

Industrial Chemical Co. (Ja.) Limited

Appellants

v.

Owen Ellis

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 17TH MARCH 1986

Present at the Hearing:

LORD BRIDGE OF HARWICH

LORD TEMPLEMAN

LORD MACKAY OF CLASHFERN

LORD OLIVER OF AYMERTON

LORD GOFF OF CHIEVELEY

[Delivered by Lord Oliver of Aylmerton]

This is an appeal from a judgment of the Court of Appeal of Jamaica (Carey, White and Ross JJ.A.) delivered on 1st March 1985 allowing an appeal by the respondent, Owen Ellis, from the dismissal by Bingham J. in the Supreme Court of Jamaica on 16th January 1984 of the respondent's claim against the appellants for damages for personal injury sustained by the respondent in the course of his employment and directing that judgment be entered in his favour for a sum of \$151,320.00 and costs.

The appellants are, and were at all material times, the owners and operators of a chemical plant in Spanish Town, Jamaica, at which they manufactured, among other chemical products, sulphuric acid. The respondent, who is a man of good education with a Diploma in Engineering, was first employed by the appellants in June 1975 and, after a three month period as a trainee operator, was appointed to the post of Acid Plant Operator which he held at the date of the accident giving rise to the action. On 13th December 1978 it became necessary for him, in the course of his employment, to open a valve on a reserve tank through which sulphuric acid was being pumped. Whilst he was performing this operation the

spindle of the valve snapped and sulphuric acid gushed out under pressure. Apart from boots, gloves and a helmet, the respondent was wearing no protective clothing and he suffered severe burns on his arms, legs and the upper part of his body. It is not in dispute that his injuries were extremely serious and it is no part of the appellants' case that, given liability on their part, the damages awarded by the Court of Appeal were excessive. The argument before their Lordships has centred entirely on the question of whether the trial judge having, on conflicting evidence, found the facts in the appellants' favour, the Court of Appeal could properly conclude from the judge's notes of the evidence given before him, that he had misdirected himself on the facts in finding that the appellants had made out their defence and substitute their own contrary findings.

In considering this question it may be convenient first to set out the undisputed background facts before going to the pleaded case and the conflicting evidence recorded by the judge and his conclusions upon it.

The appellants' plant is a highly automated one, the operation of which is controlled by the Plant Operator from a control room from which he is able to control the operation of the pumps and to monitor, by means of gauges, the performance of the plant. The control room adjoins or is near to what was described by the judge in his judgment as "the danger area" where the acid circulation tanks are situated. In the ordinary way the plant is in operation twenty-four hours a day, seven days a week, and four Plant Operators are employed on successive eight-hour shifts. Normally it is not necessary for the Plant Operator to leave the control room, except in circumstances where the gauges indicate some malfunction or when, for any reason, the plant has had to be shut down and it becomes necessary to manipulate the valves on the circulation tanks during the process of closing down or re-starting.

Adjoining or near to the danger area safety showers are provided and it is a clear rule of the appellants which is brought to the notice of the employees and, in particular, of Plant Operators (who are also Supervisors), that anyone entering the danger area must wear acid protective clothing. There is in fact a notice at the foot of the stairs leading to the danger area which reads "Caution. Acid protective clothing must be worn in this area".

Regulation 76(b) of the Factories Regulations 1961, made under section 12 of the Factories Act, provides that:-

"There shall be provided and maintained in good condition ... suitable protective clothing including overalls, aprons, gloves, gauntlets, face shields and boots for the use of persons required to handle acids or other corrosive substances in the course of their work."

A correlative duty is cast on an employee by Regulation 79 of the same Regulations that "Where any means or appliance for securing safety is provided for the use of any such person" (i.e. a person employed in any factory) "he shall use the means or appliances".

As will be seen, there was a critical conflict at the trial between the appellants' and the respondent's witnesses as to whether such protective clothing was provided or available to the respondent at the time of the accident, but it was not in dispute that the appellants did normally have available protective equipment consisting of safety boots, a face shield, a safety helmet, safety gloves and an acid protective suit comprising a jacket and pants. The unchallenged evidence of Mr. Markes, the appellants' Plant Manager at the time of the accident, was that, whilst acid could burn through the safety suit, it would not do so in under five minutes and that the suit would offer complete protection for sufficient time for the wearer to get under the safety shower and wash away contaminating material.

