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GDT.C.6

Judgment
20, 1965

No. 11 of 1965

IN THE PRIVY COUNCIL

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
-9 FEB 1966
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LONDON, W.C.1.

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

80969

BETWEEN :-

UTAH CONSTRUCTION & ENGINEERING PTY. LTD. AND BROWN & ROOT SUDAMERICANA LIMITED ... ... Appellants (Defendants)

- and -

JANOS PATAKY... ... ... Respondent (Plaintiff)

CASE FOR THE APPELLANTS

Record

1. This is an Appeal by leave of the Supreme Court of New South Wales, granted on the Twenty-seventh April 1965, from the Order of the Full Court of the Supreme Court of New South Wales (Sugerman, Maguire and Nagle JJ.) dated the Seventeenth March 1965. By the said Order the verdict and Judgment of Asprey J. in the Supreme Court of New South Wales dated Twenty-fourth June 1964, insofar as it related to the Second Count of the Plaintiff's Declaration, was set aside and a new trial ordered on the issues raised under the Second Count of the Declaration and the Pleas of the Defendants thereto. p. 200 p. 165

2. In the action brought by the Respondent against the Appellants and heard by Asprey J. sitting without a jury the Plaintiff sought to recover from the Appellants damages in respect of injuries suffered by him whilst working as an employee of the Appellants. In the First Count of the Respondent's Declaration he alleged negligence at common law by the Appellants, as employers, to the Respondent, as employee, and in the Second Count of his Declaration the Respondent alleged a breach by the Appellants of a duty to him imposed upon the Appellants under and by virtue of the second paragraph of Regulation 98 made under the p. 3 p. 4

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Scaffolding and Lifts Act 1912 (as amended). Asprey J. found a verdict and entered Judgment for the Appellants on both counts of the Plaintiff's Declaration. Upon the
p. 165 hearing of the Appeal from the Judgment of Asprey J. brought by the Respondent to the Full Court of the Supreme Court of New South Wales, the Respondent did not pursue
p. 185 his Appeal insofar as it related to the verdict and Judgment for the Appellants on the First Count of the
p. 186 Declaration and his Appeal was dismissed by the Full Court of the Supreme Court of New South Wales insofar as it related to Asprey J.'s Verdict and Judgment on the First Count of the Declaration.

3. The issues arising upon this Appeal may be summarised as follows:-

(i) Whether the second paragraph of Regulation 98 made under the Scaffolding & Lifts Act 1912 (as amended) is a valid exercise by the Governor of New South Wales of powers granted by the said Act to him to make Regulations.

(ii) Whether the Act and the second paragraph of the said Regulation confer a right of action upon the Respondent for breach of Statutory duty against the Appellants.

4. The Appellants were at all material times contractors engaged in tunnelling operations as part of the works known as the "Snowy Scheme" carried out in the Snowy Mountains region under the authority of the Snowy Mountains Hydro-Electric Power Act 1949-1958 of the Commonwealth of Australia. The Respondent was employed by the Appellants as an Assistant Surveyor in the tunnel it was constructing near Island Bend. The Respondent met with an accident on 7th July 1962 whilst working at or near the race of a tunnel which had been at that time constructed into a mountain for a distance of 800-900 yards to a diameter of approximately 21 feet when a rock fell from the roof of the "blasted out area" of the tunnel upon the Respondent. The procedure for the excavation of the tunnel followed a regular cycle of events or operations. This cycle was described by Asprey J. as follows:

