Judgment 13 of 1978

No. 6 of 1976

In the Judicial Committee of the Privy Council

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN—

THE PORT SWETTENHAM AUTHORITY
Appellants.
(2nd Defendants)

— AND —

T. W. WU AND COMPANY (M) SDN. BHD
Respondents.
(Plaintiff)

CASE FOR THE RESPONDENTS

RECORD

1. The Appellants are appealing from an Order of the Federal Court of Malaysia dated 8th March 1975 (Suffian L. P., Lee Hun Hoe C. J. Borneo and Ali F. J.) dismissing an appeal by the Appellants from a judgment of Abdul Hamid J. in the High Court of Malaya at Kuala Lumpur delivered on 27th June 1974, whereby it was ordered that the Appellants should pay to the Respondents the sum of $21,236.84. By an Order dated 22nd September 1975, the Federal Court of Malaysia granted the Appellants final leave to appeal to His Majesty the Yang di-Pertuan Agong. pp. 67-68 pp. 25-41 pp. 41-42 pp. 72-73

2. This action arises out of the loss of 64 cases of pharmaceutical goods weighing approximately 5.65 tons. These cases, together with 29 other cases, formed part of a consignment carried on board the vessel "SANSEI MARU" from Hong Kong to Port Kelang (Port Swettenham) in Malaya. The consignment had been shipped under two Bills of Lading dated 28th March 1970, in both of which the Respondents were named as the consignees. The vessel arrived at Port Swettenham on or about 5th April 1970 and there is no dispute between the parties to this appeal, that when the Respondents' forwarding agents, Messrs. Din's Trading SDN. BHD., came to collect the consignment from the Port, only 29 cases were delivered to them and the Appellants were unable to deliver the balance of 64 cases worth $21,236.84. pp. 74-75 pp. 88-89

3. The Appellants disputed that the said 64 cases had ever been received by them from the ship. Accordingly, on 11th January, 1971, the Respondents issued a Specially Indorsed Writ against the Owners of the vessel, the SANKO ASIA Line Limited, as First Defendants and against the Appellants, as Second Defendants. At the trial of the action it was pp. 1-5

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p. 37 ll.18-22
p. 48 ll 29-33

proved by documentary and oral evidence that, contrary to the Appellants' case, all 93 cases had been discharged from the ship into the possession of the Appellants and Abdul Hamid J. and the Federal Court so found. At the trial, judgment was therefore given for the shipowners against the Respondents, and under the circumstances set out hereunder for the

p. 41 ll. 3-4

Respondents against the Appellants. The learned Judge made a "Sanderson" order for costs against the Appellants. The Federal Court likewise

p. 66 ll. 35-

gave judgment against the Appellants (also affirming the order as to costs).

4. With regard to the circumstances under which the Appellants came to be unable to deliver up to the Respondents the said 64 cases, the

p. 9 ll. 14-
p. 10 ll. 30-
p. 15 ll. 27-

position was as follows. The Respondents proved that a quantity of pharmaceutical goods identified as having come from the missing cases were subsequently found at a pharmacy in Kuala Lumpur and that the proprietor of the pharmacy was arrested by the Police and charged although subsequently released. The Appellants called only two witnesses,

pp. 17-25

the Assistant Traffic Manager and the Officer in charge of Port Security. Neither had any knowledge of the circumstances relating to the consignment in question and they were only able to give general evidence. The Appellants did not call their employees who had had the care and control of the relevant consignment nor did they call anyone who knew anything about it. In the words of Lee Hun Hoe C. J. who delivered the judgment of the Federal Court:—

p. 57 ll. 9-124

"... It was established on a preponderance of probabilities that "the goods were conveyed by [the Appellants'] employees and kept "in their custody. They could not explain how the bulky and heavy "goods could be taken out of the shed [by unauthorised persons] "under the watchful eyes of their employees."

As to the system spoken to by the Appellants' witnesses, he said:—

p. 58 ll. 35-40

"If their system and security were so good then [the removal of] "such bulky and heavy goods from the shed could not have escaped "the vigilence of their employees bearing in mind that they were

p. 60 ll. 5-11

"supposed to be working in shifts round the clock .... [Counsel for "the Appellants] frankly admitted [the Appellants] did not know "whether the missing goods were ever in their possession. Something "must be wrong with their system of which they spoke so highly, "if they could say they did not know anything about goods proved

ll. 18-20

"to have been delivered to their custody .... their system was not "as impeccable as they wanted the Court to believe. Neither was

p. 64 ll. 22-25

"their security adequate .... The learned Judge could not but find "the Appellants negligent considering the circumstances under which "the goods disappeared, the nature, bulk and weight of the goods, "and the system of security."