The accident which caused the respondent's injuries occurred at about 1.55 p.m. on 13th December 1978 towards the end of his shift. There had been intermittent periods of dislocation prior to the commencement of his shift as a result of a failure in the water supply system, so that the plant had had to be closed down. When the water supply was restored it was necessary to re-start the plant. The respondent started the circulation pumps from the control room but noticed that number two pump had a pin hole leak. He therefore shut that pump down and started a third pump which was connected to a reserve circulation tank. Once the pump was priming, so that pressure was building up, it was necessary for him to go into the danger area to open the valve of the reserve tank and it was during that operation, which, as already observed, was carried out without a protective suit, that the accident occurred. The valve concerned was one which had been fitted about three months before the accident. It was not in dispute that it was supplied by reputable specialist manufacturers as a complete unit which did not require to be assembled by the maintenance staff on fitting. Once fitted the only part of it which was visible on external examination was the valve handle and the spindle to which it was attached and which is

fastened internally to the valve gate. The spindle is protected from corrosion by a gland and no leakage had been detected prior to the accident. Nevertheless the spindle broke away from the gate and subsequent inspection revealed that it had been severely corroded by acid.

Although in the endorsement on the writ the respondent claimed damages for negligence and breach of statutory duty, the Statement of Claim made no reference to any statutory duty but claimed only that the accident was caused by the appellants' failure to maintain the valve and to ensure that it was in working order. The Defence denied negligence but pleaded in any event that the accident was due entirely to the respondent's own negligence in failing to wear the protective clothing issued to him and in failing himself to inspect the valve. There was an alternative plea of contributory negligence. The Reply denied specifically any failure to wear protective clothing or to inspect the valve (thus, in effect, raising a positive case) but went on to allege (in paragraph 3) that no protective clothing apart from a pair of short gloves was supplied or available and (in paragraph 4) that the appellants had installed the wrong type of valve, that is to say, an ordinary valve instead of an acid valve.

Thus, as the learned trial judge observed, the respondent's real case - that no protective clothing was supplied - was raised in reply. An application at the trial to amend the Statement of Claim by including in it the same allegation was refused. This seems curious since, as the learned judge appreciated, that was the critical issue and one which could hardly, at that stage, have taken the appellants by surprise. But nothing in fact turns on this, since the judge received evidence from both sides with regard to the issue and dealt with it fully in the course of a very clear and careful judgment. Since in the event this emerged as the critical issue of fact upon which the respondent's claim hinged, it may be convenient to dispose first of the alternative case based upon the defective valve. In fact the respondent did not seek to support the case pleaded in the reply that the wrong type of valve had been fitted but concentrated instead upon attempting to establish a case that had never been pleaded, namely, that the valve had been fitted without a gate. That was rejected by the learned judge after hearing the evidence on grounds which appear to their Lordships to be wholly convincing, and although his rejection of it was formally included as one of the grounds in the Notice of Appeal, it was not dealt with by the Court of Appeal in its judgment.

In fact the circumstances in which the spindle became corroded figured very little in the evidence. No technical evidence was called on behalf of the respondent and the only evidence before the judge was that of Mr. Markes, a former Plant Manager, Mr. Harding, the Safety Officer at the time of the accident, and Mr. Laidlaw, the Mechanical Supervisor. Mr. Markes' evidence was that the plant was subject to periodic checks, some weekly, some monthly; that the valve concerned had been supplied by specialist manufacturers of very high reputation pursuant to an order specifying its use for sulphuric acid and stating the relevant conditions of concentration and temperature; that it had been installed three months before the accident and that breakdown in so short a period was unusual, the normal lifespan of such a valve being at least a year. In cross-examination his evidence was that an inspection to see whether the valve conformed to specification would have been impracticable and that no leakage indicating eating away at the spindle had been reported to him. Mr. Harding's evidence was that he was not merely surprised but shocked at the extent to which the spindle had been eaten away. Finally, Mr. Laidlaw's evidence was that the valve, when fitted, was a new one taken from the stores; that there was nothing unusual about it when examined prior to fitting; that there were no complaints about it either from the mechanics who fitted it or from the operators; and that, on inspection after the accident, the gland was found to be in perfect condition.

