24, 1982

IN THE PRIVY COUNCIL No.10 of 1981

ON APPEAL

FROM THE COURT OF APPEAL OF BERMUDA

BETWEEN :-

GABRIEL MARRA — First Appellant (First Plaintiff)

- AND

SONDRA MARRA — Second Appellant (Second Plaintiff)

- AND -

J.B. ASTWOOD & SON LIMITED — Respondent (Defendant)

CASE FOR THE APPELLANT

RECORD

1. This is an Appeal from the judgment of the 30th day of June 1980 of the Court of Appeal of Bermuda (Blair-Kerr, P. Duffus and Summerfield J.A.) allowing an appeal from a judgment dated the 9th day of October 1979 of the Supreme Court of Bermuda (Robinson J.) giving judgment for the First Appellant in the sum of $188,442.15 and for the Second Appeallant in the sum of $1,400 as damages for breach of contract and/or negligence. p.95, l.29 p.88, ll.1-20

2. The issues in this Appeal are:-

(i) Whether the Court of Appeal for Bermuda were right to reverse the learned trial judge's findings of fact; and

(ii) Whether the said Court were correct in regarding any distinction between the duties owed in contract and the tort of negligence as artificial; and

(iii) Whether the said Court adopted the proper approach in construing the exemption clauses in the contract.

3. The First Appellant was born on the 31st day of March 1929 and lives at 670 Hickory Street, Washington Township, New Jersey, U.S.A. with his wife the Second Appellant. The First Appellant qualified as a professional hairdresser in the 1950's and was also a professional musician who p.15,ll.30-35 p.29,l.50 p.18,l.18

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played the flugel, horn, trumpet and valve trombone.

p.15,11.35-40 p.30 11.3-5 The Appellants arrived in Bermuda on the 24th day of July 1977 for a week's holiday. They were to stay at the White Sands Hotel. At all material times the

p.3, 11.15-19 p.7, 11.21-22 p.15,11.35-40 Respondents carried on the business of hiring out auxiliary motor cycles from premises in Front Street, Hamilton, Bermuda. On the 25th day of July 1977 the First Appellant ordered through the hotel a low double seated mobylette auxiliary cycle from the

p.31,11.20-25 p.22,11.8-11 Respondents which cycle was delivered the same day by the Respondents deliveryman Mr. Robert Johnson. The First Appellant had hired a cycle on a previous

p.16,11.1-4 p.22,11.23-35 p.16,11.19-24 visit to Bermuda and knew how to ride one. The deliveryman gave no instructions to the First Appellant of how to cope with an emergency arising out of the use of the cycle. The cycle appeared to be in working order but the First Appellant did not

p.15, 1.21 p.16,11.31-32 p.22,11.39-40 inspect it. After paying a deposit of $20 for the said cycle the First Appellant read halfway down a receipt given to him by the deliveryman. The First

p.23 11.1-10 p.16,11.46-50 p.p.140-141 Appellant signed the receipt Exhibit 1 without realising the legal significance of the documents content or of so signing. Whilst using the cycle

p.17,11.1-18 before and at the time of the accident the First Appellant found that the cycle's brakes did not work

p.16,11.30-2 p.17,11.30-60 properly. The First Appellant found that the throttle worked inefficiently and that it stuck in an open position. When the First Appellant with the Second

p.17,11.30-60 Appellant as pillion passenger was riding the cycle in an easterly direction along the South Shore Road, the First Appellant was unable to stop the cycle and collided with a stationary taxi on the westbound carriageway.

p.27,11.5-28 pp.17,18 11.1-25 pp.20.21 11.1-41 p.24,11.48-60 p.25,11.1-19 p.30,11.20-50 pp.153-171 The taxi driver was a Mr. R. Ming. The First Appellant suffered serious personal injury, loss and damage. The Second Appellant suffered personal injury, loss and damage.