5. However, before Abdul Hamid J. and the Federal Court the Appellants argued various legal defences arising from the following statutory provisions:—

(A) Sections 104 and 105 of the Contracts (Malay States) Ordinance 1950;

(B) Section 29 of the Port Authorities Act 1963 and By-Law 91 (1) of the Port Swettenham Authority By-Laws 1965;

(C) Section 3 (1) (a) of the Civil Law Ordinance 1956 and *Cheshire v Bailey* (1905) 1 K.B. 237 (before the Federal Court only).

All these arguments were rejected. Also rejected by the Federal Court was an argument that the Respondents had failed to plead a claim in the tort of detinue and had therefore provided the Appellants with a defence. p. 47 ll. 21-

A. THE CONTRACTS ORDINANCE.

6. The contracts ordinance provides:—

"(104) In all cases of bailment the bailee is bound to take as "much care of the goods bailed to him as a man of ordinary prudence "would, under similar circumstances, take of his own goods of the "same bulk, quality, and value as the goods bailed.

"(105) The bailee, in the absence of any special contract, is not "responsible for the loss. destruction, or deterioration of the thing "bailed, if he had taken the amount of care of it described in section "104 of this Ordinance."

7. The Appellants argued firstly that these provisions altered the burden of proof so that notwithstanding the fact that the Appellants were the bailees of the goods and had failed to re-deliver them to their bailors (the Respondents), the Respondents must prove affirmatively that such failure was caused by a failure of the Appellants to take the care a man of ordinary prudence would, under similar circumstances, take of his own goods; and secondly, that applying such standard of care the Appellants ought in any event to be exonerated.

8. In support of the argument with regard to burden of proof, the Appellants relied upon *Dwarkanath Raimohan Chaudhuri v The Rivers Steam Navigation Co. Ltd.* (1918) 46 I.C. 319, (1917) A.I.R. (P.C) 173, a decision of the Privy Council upon the identical provisions of the Indian Contract Act, 1872. Abdul Hamid J. and the Federal Court held that neither the *Dwarkanath case* nor Sections 104 and 105 had introduced any new principle with regard to burden of proof, nor were they intended to vary the relevant common law rules. They referred to (inter alia) Pollock & Mulla on the Indian Contract and Specific Relief Acts (9th edn. at p666), *Abdul Rahman v Ariffin* (1956) 22 MLJ 89 and *Gee Hup & Co. v Yeo Swee Hern* (1935) 4 MLJ 66. They further pointed out that in any event section 106 of the Malaysian Evidence Act (1950) provides: p. 30 ll. 36- p. 48 ll 48- p. 30 ll. 44- p. 62 ll. 42- p. 48 ll. 39-

"When any fact is specially within the knowledge of any person, the "burden of proving that fact is upon him."

In the present case, the Appellants had signally failed to adduce evidence of the facts within their knowledge.

9. With regard to the standard of care, Abdul Hamid J. and the Federal Court held that the provisions of the Contracts Ordinance did not make any material difference to the standard of care to be applied nor did it affect the decision in this case. Abdul Hamid J. had directed himself correctly in accordance with the Contracts Ordinance when he said that: p. 36 ll. 37-43

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"In the final analysis it is apparent that a bailee for reward is "under a liability in the performance of his duties and responsibilities, "to exercise due care and diligence of the goods entrusted into his "custody as a prudent man would of his own goods according to all "circumstances of the case."

p. 50 ll. 5- The Federal Court also referred to *Secretary of State v Ramdhan Das Dwarka Das* (1934) 150 I.C. 189.

B. The Port Authorities Act and the By-Laws.

10. The Port Authorities Act 1963 provides:—

"29. (1) The Authority may with the approval of the Minister "make By-Laws for . . .

"(g) limiting the liability of the Authority in respect of any "loss, damage or injury to any person, occurring without the actual "fault or privity of the Authority (whether in any vessel operated or "maintained by them or on any wharf, quay or other part of the "port);"

The Port Swettenham Authority By-Laws of 1965 provide:—

"91 (1) The Authority shall not be liable for any loss, destruc- "tion or deterioration arising from delay in delivery or detention "or misdelivery of goods or from any other cause unless such loss "or destruction has been caused solely by the misconduct or negli- "gence of the Authority or its officers or servants."

p. 49 ll. 39- 11. The Appellants argued that By-Law 91 (1) had the effect of imposing a burden of proof on the bailor to prove affirmatively the causation of the loss. Such argument was contrary to the previous decision of the Federal Court in *Sharikat Lee Heng SDN. BHD. v The Port Swettenham Authority* (1971) 2 MLJ 27, which was binding on both Abdul Hamid J. and the Federal Court. The Appellants argued that the p. 30 ll. 25-28 *Lee Heng case* had been decided per incuriam because the *Dwarkanath case* was not drawn to the attention of the Court.

