47/85

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT APPEAL NO. 22 OF 1985

OF THE SUPREME COURT OF QUEENSLAND

BETWEEN:

ABEL LEMON & COMPANY PTY. LTD.

Appellant
(First Defendant)

AND:

BAYLIN PTY. LTD.

Respondent
(Second Defendant)

CASE FOR RESPONDENT

PART I

INTRODUCTION

Record

The litigation concerns a fire which occurred at premises at Brisbane in the State of Queensland on the 19th day of December, 1982. The premises were owned by the
L1-12 P8 Respondent. The Plaintiff in the action and the Appellant as their cases are pleaded were lessees of the Respondent of certain areas of the said premises. The
L1-20 P24 building was a large shed used for storage and industrial purposes.

P As against the Appellant, the Plaintiff pleads
L8-40 P25 "Rylands -v- Fletcher" and negligence. As against the Respondent the Plaintiff pleads negligence and breach of contract.

It is alleged by the Plaintiff that the fire was
L45 P25 caused by a spontaneous ignition of chemicals stored on the Appellant's premises.

In its defence, the Appellant relies upon the
L50 P2 provisions of 14 GEO.III c.78 Fire Prevention (Metropolis) Act 1774, Section 86.

In its Statement of Claim the Respondent claims against the Appellant damages for negligence and breach of
L25-60 P9 contract. The Appellant relies on the Imperial
L1-60 P10 Act in its defence to this claim also.
L1-60 P11

It was to this latter defence that the Respondent
P29 demurred. The demurrer was heard in the Full Court of
Queensland on the 13th and 14th days of November, 1984.

PART II

CONSTITUTIONAL HISTORY

1.

1.1 The Fire Prevention (Metropolis) Act 1774 applied in the colony of New South Wales by virtue of Section 24 of the Australian Courts Act 1828. That Section provided as follows:

> **"Laws of England to be applied in the administration of justice. Governor and Council may declare such laws to be in force and limit and modify them. In the meantime, the courts shall decide as to the application of such laws in the colonies.** Provided also, that all laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith, or with any charter or letters patent or order in council which may be issued in pursuance hereof), shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land respectively, so far as the same can be appiled within the said colonies; and, as often as any doubt shall arise as to the application of any such laws or statutes in the said colonies respectively, it shall be lawful for the governors of the said colonies respectively, by and with the advice of the legislative councils of the said colonies respectively, by ordinances to be by them for that purpose made, to declare whether such laws or statutes shall be deemed to extend to such colonies, and to be in force within the same, or to make and establish such limitations and modifications of any such laws and statutes within the said colonies respectively as may be deemed expedient in that behalf."

1.2 Section 86 of the Fire Prevention (Metropolis) Act 1774 (14 GEO.III c.78) provided as follows:-

> "LXXXVI. And be it further enacted by the authority aforesaid, that no action, suit, process whatever shall be had, maintained, or prosecuted, against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall, after the said twenty-fourth day of June, accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby; any law, usage, or custom, to the contrary notwithstanding: and in such case, if any action be brought, the Defendant may plead the

> general issue, and give this act, and the special matter in evidence at any trial thereupon to be had; and in case the Plaintiff become nonsuited, or discontinue his action or suit, or if a verdict pass against him, the Defendant shall recover treble costs; provided that no contract or agreement made between landlord and tenant shall be hereby defeated, or made void."

1.3 In 1837, the Sydney Building Act was passed by the New South Wales legislature. Section 74 of that Act was in similar terms to Section 86 of the Imperial Act. Section 74 provided as follows:

> "74. And be it enacted that no action suit or process whatever shall be had maintained or prosecuted against any person in whose house chamber stable barn or other building or on whose estate any fire shall after the said first day of January accidentally begin nor shall any recompense be made by such person for any damage suffered thereby any law usage or custom to the contrary notwithstanding and in such case if any action be brought the Defendant may plead the general issue and give this Act and the special matter in evidence at any trial thereupon to be had and in case the Plaintiff become nonsuited or discontinue his action or suit or if a verdict pass against him the Defendant shall recover treble costs provided that no contract or agreement made between landlord and tenant shall be hereby defeated or made void."

