Judgment 13 of 1978

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 6 of 1976

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :

THE PORT SWETTENHAM AUTHORITY Appellants

- and -

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

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal brought by leave of the Federal Court of Malaysia dated 12th May 1975 p.71 from the order of the Federal Court of Malaysia (Suffian L.P. Malaysia; Lee Hung Joe C.J. Borneo, Ali J. Malaysia) dated 8th March 1975 p.67 dismissing an appeal from the order of Hamid J. in the High Court in Malaysia at Kuala Lumpur dated 27th June 1974, whereby it was ordered p.41 that the Appellants pay a sum of $21,236.84 damages to the Respondents in respect of the loss of 64 cases of pharmaceutical goods while in the custody of the Appellants.

2. The substantial questions raised by the appeal concern :

(i) The standard of the duty of care which a bailee, whether gratuitous or for reward, must exercise in looking after goods entrusted to him by the bailor under Malaysian Law and in particular under the provisions of Sections 104 and 105 of Contracts (Malay States) Ordinance 1950 which provide as follows :

S.104 "In all cases of bailment, the bailee is bound to take as much care

RECORD

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."

S.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 has taken the amount of care of it described in Section 104 of this Ordinance."

The said provisions are hereinafter referred to as "S.104" and "S.105".

(ii) Whether on the facts as found by the judge the Appellants attained the requisite standard.

(iii) Whether on the facts found by the judge the Appellants were exempt from liability for the loss of the Respondents' goods, by reason of Rule 91(1) of the Port Swettenham Authority By-Laws 1965 which provides as follows :

"The Authority shall not be liable for any loss destruction 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 negligence of the Authority or its officers or servants."

The said Rule 91(1) is referred to hereafter as "Rule 91".

3. The circumstances out of which the appeal arises are as follows :

In March 1970 93 cases of pharmaceutical goods ("the goods"), (80 cases of 8.825 cubic
p.26 feet in volume and 12 cases of 1.300 cubic feet), were shipped aboard the vessel "Sansei Maru" at Hong Kong for carriage and delivery to Port Kelang to the Respondents. On 5th April 1970 the vessel arrived at Port Kelang and the goods were unloaded at the wharf, tallied and taken away by the Appellants for

storage in Shed No.8. All 93 cases were inspected by customs officers on 8th April 1970 and duty was paid on them on 9th April. At some time between 9th April and 15th April 1970, 64 of the cases were lost while in the custody of the Appellants. The Respondents collected only 29 cases and on 15th April the Appellants were informed in writing of the short delivery of 64 cases. On 20th July 1970 the police, acting on information supplied to them by the Respondents, raided the premises of Kuala Lumpur Pharmacy Sdn.Bhd. where some of the missing goods were recovered. The proprietor of the firm was charged with the theft of the missing cases but was subsequently discharged.

p.101

4. The Respondents claimed damages in respect of the lost goods against the carriers as First Defendants and the Appellants as Second Defendants. At the trial on 23rd and 24th April 1974 the case against the carriers was dismissed.

p.25

5. In his judgment Abdul Hamid J. dealt first with the relationship between the parties and decided that the Appellants were bailees for reward of the Respondents' goods. He stated that the Malaysian law governing the duties of a bailee in all cases of bailment was set out in S.104 and S.105 (above set out) which he recited. He then turned to the duties of a bailee for reward under the Common Law, taking as his definition Paragraph 225 at page 114 of Volume 2 Halsbury's Law of England 3rd Edition, which states:

p.27

p.28

> "A custodian for reward is bound to use due care and diligence in keeping and preserving the article entrusted to him on behalf of the bailor. The standard of care and diligence imposed on him is higher than that required of a gratuitous depository and must be that care and diligence which a careful and vigilant man would exercise in the custody of his own chattel of a similar description and character in similar circumstances."

Hamid J. did not go onto consider whether the

RECORD

standard of care imposed by S.104 and S.105 corresponded to that of the bailee for reward or the gratuitous depository at Common Law but turned at once to the question of onus of proof. He stated that at Common Law such onus lay upon the bailee and (after reviewing certain authorities), stated that Malaysian Law as to onus of proof on a bailee for reward was similar to the position at Common Law. He then turned to consider whether Rule 91 operated to shift the Common Law burden of proving how the goods came to be lost, from the bailee to the bailor, in relation to which he referred to the following

p.28 authorities :

Lee Heng's Sendirian Berhad v. Port Swettenham Authority (1971) 2 M.L.J. p.27

p.29 Dwarka Nath v. R.S. Company Limited (1971) A.I.R. (P.C.) 173

p.31 Pollock and Mulla upon Indian Contract and Specific Relief (9th Edition) p. 665

p.31 Sarkar on Evidence (12th Edition)

(all bearing upon the question of burden of proof in cases of bailment for reward)

p.32 Manfield Importers and Distributors Ltd. v. Casco Terminals Ltd. (1971) 2 Lloyds L.R.73

(a case in which the defendant warehouse owners had argued unsuccessfully that they were gratuitous bailees)

p.34 Malaysian Thread Company v. Dyama Shipping Limited (1973) 1.M.L.J. p. 121

p.35 Morris v. Martin (1966) 1 Q.B. p. 716, and
p.36 Halbury's Law of England, Volume 2, page 117.

