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Judgment 4, 1965

IN THE PRIVY COUNCIL No. 23 of 1964

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA

BETWEEN

SINCLAIR EUGENE SWAN — Appellant

- and -

SALISBURY CONSTRUCTION COMPANY LIMITED — Respondents

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from a judgment dated the 10th June 1963 of the Supreme Court of Bermuda (Allan C. Smith Assistant Justice) whereby an action brought by the Appellant claiming damages against his employers, the Respondents, on the grounds of breach of contract and negligence arising out of an accident to the Appellant which occurred on the 28th September 1959 during the course of his employment (when a crane on which he was working collapsed) was dismissed, with costs. — pp. 30,31

2. The questions arising in this appeal are the following:-

(a) whether the learned trial Judge was entitled to find as a fact (as he did) that the cause of the crane toppling over was that the ground under the right front wheel gave way suddenly; — p. 37, l.44 / p. 38, l.1

(b) whether the learned Judge was entitled to find (as he did) that, on the evidence, the Respondents had not failed in their duty of care owed by them to the Appellant; — p. 38, l.38.

p.40, l.31 (c) whether the learned Judge was entitled to find, as he did, that it was not reasonable, on all the evidence, that the Respondents should have anticipated that there might be any danger of the ground giving way and that
p.38, l.25 therefore there was no necessity for them to take extra precautions;

p.40, l.25 (d) whether the learned Judge correctly considered the question of the burden of proof of negligence, and whether he applied the correct principles.

3. The Appellant, who was employed by the Respondents as a semi-skilled labourer and had
p.33, l.29 been working for them for about three years, was on 28th September 1959 working in a crew driving piles for the foundation of a warehouse on a
p.31, l.26 site belonging to the Bermuda Gas & Utility Company.

4. For a number of years the site had been
p.31, l.30 filled apparently by dumping rubble in it and trucks had driven across the fill making a rough roadway, although the trucks did not always
p.32, l.5 follow this road but could and did drive over the general area.

p.32, l.6 5. The rubble fill had apparently been firmly packed down by this traffic, so much so that a jack hammer had to be used to dig the shallow holes to form guides for the points where the piles were to be driven.

6. The crust of rubble fill was about 14 inches thick, and the water table was reached at about 3½ feet, although the hardness of the ground varied from one spot to another.

7. The design of the new building called for a concrete floor or foundation supported on piles driven in to various depths from 14 to 27 feet in groups of three.

p.32, l.18 8. The learned Judge accepted the evidence that the Respondents' Superintendent of Works Mr. Diel
p.38, l.25 inspected the site before the pile driving was started and satisfied himself that the ground was firm enough for the mobile crane and its equipment to operate on without taking special precautions to prevent the crane from sinking in when it was working.

p.34, l.24 9. Further, when the crane was moved into the

position in which it was at the time of the accident it was placed with its wheels on the roadway earlier described. The experienced foreman, Correia, inspected the position and it appeared to be sufficiently safe and solid, and this evidence was accepted by the learned Judge. p.38, l.33 p.38, l.25

10. On the morning of the 29th September 1959 the pile driving crew consisted of the foreman Correia, a crane operator, Philpott, and two labourers, one of whom was the Appellant.

11. The morning's work of driving in three piles was successfully and uneventfully completed and the crane was moved into position as described for the first pile of the new group to be driven in.

The lead was brought into position, and the pile was hoisted to a vertical position with its point resting at the correct spot.

The luncheon break came at that stage.

12. After lunch, the foreman Correia decided that as the crane lead and pile were already in position, he would drive this pile with the sole aid of the Appellant and he told the Appellant to climb up the lead while he operated the controls of the crane to hoist the lead, so that the Appellant could fit the top of the pile under the maul. p.34, l.28

13. The Appellant's version of the accident was that he climbed up the lead, and it was hoisted up about his feet when suddenly the crane started to tremble and the Appellant hung on and remembers nothing until he came to in hospital. p.35, l.1

14. The foreman's version, which was accepted by the learned Judge as being correct was that when he hoisted the lead 9-10 feet up, with the Appellant on it, the crane began to shake violently. The boom was at about 10 feet radius and a little to the right of the centre of its traverse, and the lead began to sway away from the crane and towards the right. He released the "swing" brake of the crane and shouted to the Appellant to jump. p.35, l.8

He decided it would be more dangerous to release the brake of the hoist and let the lead drop and save the crane, than to continue to hold the weight of the lead and let the whole thing topple over, which it did.

p.36, l.18 15. The learned Judge considered that a number of factors or a combination of them could have caused the crane to lose stability and topple over.

1. That the boom was extended too far for the weight it was lifting;

2. That the operator started the lift too quickly, thereby applying a jerking force to the crane;

3. That some part of the mounting of the crane was too weak and gave way under the strain of the lift;

and 4. That the ground under the wheels was not sufficiently solid and gave way under the weight of the lift.