The judge's conclusions on this part of the case were expressed as follows:-

"From the evidence and the law applicable, therefore, it is my opinion that the presumption of negligence raised upon the pleadings and on the part of the defendant due to the sudden malfunctioning of the discharge valve which caused sulphuric acid to gush out injuring the plaintiff, has been successfully countered by evidence from the defendants which establishes on a balance of probability that they took all reasonable care both in the operations at their plant, by their method of selecting competent management personnel such as Roy Harding and Thomas Markes and in the procuring of proper machinery and equipment to protect their workers including the plaintiff.

The fact that the defendants delegated the duty of providing their plant with proper equipment, in particular the discharge valve in question, would not *ipso facto* absolve them from liability unless the defect which caused the injury to the plaintiff was a latent one, and one which the defendants taking all reasonable care could not

have foreseen. Having regard to the fact that the manufacturer Cranes was a reputable one and the evidence of the plaintiff that when installed it was not possible to see the gate on the valve and the fact that the said valve had been in service for only three months, there was nothing on the face of it which would have placed the defendants upon enquiry that there was anything wrong with the valve in question. The loosening away of the spindle from the gate has to be seen therefore in the light of all the evidence as a defect in the manufacture of the valve by the manufacturer Cranes, a defect which having regard to the position of the gate was a latent one and one which the defendants taking all reasonable care could not have foreseen, and for which they were not responsible for the resulting injury to the plaintiff."

It is not entirely clear to their Lordships how far, in reversing the decision of the trial judge, the Court of Appeal differed from him as regards this part of the case, for they dealt with it almost parenthetically in the course of a consideration of what they acknowledged to be the critical issue of the provision of proper safety equipment for the carrying out of what was acknowledged by the respondent and his supporting witness to be an inherently risky operation. Although the Court appears in this passage to be somewhat critical of the approach of the trial judge they themselves express no clear conclusion on the matter and their decision turned, as their Lordships read it, entirely upon the view which they formed that the evidence before the trial judge showed positively that no proper safety equipment was supplied or available to the respondent. They remarked upon the absence of technical evidence in the following passage:-

"We would observe that no evidence whatsoever was called to explain the reason for this unfortunate accident. No technical evidence was given, for example, of tests carried out on the faulty valve after the accident, and the results of such tests. There was no satisfactory evidence of whether the valve installed satisfied the relevant specifications. It seemed to be thought adequate proof of a safe system of work to say that the firm which supplied the valve was a reputable one. From the answers given by the two senior officers of the company and which have been noted earlier in this judgment, no satisfactory checks or monitoring system appeared to be in place. Subsequent to the accident we would have expected that some inquiry would have been held. If one were held its results have not so far been made known."

Whilst this appears to be critical of the trial judge's approach, the following passage from a later part of the Court's judgment seems to indicate that, whether critically or not, they accepted his conclusion at any rate to the extent of agreeing that the burden lay upon the respondent to establish negligence:-

"At the hearing of the appeal the parties raised other matters such as whether this was a case where there was a latent defect which caused the accident, but as we observed there was no evidence on which to decide this point although the judge came to that conclusion. The doctrine of *res ipsa loquitur*. it was suggested, applied to the circumstances of this case. But on this we did not agree and need say no more about it."

The question of whether negligence on the part of the appellants was established was one of fact which the learned trial judge had decided in their favour. In their Lordships' view, the only evidence before the learned judge as to the circumstances in which the valve was installed and became defective was such that he could quite properly have formed the conclusion that he did form that the appellants could not be held responsible in negligence for the fracture of the valve's spindle which caused the acid to escape, and if and so far as the Court of Appeal's reversal of his decision implies a contrary finding of fact by that Court on this part of the case, such finding was not, in their Lordships' opinion, justifiable.

The crucial question, therefore, upon which the present appeal hinges, is whether the Court of Appeal could, having regard to the judge's findings of fact as regards the provision of safety equipment, legitimately substitute their own findings and conclude, contrary to the trial judge's conclusion, that the injuries which the respondent sustained were not the result of his own carelessness in carrying out an operation which he knew to be dangerous without taking proper precautions but were due to the failure of the appellants to provide him with the proper safety equipment which it was their duty to provide.