(all concerning the master's liability for the torts of his servants acting in the course of their employment).

p.36 6. Hamid J. concluded (i) that the bailee for reward was under a duty to exercise such due care and diligence in relation to goods entrusted into his custody as a prudent man would exercise in relation to his own goods according to all the circumstances of the case,

(ii) that on proof of failure to deliver the goods the burden shifted to the bailee to show that the loss was not the result of any negligence or misconduct on his part and (iii) that Rule 91 did not shift the burden of explaining the loss of the goods away from the bailees. He then examined the facts. p.37

RECORD

7. Before setting out his findings, reference should be made to the evidence given at the trial on 22nd and 23rd April 1974, none of which was either expressly or impliedly rejected by the judge. The evidence material to this appeal is that relating to the procedure and security measures adopted by the appellants in storage of the goods in the warehouse sheds, delivery to forwarding agents and removal from the Port Area. The evidence on procedure is set out mainly in the oral evidence given by the Appellants' first witness Hamidon Bin Yunus who was the Assistant Traffic Manager North Port in 1970, and the evidence on security mainly in the oral evidence given by the Appellants' second witness Yap Sen Fook who was in charge of security in the port at the time. pp.8-25 p.17 p.23

8. The effect of the said evidence in summary was that following a tally by the shipping agents the goods were stacked in Shed No.8 where a staff of 7 clerks working round the clock in 3 shifts looked after the goods. A chief delivery clerk divided his time between the shed and his office. A clerk in charge of the shed oversaw stacking, delivery, documentation and stocktaking. Two tally clerks made a visual tally, and delivery, of goods. A wharf clerk directed the goods to their appropriate destinations as they came off the ship and arranged the smooth running of the transport for this purpose. An assistant clerk was available to accompany forwarding agents collecting goods from the shed. There was no immediate stocktaking of cargo received from the vessel. However, there was available in respect of the goods a special, more expensive, service given to cargoes where each package was of less than 40 cubic feet and worth more than $2,000 (which service was also available for cargo of lesser value at the option of the consignee). pp.17-18

RECORD

If such service had been required a special tally clerk and a special tally sheet would have been provided for its security; the

p.18 tally clerk, having tallied the cargo on discharge, would have accompanied it to a separate "valuable cargo shed" where it would then have been stored till collection. Security within the Port was maintained by police, in plainclothes and in uniform, who patrolled the Port Area and inspected the

p.23 sheds. They worked in four hour shifts round the clock. There were instances of petty thefts but the policing was adequate.

The sheds were locked during meal hours and when they were not being worked. The keys were kept by the police and handed to the clerks in charge of the go-down or to

p.23 another member of the staff.

p.18 The Port was surrounded by a 10 foot chain link fence and the marine police patrolled the sea front at all hours.

p.24 Entry to and exit from the Port was controlled. For a person wishing to enter, a port pass was necessary, and if he entered with a vehicle the number of his vehicle was written down in the pass book.

On exit the proper documents were required of any person wishing to take goods out of the port. A port gate-checker checked goods

p.24 going out; there were also police on duty at the gate. 100% checks of vehicles were not carried out but random checks were. Some members of the port staff had been charged with pilferage, and there was some thieving by stevedores and forwarding agents but there had been only one case of theft on a large scale during the 5 years in which the Appellants' second witness had been in charge of security, the goods in that case

p.25 being recovered outside the Port Area. No member of the Appellants' staff had been charged for theft or for aiding and abetting the theft in this case. Periodic consultations with Customs and Excise were held in order to increase the efficiency of the

p.18 service given by the Appellants.