"The procedure for the excavation of the tunnel followed a regular cycle of events or operations. Firstly, a number of holes are drilled in the forward rock-face of the tunnel and explosives are laid in the face, and after the area is cleared of personnel, these explosions are detonated. A considerable amount of rock and rubble is discharged from the tunnel in the area detonated and this apparently falls to the floor of the tunnel and forms part of what is known as the "muck pile". Secondly, after the expiration of 15 minutes from the completion of the blasting operation the Shift Supervisor (who is also known as the "Walker"), or a foreman, goes up to the face of the tunnel where the blasting operation has been carried out in company with an electrician who sets up lights and the Supervisor then makes an inspection of the freshly blasted face. Thirdly, the Supervisor orders miners to "bar down". This is a process by which miners with steel bars of varying lengths bar down or prize from the tunnel roof and both sides of the tunnel the blasted out area of loose rock. The loose rock is detected by visual observation and also by taking soundings of the rock with the bars. This work usually takes from half to three-quarters of an hour. Fourthly, the rock and earth rubble which has fallen to the tunnel floor from both the blasting operation and the barring down constitutes the muck pile and a mucking machine is brought into the tunnel on railway lines and loaded at a situation adjacent to the muck pile. By means of the mucking machine the material comprising the muck pile is removed from the floor of the tunnel and placed into trucks by which means it is taken back out of the tunnel. The Assistant Surveyor is located at this stage at a platform suspended from the roof of the tunnel and known as the "roof station" and the roof station is some 600 to 800 feet back from the tunnel face. The Assistant Surveyor received a signal from his assistant

> or, as he is sometimes called, the "Chainman", that he (the Chain-man) is going to the face. The Chain-man then goes up to the face of the tunnel with a torch and then shines the torch back in the direction of the tunnel entrance so that the Assistant Surveyor is able to pick up the light by means of a theodolite and, as a result of their efforts, the Chain-man is enabled to make markings on the face of the tunnel. Sixthly, when the mucking operation is completed, the Assistant Surveyor goes up to the face, makes his calculations, and again marks the face of the tunnel to indicate where drill-holes are to be made for the laying of explosives. Seventhly, when these operations have all been completed, the cycle repeats itself."

5. Although there was a great deal of conflict of
p. 176 evidence at the trial as to whether the "barring down" process referred to in the third stage of the cycle had been completed or whether the barrers down were still in the process of carrying out the initial barring down operation, Asprey J. found as a fact that barring down had concluded in the subject area when the accident to the Respondent happened and that the Respondent at the time of receiving his injuries had commenced his duties at the face of the tunnel referred to in the sixth stage of the cycle. However Asprey J. held that there was no
p. 179 evidence that the barring down had not been done efficiently or that it had not been properly supervised and further held that there was always a possibility of pieces of rock falling from the roof of the tunnel even after the barring down procedure has been carried out.

6. At the trial, Counsel for the Respondent sought to tender so much of Regulation 98 made under the Scaffolding & Lifts Act 1912 (as amended) as was set out in the Second Count of the Respondent's Declaration. This portion of the Regulation reads as follows:-

> "98.....Every drive and tunnel shall be securely protected and made safe for persons employed therein....."

p. 150 In a Judgment given on the 2nd March 1964, Asprey J.

rejected the tender of this the aforesaid portion of Regulation 98 on the ground that it was ultra vires the Scaffolding & Lifts Act 1912 (as amended).

7. Before the hearing by the Full Court of the Supreme Court of New South Wales of the Appeal brought by the Respondent to that Court from the verdict and Judgment of Asprey J., the Full Court of the Supreme Court of New South Wales then constituted by Walsh, Macfarlan, Taylor JJ. in a joint Judgment delivered by Walsh J. on the Tenth November 1964 in Scarlett v. Utah Construction and Engineering Pty. Limited 82 W.N. (Pt. 2) p. 94 dismissed a demurrer taken by the Defendant in that case to a count in a Declaration based upon a breach of the duty imposed by the second paragraph of Regulation 98 made under the Scaffolding & Lifts Act 1912 (as amended) and upheld the validity of the said Regulation. In that case the said Full Court of the Supreme Court of New South Wales refused to adopt any of the reasons given by Asprey J. in the case presently under Appeal for holding that the said Regulation was ultra vires the said Act.