1.4 It has been held by the High Court of Australia that the repetition of Section 86 of the Imperial Act by the New South Wales legislature in Section 74 of the Sydney Building Act operated as an implied repeal of the Imperial Act insofar as it related to New South Wales. See Hazelwood -v- Webber (1934) 52 C.L.R. 268 at 275. The provisions of 14 GEO. III c.78, notwithstanding that the statute in which it occurs related to London, have been held to be of general application. See Richards -v- Easto (1846) 15 M. & W. 244; 153 E.R. 840.

1.5 By letters Patent of the 6th June, 1859, the territory of Queensland became a separate colony. See New South Wales Constitution Act (1855) 18 & 19 VIC. c. 54 (Imperial):-

> "7. **Portions so separated may be erected into separate colonies.** It shall be lawful for her Majesty, by letters patent to be from time to time issued under the Great Seal of the United Kingdom of Great Britain and Ireland, to erect into a separate colony or colonies any territories which may be separated from New South Wales by such alterations as aforesaid of the northern boundary thereof; and in and by such letters patent, or by Order in Council, to make provision for the government of any such colony and for the establishment of a legislature therein, and full power shall be given in any by such letters patent or Order in Council to the Legislature of the said colony to make further provision in that behalf."

1.6 Clause 20 of the said Letters Patent published in the Queensland Government Gazette of the 24th day of December, 1859 provided as follows:-

> "20. All Laws, Statutes and Ordinances, which at the time when this Order in Council shall come into operation shall be in force within the said colony, shall remain and continue to be of the same authority as if this Order in Council had not been made, except in so far as the same are repealed and varied hereby; and all the courts of Civil and Criminal Jurisdiction within the said colony, and all charters, legal commissions, powers and authorities, and all offices, judicial, adminmistrative, or ministerial within the said colony respectively, except so far as the same may be abolished, altered, or varied by, or may be inconsistent with the provisions of this Order, shall continue to subsist as if this Order had not been made, unless and until other provisions shall be made as to any of the matters aforesaid by Act of the Legislature of Queensland; but so that the power of the Governor of New South Wales in relation to the matters aforesaid shall (except as hereinbefore provided) be vested in the Governor of Queensland."

1.7 Therefore, by virtue of that Clause 20 the provisions of the Sydney Building Act 1837 applied in the State of Queensland.

1.8 Further support for this proposition can be found in Section 33 of the Australian Constitution Acts 1867 as amended. That Section provides as follows:-

> "33. **Force of laws and authority of courts preserved. Order in Council s.20. Schedule to 18 and 19 Vic. c.54.** All laws statutes and ordinances which at the time when this Act shall come into operation shall be in force within the said colony shall remain and continue to be of the same authority as if this Act had not been made except in so far as the same are repealed and varied hereby
>
> and all the courts of civil and criminal jurisdiction within the said colony and all charters legal commissions powers and authorities and all offices judicial administrative or ministerial within the said colony respectively except so far as the same may be abolished altered or varied by or may be inconsistent with the provisions of this Act shall continue to subsist as if this Act had not been made."

1.9 Further support for the proposition can be found in Section 20 of the Supreme Court Act of 1867 (31 Vic. No. 23). It provided as follows:-

> "20. **Laws of England to be applied in the administration of justice. 9 Geo. 4 c.83 s.24.** Provided and be it declared and enacted that all laws and statutes in force within the realm of England at the time of the passing of the Imperial Act of the ninth year of King George the Fourth chapter eighty-three (not being inconsistent herewith or with any law or statute now in force in this Colony) shall be applied in the administration of justice in the Courts of Queensland so far as the same can be applied within the said colony
>
> **Proviso not to extend to Queensland Imperial Acts not now in force there.** But nothing herein shall have the effect of extending to Queensland the operation of any Imperial Act not now extending

> to Queensland or of diminishing the present jurisdiction power or authority of the said Supreme Court or of the judges or any judge thereof."

1.10 Regard should be had to the proviso of that Section which explicitly excludes the extension to Queensland of the operation of any Imperial Act which was not then extending to Queensland.