12. Both Abdul Hamid J. and the Federal Court rejected these arguments. They held that *Lee Heng v Port Swettenham Authority* was p. 31 ll. 27-30 not decided per incuriam since the *Dwarkanath case* had in fact been cited to the Court, although it was not referred to in the judgment of H.T. Ong C.J. They also held that in any event the *Lee Heng case* was rightly decided. By-Law 91 (1) is not concerned with the burden of proof. p. 30 ll. 25- Further, if the argument of the Appellants were right the By-Law would p. 37 ll. 9-13 be ultra-vires as exceeding the power granted by section 29 (1) (g). p. 54 ll. 17- p. 65 ll.1-5

C. The Civil Law Ordinance.

13. The Civil Law Ordinance 1956 provides:—

"3. (1) Save so far as other provisions have been made or "may hereinafter be made by any written law in force in Malaysia "the Court shall—

"(a) in West Malaysia or any part thereof, apply the common "law of England and the rules of equity as administered in England "on the 7th day of April, 1956."

14. The Appellants argued that if the correct inference from the evidence was that the goods were stolen by or with the connivance of their employees, the Federal Court should apply and follow the English decision in *Cheshire v Bailey* (1905) 1 Q.B. 237 and hold that the Appellants were not vicariously liable for such acts of their servants; the Court should have no regard to the decision or reasoning in *Morris v Martin* (1966) 1 Q.B. 716 which was decided after 7th April 1956. (They also relied upon *Malayan Thread Co. Sdn. Bhd. v Oyama Shipping Line Ltd.* (1973) 1 MLJ 121).

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p. 60 ll. 21-

15. These arguments were rejected by the Federal Court as being both over-technical and unsound. *Cheshire v Bailey* could not stand with *Lloyd v Grace Smith & Co.* (1912) A.C. 716. There was nothing to prevent the Federal Court from agreeing with the Court of Appeal in *Morris v Martin* that the common law of England was correctly laid down in *Lloyd v Grace, Smith* and not in *Cheshire v Bailey*. *Malayan Thread Co. v Oyama Shipping Line* was distinguishable and, insofar as it relied on *Cheshire v Bailey*, should not be followed.

p. 62 ll. 28-29
p. 61 ll. 31-

16. *With regard to all of the defences raised,* the Respondents respectfully submit that Abdul Hamid J. and the Federal Court were right to reject the various arguments advanced by the Appellants. The evidence disclosed a breach of the bailee's duty to re-deliver to his bailor and therefore a prima facie case of the bailee's liability. Also the evidence disclosed a case of "res ipsa loquitur" raising an inference that the goods were lost as a result of the misconduct or want of care of the Appellants and their servants. The Respondents have discharged any burden of proof which could properly be placed upon them. Further, the Appellants failed to discharge the burden of proof upon them under Section 106 of the Evidence Act. Neither the Contracts Ordinance nor the said By-Law purport to alter or to affect the burden of proof nor do they serve to rebut the prima facie liability established by the Respondents on the evidence adduced at the trial.

17. The Respondents respectfully submit that this Appeal should be dismissed and that the judgment and Order of the Federal Court should be affirmed for the following, among other,

REASONS

(1) BECAUSE the evidence at the trial established that the Appellants became Bailees of the whole consignment of pharmaceutical goods and that 64 cases were lost while in their custody;

(2) BECAUSE the Appellants, as bailees of the 64 cases, failed to re-deliver the same to the Respondents;

(3) BECAUSE the burden of proving that the Appellants had taken as much care of the consignment as a man of ordinary prudence would have taken under similar circumstances of his own goods, was on the Appellants once it was established that they were bailees of the consignment;

(4) BECAUSE the Appellants failed to discharge the burden aforesaid;

(5) BECAUSE the Appellants failed to discharge the burden of proof on them under Section 106 of the Malaysian Evidence Act 1950;

(6) BECAUSE the Appellants were not protected by the provisions of By-Law 91 (1) of the Port Swettenham Authority By-Laws 1965;

(7) BECAUSE Sections 3 (1) (a) of the Civil Law Ordinance 1956 does not provide the Appellants with a defence;

(8) BECAUSE on the evidence the correct finding and/or inference was that the goods were lost as a result of the misconduct and/or want of care of the Appellants and/or their servants;

(9) BECAUSE the judgment of Abdul Hamid J. and the judgment of the Federal Court of Malaysia were right for the reasons given in those judgments.

J. S. HOBHOUSE

M. HAVELOCK-ALLAN

No. 6 of 1976

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

HOLDEN AT KUALA LUMPUR

BETWEEN

THE PORT SWETTENHAM AUTHORITY
Appellants.
(Second Defendants.)

AND

T. W. WU AND COMPANY (M) SDN. BHD.
Respondents.
(Plaintiffs.)

CASE FOR THE RESPONDENTS.

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