8. Upon the hearing of the Appeal by the Respondent to the Full Court of the Supreme Court of New South Wales only the following grounds of Appeal (the numbers are those in the Respondent's Notice of Appeal to the Full Court of the Supreme Court of New South Wales) were pressed:-

"(3) That His Honour should have admitted the tender of the Regulations under the Scaffolding & Lifts Act and further held that they provided a cause of action;

(4) That His Honour was wrong in law in holding that Regulation 98 and the other Regulations under the Scaffolding & Lifts Act were ultra vires and invalid;

(5) That His Honour should not have ruled that the Regulations under the Scaffolding & Lifts Act were invalid and did not provide a cause of action, and

(12) This His Honour should have held that the second count of the Declaration provided a good cause of action for the Appellant."

9. It was conceded by Counsel for the Appellants upon

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p. 186 the hearing of the Appeal before the Full Court of the Supreme Court of New South Wales that the conclusion of Asprey J. upon his rejection of the tender of Regulation 98 in evidence and his ultimate Judgment for the Appellants in the action on the Second Count of the Respondent's Declaration could not stand if the Full Court saw fit to follow the previous decision of the Full Court of the Supreme Court of New South Wales in Scarlett v. Utah Construction & Engineering Pty. Limited 82 W.N. (Pt. 2) p. 74. Counsel for the Respondent relied merely upon the decision in Scarlett's Case. In the result the Full Court, following the decision in Scarlett's Case, allowed the Respondent's Appeal on the grounds 3, 4, 5 and 12 of his Notice of Appeal referred to in paragraph 8 hereof.

10. The Scaffolding & Lifts Act 1912-1960 contains provisions relating to "excavation work" since an amendment to the principal Act effected by Act No. 38 of 1948. "Excavation work" is defined in Section 3 as follows:-

> "'Excavation work' includes any work in connection with:-
>
> (a) excavating for or preparing foundations for a building or structure,
>
> (b) tunnelling,
>
> (c) the sinking or digging of any shaft or well, and
>
> (d) excavating for water, sewerage, drainage, gas or electricity supply;
>
> but does not include an excavation less than five feet in depth measured from the top of the excavation."

The words "Tunnelling" and "Tunnel" are not defined. References to "excavation work" occur in Section 4A(b), 6, 6A, 13, 15, 18 and Section 19(c) and 22. The only Section of the Act relied upon by the Respondent and the Full Court of the Supreme Court of New South Wales in considering the validity of the second paragraph of Regulation 98 was Section 22. No other provision of the

Act gives any power to make Regulations and No Section of the Act by itself imposes any duty to carry out the provisions of the Regulations. So far as is material this Section is as follows:-

"22(1). The Governor may make regulations not inconsistent with this Act prescribing all matters which are required or authorised to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Without limiting the generality of the powers conferred by sub-s.(1) of this Section, the Governor may make regulations.....

(g) relating to ....

(iv) the manner of carrying out building work, excavation work or compressed air work;

(v) safeguards and measures to be taken for securing the safety and health of persons engaged in building work, excavation work or compressed air work, or at or in connection with conveyors, cranes, hoists, lifts, plant, scaffolding or gear;.....".

(4) A regulation may impose a penalty not exceeding One hundred pounds for any breach thereof."

References in Section 22(2)(a) and (f) to excavation work are not relevant.

11. The Appellants adopt the view of the Full Court in Scarlett's Case as to the meaning and extent of operation of Subsection (1) of Section 22 of the Scaffolding and Lifts Act 1912-1960. In essence this was that such a power as is contained in that subsection will not support attempts to widen the purposes of the Act or to add new and different means of carrying them out but will authorise the provision of subsidiary means for carrying into effect what is enacted in the Statute itself. Note also

Shanahan v. Scott (1957) 96 C.L.R. 245 at p. 250 and Peppers Self Service Stores Pty. Ltd. v. Scott (1958) 98 C.L.R. 606 at p.610. There is no provision in the Act concerning the manner of carrying on excavation work or relating to safeguards, measures to ensure safety to workers engaged in excavation work or relating to the safety of places where excavation work may take place.