9. Turning to the facts found by the judge, he dealt first with the question whether the

64 cases had been short-landed or not. He concluded that they had not and that they were missing or lost while in the custody of the Appellants. He then addressed himself to this question: had the Appellants succeeded in showing that the loss had not been caused by their misconduct or negligence or that of their officers or servants? He read Rule 91 and the passage from the Lee Heng case in which H.T.Ong C.J. laid down that the effect of Rule 91 was not to shift from the bailee to the bailor the burden of showing that the bailee had taken all reasonable care of the goods. He held that the Appellants failed to offer an explanation of how the goods had disappeared and that because of their failure to offer an explanation for the loss of the goods the Appellants had failed to show that they had exercised due care and diligence. He stated that it was incumbent upon the Appellants to lay before the court the evidence, which was exclusively within their knowledge, sufficient on the balance of probabilities for the court to hold that the loss had not been occasioned in circumstances which showed lack of care on their part. He found that the irresistible inference from the facts was that the goods "might" have been stolen as a consequence of negligence of the servants of the Port Authority in the course of their employment. Further he stated that the theft "might" have taken place through the active participation or complicity of one or more of the Appellants' employees. He said that the goods must have been removed from the port in a vehicle and loading could not easily have been done without the active assistance of the port employees.

RECORD
p.37
p.38
pp.38-39
p.39
p.40

10. Hamid J. apparently accepted that security arrangements at the port were adequate but suggested aspects which could be improved.

p.40

11. He allowed the Respondents' claim against the Appellants for $21,236.84, and awarded interest at 3% per annum from 3rd April 1970, together with costs and further ordered the Appellants to pay the First Defendants' costs.

pp.40-41

12. By a notice of appeal dated 23rd July, 1974 the Appellants appealed against the

p.43

RECORD

decision of Hamid J. The appeal was heard by the Federal Court of Malaysia, (Suffian L.P. Malaysia, Lee Hun Hoe C.J. (Borneo), Ali F.J. Malaysia) on 8th and 9th January 1975, and the judgment of the Court was delivered by
p.46 Lee Hun Hoe C.J. (Borneo) on 8th March, 1975.

p.46 13. In his judgment the learned Chief Justice referred to the grounds of appeal and grouped them under three headings: the burden of proof, the inference of negligence from the facts, and costs. He summarised the facts,
p.47 dismissed a point on the pleadings which had been raised by Counsel for the Appellants and turned to the question of the burden of proof, asking: had the learned Judge been
p.48 right to place the burden on the Appellants in the circumstances to prove that the loss of the goods was not caused by negligence on their part?

14. He stated that the Appellants' duty was to take all reasonable precautions to protect goods entrusted to them from theft loss or damage. He then read S.106 Evidence Act:

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

which he held put the burden upon the Appellants.

p.49 15. The learned Chief Justice then turned to S.104 and S.105 and Rule 91. The Appellants had contended (i) that Rule 91 reduced the liability of the Authority and placed upon the Respondents the onus to show that the loss was caused solely by the misconduct or negligence of the Authority, its officers or servants, (ii) that S.104 imposed upon the bailee the standard of care of a gratuitous bailee at Common Law (and not a bailee for reward), and (iii) that under Indian Law the duties of a bailee for reward are the same as those of a gratuitous bailee, and that therefore the position was the same under Malaysian Law which had the same provisions governing bailment.

p.51 16. The learned Chief Justice rejected the first contention. After referring to Abdul Rahman v. Ariffin (1956) 22 M.C.J. 89,
p.52 and Gee Hup and Co. v. Yeo Swee Hern Trading

he accepted the general proposition on onus of proof set out in Halsbury's Laws of England (2nd Edition) Vol. 2 page 751 and he next dealt with S.29(1)(g) Ports Authorities Act 1963 holding that it did not enable the Appellants to exempt themselves totally from liability. He said Rule 91 had nothing to do with onus of proof or shifting of onus of proof. The Lee Heng case, which was binding on him, supported this conclusion. The learned Chief Justice summarised the law on burden of proof thus: it was up to the Appellants as bailees to show that the loss was not due to their negligence, and the fact that they had devised a good system did not render them less liable if it was not shown that the loss of the goods arose otherwise than through their negligence. p.53 p.54 p.56 p.57

He referred to dicta of Lord Justice Morris in British Traders and Shippers Ltd. v. Ubique Transport & Port of London Authority (1952) 2 Lloyds 234 at page 256 with regard to the burden of proof that rests upon a bailee in a case where the goods are lost. p.57

17. The next subject treated by the learned Chief Justice was vicarious liability. The Appellants' contentions were that there was no evidence of theft by an employee of the Appellants, nor would complicity by an employee render the Appellants vicariously liable. Counsel for the Appellants had further argued that the law on the master's liability for the fraudulent act of his servants was contained in the case of Cheshire v. Bailey (1905) 1 K.B. 239, contending that Morris v. Martin which expressly disapproved Cheshire v. Bailey was not the law of Malaysia by virtue of the operation of Section 3(1)(a) of the Civil Law Ordinance 1956. However the learned Chief Justice held that Lloyd v. Grace Smith and Co. 1912 A.C. 716, which had impliedly overruled Cheshire v. Bailey, was the law in Malaysia. p.60 p.62