4. The Appellants started the present action in the

pp.1-2 Supreme Court of Bermuda by generally indorsed Writ dated the 20th day of February 1978 claiming damages for injury, loss and damage caused by the breach of contract of hire of the 25th day of July 1977 and/or the negligence of the Respondent resulting in the traffic collision on the 26th day of July 1977 on the

p.3-6 South Shore Road, Warwick Parish, Bermuda. By their

p.6 Statement of Claim dated the 14th day of February 1978

p.3 the Appellants alleged that there were implied terms in the contract that the cycle was reasonably fit for its purpose; was without defect and in good, proper roadworthy condition; and that adequate instructions ought to have

p.4 been given to the Appellants so they could make proper and safe use of the cycle. The particulars of the breaches of the implied terms alleged that the cycle throttle stuck in an open position; the brakes were inefficient and failed to stop the cycle when the

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throttle was so stuck; that the brakes could not stop the cycle when ridden by two persons; and that no instructions were given of how to cope with the cycle when the throttle was stuck in an open position. Alternatively the Appellants alleged negligence in the supply of a defective cycle. The Appellants alleged that the collision on the 26th July 1977 was caused by the aforesaid defects and the Appellants suffered injury loss and damage. By their Defence and Counterclaim dated the 3rd day of April 1978 the Respondents admitted their business and the contract of hire dated the 25th day of July 1977. They made no admissions as to the implied terms and denied any breach thereof. They admitted the colision but denied that the causation was due to the allegations made by the Appellants and alleged in the alternative that the First Appellant was guilty of contributory negligence in the manner of his driving the cycle. The Respondents alleged estoppel by reason of the First Appellant's signing of the receipt which it was alleged contained words exempting the Respondents from any liability. By their Counterclaim the Respondents alleged that the First Appellant had agreed to indemnify them for the claim brought against them by the Second Appellant. By their Reply and Defence to Counterclaim dated the 20th day of April 1978 the Appellants alleged that the Respondents were unable to rely on the Exemption clauses by reason of their fundamental breach of contract. The Statement of Claim and the Defence set out the material facts referred to in Paragraph 3 above.

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p.4, p.5-6
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pp.10-11

5. The action came on before Robinson J. on the 16th day of July 1979 and was adjourned on the 18th day of July for judgment to be delivered after consideration. Robinson J. gave judgment on the 9th day of October 1979.

p.13
p.88

6. The learned Judge outlined the facts and the sequence of events which led up to the collision. He referred to the nature and extent of the Appellants injuries. By reference to the Statement of Claim, the Defence and Counterclaim and the Reply the learned judge set out the issues involved in the action. At paragraphs 36-57 of his judgment the learned judge sets out his findings of fact.

pp.65-71
p.73 l.15 to p.77 l.52

7. Robinson J. made the following findings of fact:-

(i) That the First Appellant only read a portion of the receipt;

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(ii) The Respondents servant deliveryman Mr. R. Johnson did not draw the First Appellants attention to any clause exempting the Respondents from liability;

p.73 l.39 to p.74 l.29

(ii) That there was no evidence as to whether and if so what inspection was made for faults and defects of the particular auxiliary cycle delivered to the First Appellant by the Respondents deliveryman Mr. R. Johnson or by their mechanic Mr. Madeiros;

p.74 l.39 to p.75 l.32

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p.78 ll.12-17 (iv) No proper instructions had been given to the First Appellant of how to cope with the sort of emergency that arose;

p.76 ll.24-33 (v) That there was a high spot on the inner sleeve of the throttle control which rubbed against the outer sleeve;

p.76 l.49 to p.77 l.17 (vi) The learned trial judge found that he could not reconcile the evidence of Sergeant Pratt that he had carried out an apparent test of the cycle brakes nine days after the collision with the evidence of Sergeant Counsell that there was damage to the front forks and wheel;

p.74 l.30 to p.77 l.52 (vii) There was an acute conflict of evidence between the First Appellant on the one hand and Sergeant Pratt, Mr. Madeiros and Mr. Johnson for the Respondents on the other and after lengthy consideration of the conflict the learned trial judge accepted the First Appellant's evidence as to the condition of the cycle;

p.77 ll.30-52

p.77 ll.18-29 (viii) That Sergeant Pratt's evidence was no more than speculative;

p.81 ll.8-16 (ix) The Appellants were not made aware of the exemption clauses printed on the receipt or that those clauses had

p.81 ll.16-35 contractual force; nor had they been assented to by the First Appellant; nor that the exemption words were clear.