12. In Scarlett's Case (supra) the Full Court had arrived at its conclusion that the second paragraph of Regulation 98 was a valid exercise of power for the following reasons:-

(a) That Section 22 of the Scaffolding and Lifts Act 1912-1960 is not concerned directly with the definition of duties but withthe statement of topics or matters in respect of which power is granted to enact subordinate legislation.

(b) That the meaning of words conferring a grant of power is not always governed by the same considerations as where the same or similar words are used to define a duty.

(c) That power to make regulations "relating to" the "manner of carrying out tunnelling" and "relating to" "safeguards and measures" is wider than a power which authorises a "prescribing" of regulations on the same subject matter.

(d) That the decision in Australian Iron & Steel Ltd. v. Ryan (1957) 97 C.L.R. 89 particularly the Judgment of Williams J. requires a broad approach to be taken in construing the powers conferred by Section 22 (2) (g)(iv) and (v). In this decision Williams J. and Webb J. who concurred, considered that the Regulations therein involved, that is to say, Regulations 73(2) and (5) imposed duties intended to safeguard the safety of persons engaged in building work. The Full Court in Scarlett's Case found that the second paragraph of Regulation 98 also imposed a duty with the same intention regarding persons engaged in excavation or tunnelling work.

(e) That the reasoning of Ryan's Case (supra) is that a provision of safety in or near where building work is being done is a provision relating to the manner of carrying out building work and also a provision relating to safeguards and measures to be taken for securing the safety of persons engaged in building work. Similar reasoning is applicable to the second paragraph of Regulation 98.

10 13. The Appellants respectfully submit that the reasoning of the Full Court in Scarlett's Case is in error in the distinction made by the Judges in applying the passage in the speech of Viscount Ratcliffe in Brown v. National Coal Board 1962 A.C. 574 at p. 593 as follows:-

> "It may be possible to find a pregnant difference in the nature of each obligation corresponding with the difference in the language used. It is at least possible to see that the differences of language bear some relation to difference
20 in the kind of thing that is to be the subject of the duty. But it is, I think, impossible to say that in the face of all these differences such words as 'the manager shall take such steps as may be necessary' for securing a specified result impose a liability of just the same order as a requirement that he is to secure or ensure that result or, more simply that a state of affairs corresponding with the desired result is at all times to exist".

30 to Section 22 of the Scaffolding and Lifts Act. It is true that Section 22 is not concerned with the definition of duties directly; the reasoning of Viscount Ratcliffe should have been examined in relation to the construction of the second paragraph of Regulation 98 when considered in the light of the power given under Section 22 of the Act to make regulations. The regulation sought to make a duty of the end or purpose for which regulations could be made rather than binding an employer to adopt means for achieving the end or purpose.

40 14. The appellants respectfully submit that the reasoning of the Full Court in Scarlett's Case is in error when it draws a distinction between principles which apply in the

consideration of the meaning of words used in the grant of a power and in the definition of a duty. The matter for determination was whether the exercise of the power in its attempt to define a duty fell within the power. Note Brunswick Corporation v. Stewart 65 C.L.R. 88.