The principles governing the approach of an appellate court to the review of the decision of the judge of trial on disputed issues of fact are familiar, but it is worth stressing yet again what has been said both by the House of Lords and by this Board.

The matter is summed up in the well known passage from the speech of Lord Thankerton in *Watt or Thomas v. Thomas* [1947] A.C. 484 at pages 487 and 488:-

- "(I) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
- (II) The appellate court may take the view that without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence.
- (III) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

The instant case is one where, on any reasonable interpretation of the facts, there was an acute conflict, as the learned judge noted, between the evidence of the respondent and his supporting witness, Mr. King, and the evidence of the appellants' witnesses. The importance, in these circumstances, of the advantage enjoyed by the judge who heard and saw the witnesses at first hand can, therefore, hardly be over-estimated, and it is appropriate to bear in mind the caution uttered by Lord Shaw in *Clarke v. Edinburgh Tramways Co.* (1919) S.C. (H.L.) 35 at page 36:-

"In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

Moreover, in a case such as the present, where there is no verbatim transcript of the evidence but merely what their Lordships have been told by counsel were the trial judge's own notes of the evidence which

cannot, in the nature of things, be a complete record of everything that was said, there should be borne in mind also the following passage from the opinion of this Board delivered by Lord Fraser of Tullybelton in *Chow Yee Wah v. Choo Ah Pat* [1978] 2 M.L.J. 41 at page 42:-

"When Lord Thankerton referred in paragraph (I) to 'the printed evidence' he was referring to a transcript of a verbatim shorthand record of the evidence, such as was available in the case. But in the instant appeal all that the Federal Court had before it was the judge's notes of the evidence, perhaps augmented in places by a transcript of shorthand notes, and it is obvious that the disadvantages under which an appellate court labours in weighing evidence are even greater when it has to rely on such an incomplete record than when it has a verbatim transcript."

Now to begin with there were a number of matters which were beyond dispute and which were the subject matter of admissions by the respondent and his witness, Mr. King. On his own evidence, the respondent was an experienced Acid Plant Operator whose duties were substantial and involved considerable responsibility for supervising the operation of the plant and the conduct of other employees. He was also, on his own admission, very well aware of the dangers of the process of producing sulphuric acid, conscious of the warning notice at the entrance to the danger area and aware of the danger of handling a valve without wearing protective clothing. He was aware that it was a breach of company regulations to do so, aware that previous accidents had occurred and aware that he was taking a chance, although he did not expect that a relatively new valve would malfunction.

It was common ground that boots, helmet and gloves were issued to each operator and that protective suits were normally available. These were left on racks in an area adjacent to, or forming part of, the control room and referred to as "the changing room" and were available for any operator who required one for the performance of any function where protection was required. Suits were also normally kept in the stores and were available on requisition, although there was a dispute about whether a Plant Operator required a requisition to be approved by his superior. The evidence of Mr. Vinton King, the Senior Plant Operator at the time of the trial, was that as a trainee operator he had had no suit of his own but had helped himself to what was available in the changing room and that others could do the same.

The crucial question which the trial judge had to decide was whether a protective suit was supplied or

was available to the respondent immediately prior to the occurrence of the accident. The respondent's evidence had been that, prior to going on leave in August, he had in fact his own individual suit which he left in the changing room. When he returned from leave, he said, it was missing and he sought a replacement from the stores a few days after he resumed work and also on the day before the accident. No suits were available. That was a matter which depended on the unsupported word of the respondent and he gave no evidence about who had told him that no suits were available nor did he call any witness from the stores to testify to the fact. Mr. King, who was also employed by the appellants at the time of the accident, gave evidence that the suits in the changing room were dirty and added what was clearly an hearsay statement that prior to the accident, other workers had tried to get suits and failed so he presumed that none was available, although he admitted that he had not himself either visited the stores or made any enquires of the store keeper. He did however give one important piece of evidence to which the Court of Appeal attached great importance. It is recorded by the judge thus:-

"On the day of the accident there was no protective clothing available in the changing room because after the accident I went in the changing room to get a towel to put around Mr. Ellis's pelvic area which was burnt off and there was no protective suits seen by me there. They are normally kept on hooks behind the door."

One of the curious features of the case is that the respondent is not recorded as having himself given any evidence that he looked in the changing room for a suit and found none, contenting himself simply with the assertion that none was issued or available to him.

