judge said, the Appellants had failed to prove a case of nuisance; he found as a fact that the Respondents' buildings, perhaps not the best kind for the purpose, had been approved by the local authorities, who had placed certain conditions which appeared to them to provide sufficient safety measures. The claim based on nuisance would be dismissed.

20 6. As to the claim in negligence, the learned Judge held that there was no negligence arising from the condition or use of the premises at the time of the fire, and went on to consider the allegations that the spread of the fire to the Appellants' premises had been due to the negligence of the Respondents or their servants. He said:-

30 "On this question I think the following evidence would be relevant. The defendants employed D.W.3. as a watchman who in my view was incompetent. I accept his evidence that he was there the whole night because on this ground the plaintiffs did not try to dispute but I feel considerable doubt that he was really awake during the part of the night and early next morning. I accept the evidence of both the experts called by the plaintiffs that the fire must have originated some hours before it was discovered which would have meant that the fire started in a small way until the rubber materials became affected. If the jaga had really been awake I feel sure

p.74 1.18

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Record

that he would have become aware of the burning by the powerful smell the burning rubber must have produced. An ordinary watchman would have noticed this powerful smell. Again, fire extinguishers were provided but I accept the evidence of the fire officers none of them had been used. The jaga also failed to telephone the police or the fire engine when he easily could have done so on the office telephone where he said he was lying all night. If he had been a younger man or a more suitable person and less excitable I am sure that he could have telephoned either the police or the fire brigade long before the fire had developed and destroyed the defendants' premises I am also sure that the jaga had no knowledge of how to deal with a case of fire. I would therefore say that the plaintiffs succeed under particulars (iii), (iv) and (v)!" 10 20

The learned judge then went on to consider damages and accepted the evidence of the Appellants that their goods had been damaged to the value of \$100.159.79, but that this figure had been based upon selling prices; as he understood from the Appellants' pleadings that they were asking for loss due to the damage to the property but not due to loss of profit from the sale of the goods, that figure would be reduced by 15%, the difference given in evidence between cost and sale prices. There would be judgment for the Appellants for \$87.135.32. 30

7. The Respondents appealed to the Federal Court of Malaysia against the findings that they had been negligent and upon the question of damages. The Appellants cross-appealed upon the finding that the Respondents had not been guilty of nuisance or negligence in relation to the use or condition of the premises, and upon the amount of damages awarded. 40

8. The appeal was heard in the Federal Court (Ong, F.J., Azlam Shah, J. and Ahmed J.) on the 11th October 1967. Counsel for the Respondents was stopped soon after beginning his argument, and argument was heard only on the issues of

liability and not on the questions relating to damages.

Record

9. Judgment was given by the Federal Court on the 26th January, 1968, allowing the appeal and reversing the judgment of Azmi J.

pp.94-101

10 The single judgment was given by Ong, F.J. After summarising the facts, he said that nuisance and negligence were claimed as grounds for liability; the two torts should not be confused, but there was one common feature of liability necessary in each, that of the foreseeability of the damage. The trial judge had made a finding, that there was no nuisance; that finding implied that he was satisfied not only that the conditions laid down as to safety measures were sufficient to remove all foreseeable hazards but also that the Respondents had complied with those conditions. It was therefore surprising that the trial judge took a  
20 contrary view of the Respondents liability in negligence which implied foreseeability of the event causing damage. After quoting the material part of the judgment, Ong, F.J. said that there was a manifest self contradiction in the trial judge's judgment which made it necessary to consider the question of negligence again. The trial judge had not drawn any distinction between the fault of the Respondents themselves and the fault of the watchman. Taking the liability  
30 of each separately, it was not foreseeable even as a remote possibility that the factory would catch fire at night. As to the watchman, assuming that he was sleeping, the material question was whether, when he awoke, he could have done anything to subdue the fire. Unless this was shown, his only fault was to fall asleep; there was no evidence that he could have reached a fire-extinguisher when he was aroused. The fact that the fire was unfore-  
40 seeable at that time of night must be conclusive in negating any negligence by the Respondents or their servants; for the same reason the claim in nuisance also failed. The appeal would be allowed and the judgment of the trial judge would be set aside.