1.11 In 1861, the Australian Colonies Act (24 & 25 VIC. c.44 (Imperial)) was passed. This Act removed any doubt as to the authority of the legislature of Queensland to pass legislation pursuant to the Letters Patent of 6th June, 1859. Section 3 of the said Act provided as follows:-

> "3. **All provisions of Letters Patent of 6th June, 1859, and proceedings thereunder of government, etc., of Queensland to be valid.** All the provisions made in the aforementioned Letters Patent and Order in Council of the said sixth day of June one thousand eight hundred and fifty-nine, for establishing the colony of Queensland, and for the government of the said colony, and for the establishment of a Legislature therein shall be and be deemed to have been valid and effectual for all purposes whatever; and all acts and proceedings of the said government and Legislature shall be and be deemed to have been from the date of the said Order in Council of the same force and effect as if the last mentioned Order in Council had been in all respects valid and free from doubt."

1.12 Further clarification as to the powers of the colonial legislatures to pass law is to be found in the Colonial Laws Validity Act 1865. (28 & 29 VIC. c.63 (Imperial)). Clause 2 provided as follows:-

> "2. **Colonial laws, when void for repugnancy.** Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of

> Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and in operative."

1.13 It could not be said that the Sydney Building Act was repugnant to the provisions of the Fire Prevention (Metropolis) Act 1774. The Sydney Building Act was in full force and effect in Queensland at the date of separation.

1.14 In 1879, the New South Wales legislature passed the Sydney Improvement Act (42 VIC. No. 25). The effect of that legislation was inter alia to repeal the Sydney Building Act of 1837.

1.15 The High Court in Hazelwood -v- Webber at page 276 has supported the view that a New South Wales decision of Reid -v- Fitzgerald (1926) 48 W.N. (N.S.W.) 25 was decided correctly: that is that the repeal of the Sydney Building Act would not have the effect of reviving the old Imperial enactment (14 GEO. III c.78).

1.16 Reference was made in that case to the Acts Shortening Act (22 VIC. No. 12) and in particular Section 24. The High Court expressed the view that the term "enactment" was a term apt to include acts of the British Parliament in force by virtue of 9 GEO. IV c.83 (The Australian Courts Act).

1.17 Section 4 ot the Acts Shortening Act provides as follows:-

> "4. The repeal of an enactment by which a previous enactment was repealed shall not have the effect of reviving such lastmentioned enactment without express words And neither the repeal nor the expiration of an enactment shall affect any civil proceeding previously commenced under the same but every such proceeding may be continued and everything in relation thereto be done in all respects as if the enactment continued in force."

1.18 Secction 19 of the Acts Interpretation Act 1954-1977 (Qld) provides as follows:

> "19. **Repeal of repealing Act not to revive prior enactments.** Where any Act or part thereof repeals any Act or part of an Act by which a previous Act or part thereof was repealed, it shall not have the effect of reviving such Act or part previously repealed, unless it contains express words for that purpose."

PART III

IMPLIED REPEAL OF IMPERIAL ACT

1.1 Section 74 of the Sydney Building Act 1837 impliedly repealed the Imperial Act (14 GEO. III c.78). It has been held that the legislature of New South Wales had such power to repeal an Imperial Act. See Harris -v- Davies (1885) 10 App. Cas. 279. Their Lordships in that case held that as it was the intention of the legislature of New South Wales to place an action for words spoken on the same footing as regards costs and other matters as an action for written slander then the Statute of James as regards as an action for words was impliedly repealed by the Act of the colonial legislature.

1.2 In the case of Kutner -v- Phillips (1891) 2 Q.B. 267 A.L. Smith J. said at 271:-

> "Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim, 'Leges posteriores contrarias abrogant' applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together."

1.3. A perusal of the relevant Sections of the Imperial Act (14 GEO. III c.78) and the Sydney Building Act (Section 74) will show that apart from a few words of insignificance, the colonial legislature intended to pass legislation to cover that defence available under the Imperial Act.

1.4 In Kellett -v- Cowan (1906) St.R.Qd. 116, the Full Court assumed that the Imperial legislation applied. However, reference was not made to the Sydney Building Act 1837. Therefore, it is submitted that the decision was given per incuriam.