Against this evidence there was the evidence of Mr. Markes and Mr. Harding. The former told the Court how, after the accident, he had gone to the stores to check the availability of safety suits and had found that there were thirty-one such suits in stock. That was on the day of the accident so that, unless Mr. Markes was telling an untruth or was mistaken, it followed either that the suits were available in the stores prior to the accident or that, by some unlikely coincidence, they had arrived in the stores between the time of the accident at 1.55 p.m. and the time of Mr. Markes' inspection, which took place between 3.00 p.m. and 4.00 p.m. in the afternoon. Mr. Harding's evidence was that there was always more than one suit available in the control room and that he himself used such suits after the accident when he had to assume the office of Plant Manager. He had visited the control room between 8.00 a.m. and 9.00

a.m. on the morning of the accident but did not say specifically that suits were there at that stage. He did, however, say that prior to the date of the accident there were suits in the stores and in the control room. Shortly after the accident - how shortly is a matter of inference but it cannot on any rational view have been more than an hour or so at most - he took the broken spindle to the control room and noted that a suit, gloves and face shield were hanging on the racks.

The learned trial judge, having received this evidence and having seen and heard the witnesses examined and cross-examined, posed the question thus:-

"Who is to be believed? Mr. Harding or the plaintiff and Mr. King? Clearly all cannot be speaking the truth. Even assuming that the suit the plaintiff was accustomed to wear was missing there would still have been at least three other acid suits available on the racks from which the plaintiff could select one. The unchallenged evidence being, that apart from the plaintiff there were at least three other Plant Operators working at the Acid Plant on December 1978. The fact that prior to 13th December, Harding, King and the plaintiff himself all had no difficulty finding a suit from the pool of suits in the control room when required to go into the danger area at the plant, the weight of the evidence is therefore clearly supportive of the finding on a balance of probability that on 13th December 1978, there were acid suits on the racks in the control room when the plaintiff was in the process of carrying out the starting up operations."

Accordingly, he found that suits were available and he rejected, as placing altogether too high a duty on an employer, the submission on behalf of the respondent that in the case of a high-grade employee, such as the respondent, the appellants were, in effect, under an absolute duty to see to it that he wore a protective suit in the danger area as the company regulations obliged him to do.

In the Court of Appeal the judgment of the Court was delivered by Ross J.A. who embarked upon an extensive review of the evidence of the respondent and Mr. King and observed, quite correctly, that if that had been accepted by the judge he could only have concluded that there was not a safe system of work and that adequate protective clothing had not been provided. He then reviewed the evidence of Mr. Markes which has been summarised above and concluded thus:-

"It would seem to us that on a proper assessment of Mr. Markes' evidence he was quite unable to say precisely what the stock in his storeroom regarding protective suits was. Mr. Harding gave no evidence in this respect. The result was that the defendant had fallen short of proving that any suits were in their storeroom for the use of their operators at the time of the accident."

Their Lordships have difficulty in understanding this. It is, of course, true that Mr. Markes was unable to say positively that suits were in the store immediately prior to the accident, but his evidence was perfectly clear that on the day of the accident, and within at most two hours of its occurrence, he himself counted thirty-one suits in the store. It seems that the Court of Appeal, in so assessing his evidence, attached great importance to a passage from his cross-examination in which he was asked whether he was in a position to say positively that the suits had not arrived in the store on the day of the accident or to deny the respondent's evidence that he had unsuccessfully requisitioned protective clothing. The form of the questions put to him was such as to invite him to say whether, of his own knowledge, he could positively assert that allegations made in the evidence of the respondent and Mr. King were untrue or inaccurate and the witness's answers indicate simply that, as one would expect, his personal knowledge of what was alleged to have occurred on occasions when he was not present did not enable him to deny the allegations. The Court of Appeal appear, however, to have treated these answers either as admissions, which they clearly were not, or as demonstrating that the evidence of the respondent and Mr. King was necessarily true and had to be accepted, regardless of the probabilities raised by the positive evidence of Mr. Markes. Mr. Harding's evidence received the same treatment. It having been elicited from him that he had visited the control room in the morning and that he had actually seen protective clothing in the changing room within a short time after the accident, he was asked whether he could say positively that it was there immediately prior to the accident and whether he could deny the respondent's allegation that no such clothing was then available to him. Such questions could have only one meaning, that is to say, whether the witness's personal knowledge enabled him to controvert what had been said. To that, of course, there could have been only one answer, since it was not claimed that he was present at the time.