p.77 l.58 to p.79 l.12 8. The learned trial judge held that the auxiliary cycle supplied to the Appellants did not function properly as the throttle control did not control the acceleration or the deceleration of the cycle and that the brakes were

p.83,l.48 to p.84 l.2 ineffective. The Respondents were in breach of their contractual obligations to the Appellants. The Appellants were entitled to repudiate the contract which ended at the time of the collision.

p.84, ll.3-11 That the exemption clauses in the receipt did not deprive the Appellants of their cause of action against the Respondents for their negligence.

p.87,l.47 to p.88,l.1 The learned trial judge found that each Appellant was 30% Contributorily Negligent and awarded $188,442.15 to the First Appellant and $1,400 to the Second Appellant with interest and half taxed costs.

9. By a Notice of Appeal dated the 19th day of November 1979 the Respondent and by a Notice of Cross-Appeal dated the 27th day of November 1979 the Appellants appealed to the Court of Appeal of Bermuda. The Appeal came on before Blair Kerr P. Duffus and Summerfield J.A. on the 30th day of June 1980.

10. The Judgment of the Court of Appeal of Bermuda was delivered by Blair Kerr P. on the 30th day of June 1980.

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The learned Judges summarised the facts of the case; the course of the proceedings and referred to the earlier action tried by Robinson J. and recorded by him in his notes; the learned trial judges treatment of the exemption clauses in the contract; his findings of act and eventual decision. The learned judges held that the Respondents were not subject to an implied term to give adequate instructions on the use of the cycle to enable the Appellants to ride safely or instructions as to what to do if the throttle should remain stuck in an open position. The learned judges dealt with the effect of the exemption clauses and decided that the decision in White v. Warwick (described in the judgment as Smith v. Warwick by mistake) was wrongly decided.

The learned Judges having considered the authorities cited to them decided that clause L in the receipt covered injury directly attributable to negligence on the part of the Respondent Company's servants and that the said clause relived the Respondents from liability in both contract and tort. The learned Judges preferred the evidence of Sergeant Pratt that the throttle and brakes functioned properly to that of the First Appellant which was to the contrary. They stated that Sergeant Pratt's evidence regarding the condition of the brakes had not been challenged or referred to by the First Appellant's Counsel in his closing speech. The learned judges stated the evidence of Mr. Madeiros and Mr. Johnson that each cycle was examined for faults before delivery established a general system of checking which would cover the cycle delivered to the First Appellant. The learned Judges decided that the learned trial judges findings of fact should not be allowed to stand. The learned judges held that the accident was caused either by the negligent manner in which the First Appellant rode the cycle or by an error of judgment on his part occasioned by his limited skill and experience in riding motor cycles and not caused by any errant behaviour of the throttle control coupled with brake failure.

p.133

p.135

11. The Court of Appeal of Bermuda set aside the judgment appealed against and entered judgment in favour of the Respondent with costs in that Court and the Court below.

p.135

12. The Appellants respectfully submit that the Court of Appeal of Bermuda erred in reversing the trial judges findings of fact. It is respectfully submitted that the Court failed to apply the principles enunciated by Lord Thankerton in Watt v. Thomas (1) 1947 A.C.484. The learned trial judge was able to study the demeanour of the witnesses, their candour and partisanship in reaching his findings of fact. It is respectfully submitted that these factors cannot be discerned by an Appeal Court from the printed record of the evidence. An example of the Court of Appeal's attitude to the evidence of the First Appellant is to be found at pages 130 and 131. It is further submitted that the Court of Appeal wrongly found that the trial judge had erred in rejecting the evidence of Sergeant Pratt. The learned judges stated that there