10. The Appellants respectfully submit that

Record

the judgment of the Court of Appeal was wrong and ought to be reversed. It is submitted that the judgment of the Court of Appeal was wrong in the ground it stated for disregarding the judgment of the trial judge, namely that he had contradicted himself upon the question of foreseeability; it is submitted that there was no such contradiction. Upon the issue of nuisance the question argued and upon which evidence was led was whether there had been such a misuse of the Respondents premises so as to give the Appellants a cause of action, and no issue arose as to foreseeability. As the trial judge held that there had not been a misuse of the premises the question of foreseeability did not arise in relation to nuisance, and he did not purport to consider it. Further, the Court of Appeal have been led to a wrong conclusion by failing to consider what the subject matter of foreseeability was in each case. In relation to nuisance and particulars (i), (i) (a), and (ii) of negligence claimed by the Appellants, what had to be foreseeable was the likelihood of fire breaking out, whereas in relation to the remaining particulars of negligence (on which the trial judge made findings favourable to the Appellants), what had to be foreseeable was whether, a fire having started on the Respondents' premises, that a fire would spread to the Appellants premises. In the latter case, it is respectfully submitted that it is almost unarguable that such a course was not foreseeable; both sets of premises were largely wooden buildings containing combustible materials, and they were only a few feet apart, as Exhibit P2A shows. Even in regard to the former test, in relation to the foreseeability of a fire breaking out at all, it is submitted that the evidence given at the trial established that the Respondents had fully considered that a fire might break out on the premises and had purported to take precautions against it by installing a watchman one of whose duties was to make regular inspections for fire, installing fire extinguishers and forbidding smoking on the premises. It is respectfully submitted that the events causing damage were clearly foreseeable both in relation to nuisance and to all the

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p. 130

heads of negligence put forward.

Record

11. It is submitted that the findings of negligence of Azmi, J., were correct for the reasons given by him and that they should be restored. It is further submitted that Azmi J. and the Court of Appeal ought to have found in favour of the Appellants upon heads (i), (i) (a) and (ii) of the particulars of negligence pleaded and upon the ground of nuisance. The  
10 evidence established that the Respondents had used unsuitable premises as a rubber factory, had kept unsuitable materials there, and had kept the premises in an unsuitable condition, any of which, once a fire broke out, materially increased the risk of the fire spreading to the Appellants premises. The fact that the use of the factory had been licensed by the local authority was not conclusive against the  
20 Appellants, and the balance of the evidence was against the Respondents.

12. It is further submitted that the learned trial judge misdirected himself in deducting 15% from the proved cost of the loss of the Appellants property. The Appellants never limited their claim to the cost price of their property; it was expressly argued, and  
30 correctly it is submitted, that they were entitled to damages for loss of profit on damaged goods, and the Appellants ought to have been awarded the full amount of their proved loss.

13. The Appellants therefore respectfully submit that this appeal should be allowed, with costs, that the judgment of the Court of Appeal should be set aside, and that judgment should be entered in their favour for the full amount of their proved loss, for the following, among other

REASONS

- 40 1. BECAUSE the fire was started by the negligence of the respondents and their servants.
2. BECAUSE the fire spread to the Appellants premises by the negligence of the Respondents and their servants.

Record

3. BECAUSE the outbreak of the fire was foreseeable by the Respondents and their servants.
4. BECAUSE the spread of the fire to the Appellants' premises was foreseeable by the Respondents and their servants.
5. BECAUSE the Respondents had caused a nuisance
6. BECAUSE Azmi, J. misdirected himself over the proper basis of damages to be awarded to the Appellants.
7. BECAUSE of the grounds on which Azmi, J. found that the Respondents were negligent.

MERVYN HEALD.



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