Privy Council Appeal No. 56 *of* 1941

Pigneguy and another – – – – – – – *Appellants*

v.

Yemen Limited – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY, 1943

Present at the Hearing:
LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD PORTER
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* LORD PORTER]

In this action the appellants claimed to recover from the respondent damages for injury by fire to their estate called Barachois in Mauritius.

The fire, they alleged, began on the respondent's estate and spread to the appellants' property, doing considerable damage but to an extent not yet ascertained, since the Court of first instance by agreement between the parties dealt only with the question of liability and left the quantum of damage to be ascertained later.

It was common ground in argument before their Lordships that the principles upon which liability depended were to be found in the French Civil Code, sections 1382 to 1384, and that in accordance with those principles the mere fact that the fire originated on the premises of the respondent and spread to those of the appellants was not enough. In order to establish liability it was necessary to prove "faute," which for this purpose bears the same meaning as does "negligence" in English law, i.e. the neglect of such care as the law enjoins. Probably the extent of the obligation can be generally defined as a duty to act as a reasonably prudent man would in the circumstances, and this is best judged by those who are familiar with the local conditions. The appellants admitted that the onus was on them to prove such negligence, but said that the proper conclusion from the evidence as a whole was that this onus had been discharged.

Their story was that on the afternoon of Saturday the 29th October, 1938, a fire broke out on the respondent's estate called Yemen. In addition to this estate the respondent owns another property known as the Tamarin estate, between which and the Yemen estate runs the river Tamarin.

Next to the Tamarin estate and on the same side of the river lies the appellants' Barachois estate, which is divided from the Tamarin estate only by a "balisage" or cutting in the trees of about 20 feet in width.

Saturday's fire, the appellants say, was never put out, though its strength fluctuated. According to their account, it continued to burn all Saturday night, and as a result of the increasing heat of the day and a high wind, flared up on Sunday the 30th, crossed the river to the Tamarin estate about 11 o'clock and spread through that estate to the balisage, which it reached about 1 p.m. There, in spite of the efforts of the appellants' employees, who had been marking its progress and preparing to meet its onset, it leapt across the 20 foot gap and gained a firm footing on the appellants' property.

The respondent's story was a different one. It was said on its behalf that the original fire, which broke out on Saturday, was completely extinguished late that night or early the following morning: that Sunday's fire originated not on the Yemen estate but on the appellants' property Barachois and spread thence to the Tamarin estate, but never touched the other side of the river or the Yemen estate.

In this conflict of evidence, their Lordships must necessarily be guided by the views of the Court in Mauritius unless there is some strong reason to the contrary, more particularly in a case where the members of that Court are not only acquainted with the local conditions but, as they say, have visited the *locus in quo*. Their findings are as follows:—

> " The fire which commenced on the Saturday evening continued to burn during most of the night: steps were taken by the defendant Company to put out that fire and by 7 a.m. on Sunday morning those concerned in putting it out were satisfied that they had effectively done so and left the scene. They had done all that they had thought necessary. Nevertheless, there must have been some smouldering embers or stumps which escaped the vigilance of the men and with the increasing heat of the day these embers again got ablaze and with the increasing velocity of the wind the fire spread not only to the banks of Tamarin River but beyond. When once the fire had reached the dry bushes on the north side of the river it blazed fiercely and spread rapidly and any likelihood of its then being checked was indeed remote."

To these findings there should be joined the later passage where the learned Judges say:—

> " We are satisfied that the defendants' servants had done all that could have been reasonably expected of them in endeavouring to extinguish the first conflagration: that believing the fire had been extinguished there was no obligation on their part to leave some one on guard: and that they did not become aware of the second conflagration until after it had swept over most of the plaintiff's land."

This view, in their Lordships' opinion, necessarily involves the conclusion that the respondent's servants reasonably thought that the fire had been extinguished and were not negligent in so thinking or in failing to keep any further watch.

It was argued on behalf of the appellants that the respondent's servants were guilty of negligence in three respects:—

(i) In not putting out the original fire.

(ii) In failing to keep a further and better watch even though the fire appeared to have been put out.

(iii) In not ascertaining the existence of Sunday's fire at an earlier moment and at once taking steps to combat it even if no blame is to be attributed to them in other respects.

In their Lordships' opinion the first and second contentions are disposed of by the findings of the Court quoted above. The respondents did take the necessary steps, reasonably thought they had succeeded in putting out the fire, and were accordingly under no obligation to keep a further watch. Indeed, the respondent's evidence, which appears to have been accepted upon this point, is that their men remained on the spot for some 7 or 8 hours after the conflagration had apparently been stamped out. Obviously the duty to watch must end at some time, and no evidence was led on behalf of the appellants that the actual care taken to watch for the recrudescence of the old or the beginning of a new fire was insufficient.

As to (iii), there was no ground for supposing that the fire would break out again, and consequently, as the Court has found, no blame is to be imputed to the defendants' employees for not discovering the second outbreak earlier. They, or some of them, had been on duty all night, and had no reason to suspect danger. Indeed, no anxiety was felt for the defendants' plantation, which would suffer before that of the appellants by anyone who had helped to fight the fire and one man even slept in his hut which was close to the spot at which it had been raging. Moreover, the appellants' men never warned them that the fire had broken out again: and at best

the only time during which anything effective could have been done would have been between the recrudescence of the fire at some time well after 9 o'clock on the Sunday morning and the moment at which it crossed the river at about 11 o'clock. Thereafter, as the learned Judges found, "any likelihood of its then being checked was indeed remote."

The time is short when one remembers that the fire had to be observed, its position ascertained, and steps taken to deal with it, and it is enough to say that the Court in Mauritius has found that in such circumstances no negligence has been established at this period. Accordingly this allegation also must fail.

Their Lordships have only to add that it is unfortunate that no map of the *locus in quo* was included in or accompanied the record.

In a case where the origin and course of a fire are in question it is obviously essential that a tribunal dealing with the matter should have a clear apprehension of the relative position of the places with which the dispute is concerned. Their Lordships would point out that in the Court of first instance the very first witness was shown two sketches of the area, that before Counsel for the defence closed his case a map was put in, and that the relevant positions were marked both upon the sketches and upon the plan. The error appears to have occurred not in this country but in Mauritius. Fortunately their Lordships were able to obtain a map from the Colonial Office, but they desire to stress the necessity for the provision of such vital documents as part of the record.

They will humbly advise His Majesty that the appeal be dismissed and that the appellants should pay the respondent's costs of the appeal.

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In the Privy Council

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