The Court of Appeal's conclusion on reviewing the judge's notes of the evidence was expressed thus:-

"From the questions and answers given by Mr. Harding we think it is plain that there was no

satisfactory evidence of the stock of suits in the stores, and there was no proof of the number of suits hanging on the racks in the control room. He was careful not to state the number of suits he saw after the accident, a matter which would not have been a difficult exercise for there were only four operators. It might perhaps be fairer to the witness to say that he was not asked any question to prompt that clarification. But the burden was on the respondent to prove that protective clothing had been provided as set out in their defence."

The Court went on to point out (as was, of course, the fact) that there was no evidence on the part of the appellants which directly contradicted the positive evidence of the respondent and Mr. King. Then they observed:-

"There was no evidence adduced by the respondent to show how many protective suits were available in the control room for the use of the members of staff, nor of the number of persons who might have gone to the control room at any time to procure a protective suit for use in a dangerous area. The picture presented by the appellant and his witness of the procedures at the plant at the time of the accident make it abundantly clear that it was not a safe system and the evidence called by the respondent did not alter this picture significantly. There is uncontradicted evidence that no protective clothing was either issued or available for the use of the appellant immediately before he went to manipulate the valves. There was therefore a breach of the statutory duty owed to the appellant under the provisions of section 76 of the regulations under the Factories Act as well as negligence on the part of the respondent in failing to provide a safe system of work."

They concluded:-

"This is a case where the only positive evidence as to the presence or absence of acid suits in the control room at the material time is that of the appellant and his witness, and the learned judge was obliged to find accordingly and to act on it. The same is true of the safety system existing at the plant at the time of the accident. Even accepting the evidence of the respondent's witnesses, it cannot be said that what passed for a safety system can be regarded as such in this day and age and it seems clear to us on the evidence that the respondent did not take reasonable care for the safety of its workers."

With respect, their Lordships consider that this was a quite impermissible conclusion and on two grounds. First, it rests upon the fallacy, sometimes propounded from the Bar, that because the sworn testimony of a witness cannot be directly contradicted by that of another witness or by contemporary documents, it must necessarily be accepted as truthful by the judge regardless of his assessment of the credibility of the witness. Secondly, it seems to their Lordships directly to contravene the well-established principles upon which an appellate court has to approach the task of reviewing the trial judge's findings of fact. The question which the Court should have considered was whether there was evidence before the learned trial judge from which he could properly have reached the conclusion that he did or whether, on evidence the reliability of which it was for him to assess, he was plainly wrong.

In their Lordships' judgment, the learned trial judge's approach, reflected in the passage from his judgment referred to above, was unexceptionable. The evidence called by the appellants, taken alone, clearly established a probability that proper protective clothing was available to the respondent at the time of the accident in the stores or in the control room or in both places and it was entirely a matter for the trial judge to assess whether the evidence to the contrary given by the respondent and by Mr. King was truthful. He saw them both in the witness box and heard them examined and cross-examined and it is, in their Lordships' view, quite impossible to say, by reference to the judge's notes, that their evidence was of so convincing and compulsive a character that it necessarily had to be accepted as the truth and as overcoming the probabilities arising from the acceptance of the evidence of the appellants' witnesses. There was clear evidence before the judge from which he could perfectly properly arrive at the conclusions of fact at which he did arrive and their Lordships are, with respect to the Court of Appeal, unable to see any grounds upon which an appellate tribunal could properly reject those conclusions and substitute, from a necessarily incomplete written record, its own judgment of the credibility of the witnesses or the acceptability of their testimony. Bingham J.'s findings of fact necessarily involve the conclusion that the defence raised by the appellants was substantiated and their Lordships are unable to agree with the reversal by the Court of Appeal of his decision.

Their Lordships will, accordingly, humbly advise Her Majesty that the appeal should be allowed, that the judgment for damages and costs in favour of the respondent should be discharged and that the decision of Bingham J. dismissing the respondent's claim should be restored. The respondent must pay the appellants' costs here and below.