15. The appellants respectfully submit that the reasoning of the Full Court in Scarlett's Case is in error when it places reliance upon a difference in meaning on the words "relating to" as used in Section 22 of the Scaffolding and Lifts Act and the word "prescribing" when used in the grant of power to make regulations. Section 22 is a section granting power to make regulations in respect of many different matters and whilst some of the powers are for making regulations "prescribing" others are for "prohibiting" or for "relating to". Sub-section (1) of Section 22 is the section giving the power to make regulations "prescribing" all matters which are required or authorised to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act. Sub-section (2), in which sub-paragraphs (iv) and (v) of paragraph (g) appear, is merely a more detailed categorisation of the general power of sub-section (1) and is stated to be made "without limiting the generalities of the powers" conferred by sub-section (1) of Section 22. The words "relating to" when used in sub-section (2) in association with matters therein listed should not receive a wider meaning than "prescribing" matters referred to in sub-section (1). Further, the use of the words "relating to" in association with the manner of carrying out excavation work or safeguards and measures to be taken for securing the safety and health of persons engaged in excavation work should be construed in association with the words following, which are words denoting activity to be undertaken rather than words descriptive of a situation which has to exist.

16. The appellants respectfully submit that Ryan's Case does not determine the validity of the second paragraph of Regulation 98 and that the reasoning of the Judgment of Williams J. does not support the application of that case to this Appeal or to Scarlett's Case. In the first place the arguments submitted to the Court do not suggest that the validity of the regulations under the powers of

Section 22 of the Scaffolding and Lifts Act was argued, except in so far as it was argued that uncertainty in the regulations in question therein made them invalid. The argument of the appellants in the High Court in Ryan's Case was directed to whether breach of a regulation made under the Scaffolding and Lifts Act relating to safety in the relationship of employer and employee afforded a private cause of action. The regulations in question in Ryan's case were Regulations 73(2) and (5) which are as follows:-

> "Any person who directly or by his servants or agents carries out any building work shall take all measures that appear necessary or advisable to minimise accident risk and to prevent injury to the health of persons engaged in such building work and for this purpose, without limiting the generality of the foregoing, he shall (inter alia) — (2) provide and maintain safe means of access to every place at which any person has to work at any time.....(5) Keep all stairways, corridors and passageways free from loose materials and debris, building materials, supplies and obstructions of every kind."

Williams J. at p.95 said:-

> "The two sub-regulations under challenge fall well within the ambit of these regulation-making powers. They are regulations which impose duties intended to safeguard the safety of persons engaged in building work and they are regulations which require specific precautions to be taken which if not observed may cause such persons to suffer injury."

and at p. 96:-

> "They are in themselves separate and independent exercises of the regulation-making power and well within its terms."

Kitto J. at p. 97 said:-

"A contention on the part of the appellant was that the express provisions of sub-regulations (2) and (5) were not within the power thus conferred, having regard especially to a degree of uncertainty which was attributed to them in the context in which they appear. I am unable, however, to see any reason to doubt their validity. I adopt what has been said on this point in the Judgment of the Supreme Court."

17. The appellants respectfully submit that, in so far as Ryan's Case does establish the validity of Regulation 73(2) and (5) it does not establish the validity of the second paragraph of Regulation 98. Sub-paragraphs (2) and (5) of Regulation 73 do in fact prescribe or lay down measures and safeguards which are intended to protect a worker, the former dealing with the duty to take steps regarding the access of a worker to his place of work and the latter prescribing activity which promotes safety in places where the worker may be.

18. The appellants respectfully submit that the obiter dicta of Windeyer J. in General Constructions Pty.Ltd. v. Peterson 108 C.L.R. 251 at p. 257 are appropriate and correct in relation to Regulation 73(3) and would be of even more force in relation to the second paragraph of Regulation 98. - Windeyer J.

"Although it was not argued, I am somewhat doubtful whether Reg. 73(3) under the Scaffolding and Lifts Act, 1912-1958 does create a statutory duty a breach of which, apart from any question of negligence and without any consideration of contributory negligence, gives rise in all cases to a right of action. It seems intended to state or describe a situation in which a duty of care arises rather than to prescribe or define precisely the means that must be taken to meet that situation. It may be that Reg. 73(3) was not intended to cover a case of this sort where, for a very temporary purpose, an employee chose to

get upon a structure more than six feet above the ground, when he could have performed the task he was set by simply getting a ladder or trestle or some other platform about four feet high and working from it. But the declaration in the action alleged facts bringing the case literally within the regulation. The defendant by its pleas put those facts in issue. It did not dispute that those facts, if proved, would establish a cause of action. It fought the case on the facts, alleging that the plaintiff was not injured in the way he said he was. The jury must be taken to have found the issue of fact in favour of the plaintiff. It seems to me far too late to consider now questions of the construction of the regulations or of their effect which are not raised by the pleadings and were not raised at the trial."