16. The learned Judge rejected the first factor as he accepted the Respondents' evidence "honestly
p.37, l.1 put forward by competent witnesses" (Diel and Correia). He also rejected the second factor because the Appellant and the Respondents' foreman
p.37, l.7 both said that the crane began to shake when the lead was at or near the top of the lift, and that ruled out the theory that there was any jerking in the hoisting of the lead.

17. The learned Judge then dealt with the last two factors together.

He concluded from the evidence that the crane toppled over because the ground suddenly gave way under the right front wheel. The incident started by the crane beginning to shake violently and this
p.37, l.15 shaking was caused by a sudden jolt.

Mr. Diel, who arrived at the scene of the accident very quickly, found a hole about 11 inches deep where the right front wheel of the crane had been standing.

p.37, l.27 The learned Judge also accepted that Mr. Diel found that the bolts securing the wheel to its mounting on the axle had all sheared off evenly, and that
p.37, l.32 this was caused by the wheel suddenly dropping into the hole.

p.38, l.4 18. The learned Judge then, correctly it is submitted, posed the question as to whether the accident (having been caused as he found in the manner set out above) happened as the result of anything done or omitted to be done by the

Respondents or any of its servants.

19. The learned Judge dealt with the two real main allegations made against the Respondent:

(a) that the Respondents had failed to inspect properly the site when the crane was positioned; p.38, l.8

and (b) that there should have been a third man on the ground to give to the crane operator early warning of any signs of instability.

20. As to the first point, the learned Judge posed the question: "In the light of all this (that is the evidence he considered and which is referred to below) was it reasonable to anticipate that there might still be some danger of the ground giving way and that extra precautions should be taken to guard against it? In my opinion, the answer is No". p.38, l.38

21. He accepted that Mr. Diel and the foreman (Correia) had inspected the site and formed the opinion that the ground was sufficiently solid for the crane to operate on without putting any extra supports, such as planks, under the wheels. p.38, l.25

Further, before that day, 12 piles had been driven without incident, and that very morning three more had been driven also without incident. p.38, l.30

22. As to the second point, the learned Judge rejected the evidence of the Appellant and one Fough, an employee called as a witness by the Appellant, and found that even if there had been a third man on the ground to give warning of any instability, any such warning that he could have given would probably have been too late for the accident to have been avoided. p.39, l.40

24. It is respectfully submitted that the learned Judge who saw and heard the witnesses was entitled to accept their evidence and was entitled therefore to accept the evidence of Diel and Correia and to make such findings of fact as he did.

25. As to the onus of proof, it is respectfully submitted that the learned Judge correctly

considered the matter and applied the correct principles. He said "The fact that the crane
p.40, l.28 toppled over speaks for itself up to a point, but this is by itself not sufficient".

26. This, it is submitted, is a correct and accurate view of the res ipsa loquitur maxim. Where the maxim applies, the defendants against whom the action is brought must show that they had taken all reasonable precautions to ensure that the accident did not occur. It is submitted that the Respondents did so show by their evidence, which was accepted by the trial Judge. No evidence to contradict that given by Diel and Correia on the aspect of inspection was given on behalf of the Appellant.

27. When all the evidence has been put before the Court, the Court has to judge, it is submitted, whether the facts establish that, on balance, the plaintiff has proved his case. In Woods v. Duncan 1946 A.C. p.401 at p. 439 Lord Simonds said "To apply this principle (of res ipsa loquitur) is to do no more than to shift the burden of proof. A prima facie case is assumed to be made out which throws upon him (that is, a defendant) the task of proving that he was not negligent. This does not mean that he must prove how and why the accident happened: it is sufficient if he satisfies the Court that he personally was not negligent ..... if the Court is satisfied by his evidence that he was not negligent, the plaintiff's case must fail."

28. The Respondents therefore respectfully submit that the judgment of the learned trial Judge was right and ought to be affirmed, and that this appeal should be dismissed for the following (among other)

R E A S O N S

a) BECAUSE the learned Judge was entitled to accept the evidence called on behalf of the Respondents that they had taken all reasonable precautions by inspection of the site and that they had properly formed the view that no extra precautions were necessary.

b) BECAUSE the learned Judge was best able, by seeing and hearing such witnesses, to assess the value and reliability thereof;

c) BECAUSE the learned Judge was entitled to find that the cause of the accident was as described by the Respondents' witnesses, and that there was no negligence or breach of contract on the part of the Respondents;

d) BECAUSE the finding of the learned Judge was supported by the evidence;

e) BECAUSE the learned Judge correctly considered and applied the rules concerning the burden of proof as applicable to the rule of res ipsa loquitur (if it applied);

f) BECAUSE the finding of the learned Judge was right and supported by the evidence.

ANTHONY ALLEN

No. 23 of 1964

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- and -

SALISBURY CONSTRUCTION
COMPANY LIMITED Respondents

CASE FOR THE RESPONDENTS

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