18. He then reiterated that S.104 and S.105, read with Rule 91 in no way reversed the onus of proof which rested squarely on the Appellants as bailees for reward. p.62

Returning to the question whether the

RECORD

p.63 Appellants had discharged the burden which rested on them by showing good system and security, he held that they had not done so. Further reference was made to the British Traders case. There, secure system had not been enough. The loss was unexplained, a complete mystery, and as a result Lord Justice Morris had held that it had not been shown by the bailees that the loss had arisen otherwise than through the negligence of the Port of London Authority.

p.66 19. Having reviewed the system and security measures adopted by the Appellants the learned Chief Justice considered that there were deficiencies in the security system and he agreed with the view of Hamid J. that the theft "might" have taken place through active participation or complicity of one of the Appellants' employees. The learned Chief Justice stated that Hamid J. had not stated the law incorrectly and said that his findings against the Appellants would not be interfered with.

p.67 Finally, as to costs, they were in the discretion of the court. The court appeared not to have exercised its discretion improperly. The appeal was therefore dismissed with costs both of the appeal and of the trial.

p.71 On the 12th May 1975 the Federal Court granted the Appellants leave to appeal to His Majesty the Yang di-Pertuan Agong against the order of the Federal Court dated 8th March, 1975.

20. The Appellants submit that the Federal Court was wrong in affirming the decision of Hamid J. that they were negligent in caring for the Respondents' goods. The standard of care demanded of the Appellants by Hamid J. was that of the bailee for reward at Common Law. The correct standard of care required, under Malaysian Law, of all bailees whether gratuitous or for reward is set out in Section 104 Contracts (Malay States) Ordinance 1950. This section deliberately sets a single standard for all bailees; it is however a less exacting standard than the standard required of a bailee for reward at Common Law, and it corresponds to the standard required of the gratuitous bailee at Common Law. Further, it is submitted by the Appellants that, in assessing the standard of care required by S.104, the bailment

cases at Common Law do not assist and the court should be guided by cases decided under S.151 Indian Contracts Act, which contains provisions identical to those of S.104. The Appellants respectfully submit that they took that degree of care of the goods bailed which is demanded by S.104 and therefore are, by virtue of S.105, not liable for the loss of the goods.

21. It is also submitted by the Appellants that the Federal Court was wrong in failing to attach the correct or indeed any significance to the word "solely" in Rule 91. The Appellants make three submissions upon the effect of Rule 91. FIRSTLY, Rule 91 excludes the Appellants' liability for loss except where it can be shown that misconduct or negligence of the Appellants their officers or servants was the "sole" cause of the loss. SECONDLY, Rule 91 places the onus of showing that the Appellants' misconduct or negligence was the sole cause of the loss upon the Respondents because, on the evidence of the security and system, and the trial judge's findings that there was only a possibility that t here had been negligence by the Appellants and only a possibility that their servants might have participated in the theft of goods. In the absence of other evidence incriminating the Appellants or their servants, the correct inference to be made from the facts was that, on the balance of probabilities the loss was not caused "solely" by the Appellants, their officers or servants. THIRDLY, if (which the Appellants deny) the Appellants as gratuitous bailees, may be held vicariously liable for loss caused by the misconduct or negligence of their officers or servants, then Rule 91 restricts their vicarious liability to cases in which it can be shown that the loss is attributable "solely" to the misconduct or negligence of the Appellants, their officers of servants.

The Appellants humbly submit that the decision of the Federal Court was wrong and ought to be reversed and that the Appeal ought to be allowed with costs here and below for the following amongst other

RECORD

R E A S O N S

1. BECAUSE by the precautions they took the Appellants had shown the degree of care in warehousing the Respondents' goods which is required of them under S.104 Contracts (Malay States) Ordinance.

2. BECAUSE under the said S.104 a bailee is not made vicariously liable for the conversion by his servant of goods entrusted to the bailee unless he failed to exercise the same degree of care in the selection and supervision of his servants which a man of ordinary prudence would under similar circumstances take in the selection and supervision of servants entrusted with or having access to goods of his own of the same bulk quality and value as the goods bailed.

3. BECAUSE even if the Appellants had not exercised the degree of care demanded by the said S.104 in relation to the Respondents' goods, Rule 91(1) of the Ports Authorities By-laws operates to place upon the Respondents the onus of proving that their loss was caused "solely" by the misconduct or negligence of the Appellants, their officers or servants; the Respondents did not discharge that onus.

JOHN VINELOTT Q.C.

MARK POTTER

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

- and -

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

CASE FOR THE APPELLANTS

STEPHENSON HARWOOD [redacted],
Saddlers' Hall,
Gutter Lane,
Cheapside,
LONDON, EC2V 6BS.