The appellants also respectfully submit that the obiter dicta of Brereton J. and Else Mitchell J. in Storozuk v. Commissioner for Railways 80 W.N. 1080 are appropriate and correct in relation to Regulations 73 (17), 84, (8)and (9) and would be of even more force in relation to the second paragraph of Regulation 98.

Brereton J. at p. 1089:-

"As to these three regulations indeed I share the doubts expressed by Windeyer J. as to Reg. 73 (3) in General Constructions Pty. Ltd. v. Peterson (53) where he said: 'I am somewhat doubtful whether Reg. 73(3) under the Scaffolding and Lifts Act, 1912-1958 (N.S.W.), does create a statutory duty, a breach of which, apart from any question of negligence and without any consideration of contributory negligence, gives rise in all cases to a right of action. It seems intended to state or describe a situation in which a duty of care arises rather than to prescribe or define precisely the means that must be taken to meet that situation'.

To my mind this comment applies much more strongly

to these three regulations than to Regulation 73 (3). I think too that there is something to be said for the view that they are in terms far too vague to create a criminal liability and inappropriate to found a civil action. However, the relevant counts were not demurred to and no such argument was addressed to us."

Else- Mitchell J. at p. 1091:-

"Thirdly, although the matter was not litigated before us and presumably not before the trial judge, I am far from convinced that all of the regulations which were sued on are valid exercises of the regulation-making power conferred by the Scaffolding and Lifts Act, 1912-1960 (s.22(2)) and even if they are, I have, with Windeyer J., serious doubts as to whether each of them gives rise to private rights of action (General Constructions Pty.Ltd. v. Peterson (56)). It is neither necessary nor proper to develop these matters, but it seems to me important to examine the regulations in the light of the scheme of the Act which confers the regulation-making power; moreover, it is an open question whether some of the regulations which have been made in purported pursuance of the power conferred by s.22(2)(g) really contain any prescription or regulation of the 'manner of carrying out building work' or of the 'safeguards and measures to be taken for securing the safety andhealth of persons engaged in building work.'"

19. The appellants respectfully submit that the reasoning in Ryan's Case does not support the reasoning of the Full Court in Scarlett's Case set out in paragraph 12 (e) (supra). If it did the whole of the regulations relating to measures and safeguards and the manner of carrying out work in building would become redundant if the Governor could merely have provided:

"That all buildings in which work is carried out and all places in which workers engaged in building work shall be securely protected and made safe for the workers".

20. Sub-paragraph (iv) of Section 22(2) of the Scaffolding and Lifts Act 1912-1960 empowers the making of regulations relating to the manner of carrying out excavation work. The appellants respectfully submit that this merely authorises regulations to be made which relate to the specific methods by which tunnelling work is to be performed. If the act had intended the power to be so wide as to permit a general provision for ensuring safety towards men engaged in tunnelling work by the employer and his servants, it was not necessary to limit the power to provisions relating to the manner of carrying out the work. The regulation in question relates to the place which comes into existence by the performance of the work of tunnelling, namely the area of space which constitutes a tunnel. The power contemplates the laying down of procedures, ways and means to be used in making the tunnel or those by which a tunnel may be constructed.