1.5 It may be argued that because the Sydney Building Act 1837 is in similar terms to the Fire Prevention (Metropolis) Act of 1774 that the former Act does not impliedly repeal the latter Act. It is submitted that if the entire subject matter has been so dealt with in the latter Act then it follows that the particular provisions in this prior statute could not have been intended to subsist. See The India (1865) XII L.T. N.S. 316.

PART IV

RECENT LEGISLATION

1.1 In 1973, the Queensland Parliament passed the New South Wales Acts (Termination of Application) Act of 1973. That Act repealed certain New South Wales Acts which are specified in the schedule. Included in the schedule is the Sydney Building Act of 1837 (8 W.M. IV No. 6).

1.2 Further, Section 3 of the said Act provides as follows:

> "3. **Savings** The termination by this Act of the application of the Acts sets out in the Schedule does not -
> (a) revive anything not in force or existing at the commencement of this Act;
>
> (b) affect the previous operation of, or anything duly done or suffered under, any Act the application of which is so terminated;
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> (c) affect any right, privilege, obligation or liability accrued, acquired or incurred under any Act the application of which is so terminated;
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> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any Act the application of which is so terminated; or
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> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,
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> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed and enforced as if this Act had not been passed."

1.3 The effect of that Section "has for its object to prevent the revival of a Statute contrary to the intention of the legislature; but it cannot be supposed that it is

contrary to the intention of the legislature to restore to a statute its original force without condition, or all that it has done has been to repeal the condition." See Mirfin -v- Atwood (1869) L.R. 4 Q.B. 333 at 340-341. That case is referred to in Maxwell on Interpretation of Statutes, 12th Edition at p. 20.

1.4 The Queensland Act came into force on the 11th day of April, 1973.

1.5 In 1974 the Queensland Parliament revived Section 58 only of the Fire Prevention (Metropolis) Act of 1774. Section 58 provides as follows:-

> "58. **Insurance money from burnt building. [Tas.s.90E; cf. 14 Geo. 3, c.78, s.83 Fires Prevention (Metropolis) Act 1774].** Where a building is destroyed or damaged by fire a person who has granted a policy of insurance for insuring it against fire may, and shall, on the request of a person interested in or entitled to the building, cause the money for which the building is insured to be laid out and expended, so far as it will go, towards rebuilding, reinstating, or repairing the building, unless -
>
> (a) the person claiming the insurance money within thirty days next after his claim is adjusted, gives sufficient security to the person who has granted that policy that the insurance money will be so laid out and expended; or
>
> (b) the insurance money is in that time settled and disposed of to and amongst the contending parties to the satisfaction and approbation of the person who has granted the policy of insurance."

1.6 It is clear from the said legislation that the intention of the legislature in 1973 was to repeal the

Sydney Building Act of 1837 and not to revive any legislation which was not in force at the commencement of the Act.

1.7 Section 3 of the 1973 Queensland Act is in similar terms to Section 38 of the Interpretation Act 1889 (52 & 53 VIC. c.63).

PART V

SUMMARY

It is submitted that the appeal should be dismised because:

(a) The Sydney Building Act 1837 was in substantially similar terms to the Fire Prevention (Metropolis) Act 1774 and thus impliedly repealed same;

(b) The decision of the High Court of Australia in Hazelwood -v- Webber ibid supports the Respondent's argument that Section 86 of the Fire Prevention (Metropolis) Act 1774 was not revived by the repeal of the Sydney Building Act 1837;

(c) The repeal of the Sydney Building Act by the Sydney Improvement Act 1879 did not affect the former law as it then applied in Queensland as by then Queensland was a separate colony. By the New South Wales Acts (Termination of Application) Act 1973 the Queensland Parliament repealed the Sydney Building Act and specifically provided in Section 3(a) that any Act not then in force or existing in Queensland as at that date was not revived by the repeal of the Sydney Building Act 1837;

(d) Assuming a possible application of a common law rule that the repeal of the second Act revived the first ab initio, was altered by Section 19 of the Acts Interpretation Act 1977 (Queensland);

(e) Further, the intention of the Queensland Parliament to repeal the Imperial Act in 1973 is further evidenced by the fact that in the Property Law Act

of 1974 (Qld) a specific provision (Section 58) revived a specific provision of the Imperial Act which had been, it is submitted, repealed by the 1973 Act.

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(11/T/RJC)