p.112 l.45 to p.113 l.5
p.130

p.131

p.132 ll.25-32

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was nothing in the record to suggest that the learned judge did not accept Sergeant Pratt as an expert and that no evidence was called to the contrary by the Appellants. It is respectfully submitted that the fact that Sergeant Pratt was an independent expert did not of itself mean that his evidence should have been preferred to that of the First Appellant. The learned

p.132,11.25-32 judges further stated that the evidence of Sergeant Pratt was not challenged or referred to by the First Appellant's Counsel in his closing address. It is

p.39,1.28 to p.40 1.21 pp.43-44 respectfully submitted that the Court overlooked the cross examination by the First Appellant's counsel at trial and the references in his closing speech to the brake defect. It is further submitted that the learned judges overlooked the essential finding of the learned trial judge that there was an acute conflict between the evidence of Sergeant Pratt and the First Appellant had accepted the latter's as preferable. The learned Judges

p.132 p.134 stated that Sergeant Pratt had found the brakes and throttle to be in good working order. It is respectfully submitted that they overlooked that the learned trial

p.77, 11.18-29 judge found that Sergeant Pratt did not carry out a full test on the brakes. The learned judges overlooked

pp.38-39 p.69 the reference to the high spot on the throttle control when theyydecided that the throttle was working correctly. In deciding that the throttle worked correctly the learned judges decided that the evidence of the First

p.34 (from CA Script) Appellant to the contrary and his evidence generally was discredited. It is respectfully submitted that they were wrong to so conclude. The learned judges erred in

p.36 (from CA Script) p.76 finding that there was a general system of checking cycles and that by inference the cycle hired was properly inspected. The learned judges overlooked the evidence of the Respondents deliveryman and their mechanic that a high spot on the throttle would involve changing the throttle control and that no such change had been made.

13. It is respectfully submitted that the learned judges erred in their analysis of the law relating to the construction of exemption clauses. Clause L in the receipt does not specifically refer to claims in negligence or tort. The learned judges failed to follow the principles of construction set out in the decision in

p.116, 1.53 Top p.117, 1.45 Canada Steamship Lines v. R. (2) (1952) A.C.192. If the second and third principles therein had been properly applied contra proferentum against the Respondents the Court would have found that the said clause did not exempt the Respondents from a claim in the tort of negligence by the Appellants. It is respectfully submitted that the

pp.127-128 Court of Appeal erred in deciding that the distinction between contractual and tortious liability in this case was artificial. This conclusion overlooks in the Appellants respectful submission that the duty in contract is higher than in tort. In contract the hirer warrants the chattle is reasonably fit for the purpose for which it was hired; whereas in tort the hirer owes a duty to exercise reasonable care not to expose anyone to the risk of injury from any defect in the chattel of

which he should have been aware. The Court of Appeal wrongly held that the decision of White v. Warwick (1) (1953) 2All E.R. 1021 was wrongly decided.

14. The Appellants respectfully submit that the decision of Robinson J. be restored. That the findings of fact of the learned trial judge and his decision that the Respondents were not relieved by the exemption clauses from liability for breach of contract or from their tortious duty to ensure that the cycle was free from defects should stand.

15. On the 15th day of December 1980 the Court of Appeal of Bermuda granted Final Leave pursuant to Section 17 of the Appeals Act 1911 for the Appellants to appeal to Her Majesty in Council. p.138

16. The Appellants respectfully submit that the judgment of the Court of Appeal of Bermuda was wrong and ought to be reversed and this appeal ought to be allowed with costs for the following (amongst other)

R E A S O N S

(i) BECAUSE the Court of Appeal failed to apply the principles enunciated in Watts v. Thomas and wrongly reversed the learned trial judges findings of fact;

(ii) BECAUSE the Court of Appeal failed to distinguish between the differing duties owed in a contract of hire and those owed under the tort of Negligence;

(iii) BECAUSE the Court of Appeal failed to consider or apply the proper approach to construing exemption clauses;

(iv) BECAUSE the Court of Appeal were wrong in holding that the decision in White v. Warwick was wrongly decided.

MICHAEL MORELAND Q.C.

ALASTAIR GUNNING

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CASE FOR THE APPELLANT

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