21. Sub-paragraph (v) of Section 22(2) of the Scaffolding and Lifts Act 1912-1960 empowers the making of regulations relating to safeguards and measures to be taken by an employer for securing the safety and health of persons engaged in (inter alia) tunnelling work. The appellants respectfully submit that this merely authorizes regulations to be made which relate to acts procedures and steps which should be taken in an attempt to effect a result to a worker of safety and health. It aims at provisions for achieving an end result of safety and health for workers, not at prescribing what should be the end result of operations carried out in tunnelling work.
See Brown v. National Coal Board 1962 A.C. 574 particularly at p. 593.

22. The appellants respectfully submit that the second paragraph of Regulation 98 is ultra vires as being beyond the powers given to the Governor to make regulations under S.22 (1) (2)(g)(iv) and (v) of the Scaffolding and Lifts Act 1912-1960.

23. The appellants respectfully submit that the second paragraph of Regulation 98 is also invalid as being uncertain and vague, for the reasons submitted in paragraph 22 and for the reason that its time scope and area of operation are undefined. Any breach of the second paragraph of Regulation 98 involves liability

for prosecution and the imposition of a penalty upon the employer. Regulation 164 is in these terms:-

> "When any matter or thing is by these Regulations required, directed or forbidden to be done, or where any authority is given by these Regulations to any person to require, direct or forbid any matter or thing to be done, and such matter or thing so required or directed to be done remains undone, or such matter or thing so forbidden to be done is done, in every such case every person offending against such requirement, direction or prohibition, shall be deemed guilty of a breach of these Regulations. Any person guilty of a breach of these Regulations shall, if no other penalty is herein expressly provided for such breach, be liable to a penalty not exceeding £100."

This regulation is authorised by Section 22(4) of the Scaffolding and Lifts Act which is in the following terms:-

> "(4) A regulation may impose a penalty not exceeding one hundred pounds for any breach thereof."

24. The appellants respectfully submit that Section 22(1) and (2)(g)(iv) and (v) of the Scaffolding and Lifts Act 1912-1960 does not empower the Governor to make Regulation 98 paragraph 2 if on the true construction of that paragraph it imposes an absolute obligation upon an employer of ensuring the safety of persons employed in excavation work.

25. The appellants respectfully submit that Section 22(1) and (2)(g)(iv) and (v) of the Scaffolding and Lifts Act 1912-1960 do not empower the Governor to make a regulation imposing duties, the breach of which by an employer give rise to an action for damages by an employee based upon breach of a Statutory duty. To the extent that Ryan's Case and Darling Island Stevedoring and Lighterage Company Limited v. Long 97 C.L.R. 36 decide to the contrary they are wrong.

26. The appellants respectfully submit that this Appeal should be allowed for the following amongst other

R E A S O N S

1. BECAUSE the second paragraph of Regulation 98 is invalid as not authorised by the Scaffolding and Lifts Act 1912-1960 Section 22(1) or(2)(g)(iv) or (v) or at all.

2. BECAUSE the second paragraph of Regulation 98 imposes an absolute duty of ensuring safety towards workers in tunnels upon an employer which is not authorised by the Scaffolding and Lifts Act 1912-1960.

3. BECAUSE the Scaffolding and Lifts Act 1912-1960 and more particularly Section 22(1) and (2)(g) (iv) or (v) does not imply that a breach of Regulations made thereunder gives rise to an action for breach of Statutory duty.

4. BECAUSE the decisions in Ryan's Case and Darling Island Stevedoring and Lighterage Company Limited v. Long Case in so far as they are contrary to the last reason are wrong and should be overruled or distringuished.

5. BECAUSE the decision in Scarlett's Case was wrong.

6. BECAUSE the decision of Asprey J. was right and ought to be restored.

J. D. HOLMES

W.D.T. WARD

No. 11 of 1965

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN :-

UTAH CONSTRUCTION & ENGINEERING PTY.LIMITED AND BROWN AND ROOT SUDAMERICANA LIMITED — Appellants (Defendants)

- and -

JANOS PATAKY — Respondent (Plaintiff)

CASE FOR THE APPELLANTS

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