Privy Council Appeal No. 22 of 1985

Abel Lemon & Company Pty. Ltd. — *Appellants*

v.

Baylin Pty. Ltd. — *Respondents*

FROM

THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER 1985

Present at the Hearing:

LORD KEITH OF KINKEL
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
LORD MACKAY OF CLASHFERN

*[Delivered by **Lord Keith of Kinkel**]*

This appeal from a judgment upon demurrer of the Full Court of the Supreme Court of Queensland raises an interesting point as to whether or not in 1982 section 86 of the Fire Prevention (Metropolis) Act 1774 was applicable in that Australian State.

Though no doubt the point is of some importance to the parties or their insurers, its interest is now largely historical, since, if section 86 did apply to Queensland in 1982, it was effectively disapplied for the future by section 7 of the Imperial Acts Application Act 1984.

The factual situation which raises the point is simple. In 1982 the respondents were owners of a large industrial building at Kedron in the State of Queensland. The appellants were tenants of part of the building, certain of the five plaintiffs in the present action were tenants or sub-tenants of other parts of it, and all the plaintiffs were owners of chattels present on the latter premises. On 19th December 1982 a fire broke out in the premises tenanted by the appellants, and the building and its contents were totally destroyed. The plaintiffs sued

the appellants as first defendants and the respondents as second defendants, claiming that the fire was caused by the spontaneous combustion of chemicals stored in their premises by the appellants, that the latter were liable to the plaintiffs in damages for the loss caused to them by the spread of the fire on grounds of the rule in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 388 or alternatively negligence, and that the respondents were liable to them in negligence for allowing the appellants to keep dangerous chemicals on their premises. The appellants in their defence pleaded *inter alia* that the fire began accidentally and relied on section 86 of the Fire Prevention (Metropolis) Act 1774. The respondents served on the appellants a notice claiming indemnity against the plaintiffs' claim so far as directed against them on the grounds of breach of covenants in the lease of the appellants' premises or alternatively negligence, and in addition claimed against the appellants damages for the destruction of their building on similar grounds and also under the rule in *Rylands v. Fletcher (supra)*. The appellants pleaded section 86 of the 1774 Act in answer to these claims also.

The respondents thereupon lodged a demurrer maintaining that section 86 of the 1774 Act was repealed by the Sydney Building Act 1837 and not revived by the subsequent repeal of the latter enactment. On 14th December 1984 the Full Court (Kelly, Macrossan and Ryan JJ.) sustained the demurrer and the appellants now appeal, with leave of that Court, to Her Majesty in Council.

The Fire Prevention (Metropolis) Act 1774 contains no less than 102 sections nearly all of which are plainly intended to have only a local application. Sections 83, 84 and 86, however, are capable of being read as having a general application. It is necessary to quote them.

> "LXXXIII. And, in order to deter and hinder ill-minded persons from wilfully setting their house and houses, or other buildings, on fire, with a view of gaining themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered; be it further enacted by the authority aforesaid. That it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses and other buildings against loss by fire, and they are hereby authorises and required, upon the request of any person or persons interested in or intitled unto any house or houses, or other buildings which may hereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or

persons who shall have insured such house or houses, or other buildings, have been guilty of fraud, or of wilfully setting their house or houses, or other buildings, on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing, such house or houses, or other buildings, so burnt down, demolished, or damaged by fire; unless the party or parties claiming such insurance money shall, within sixty days next after his, her, or their claim is adjusted, give a sufficient security to the governors or directors of the insurance office where such house or houses, or other buildings, are insured, that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time, settled and disposed of to and amongst all the contended parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively.

LXXXIV. And whereas fires often happen by the negligence and carelessness of servants, be it therefore enacted by the authority aforesaid. That if any menial, or other servant or servants, through negligence or carelessness, shall fire, or cause to be fired, any dwelling-house, or out-house or houses, or other buildings, whether within the limits aforesaid or elswhere, within the kingdom of Great Britain, such servant or servants, being thereof lawfully convicted by the oath of one or more credible witness or witnesses, made before two or more of his Majesty's justices of the peace, shall forfeit and pay the sum of one hundred pounds unto the churchwardens or overseers of such parish where such fire shall happen; to be distributed amongst the sufferers by such fire, in such proportions, as to the said churchwardens shall seem just: and in case of default or refusal to pay the same immediately after such conviction, the same being lawfully demanded by the said churchwardens; that then, and in such case, such servant or servants shall, by warrant under the hands and seals of two or more of his Majesty's justices of the peace, be committed to the common gaol, or house of correction, as the said justices think fit, for the space of eighteen months, there to be kept to hard labour.

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 buildings, 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, usuage, 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."

In *Richards v. Easto* (1846) 15 M. & W. 244 Parke B. expressed the *obiter* opinion that sections 84 and 86 of the Act were of general application, and that expression of opinion was approved and applied by Lord Denman C.J., giving the judgment of the Court of Queen's Bench in *Filliter v. Phippard* (1847) Q.B. 347 at page 355. That case decided that section 86 did not protect from liability for fires started deliberately or negligently. Then in *Ex parte Gorely* (1864) 4 De G.J. & S. 477 Lord Westbury L.C. at page 480 held that section 83 applied generally, rejecting an argument that it lost its universality because it did not contain the words "whether within the limits aforesaid or elsewhere within the kingdom or Great Britain" which appear in section 84. It is to be noted that in *Westminster Fire Office v. Glasgow Provident Investment Society* (1888) 13 App. Cas. 713 Lord Watson at page 716 expressed the opinion, *obiter*, that section 84, notwithstanding these words, did not apply to Scotland, and indicated that *Ex parte Gorely (supra)* might have to be reconsidered. But in their Lordships' opinion it is now far too late to consider disturbing long standing decisions in favour of the general application, in England at least, of the three sections.

The Australian Courts Act 1828 enacted, by section 24, that all laws and statutes in force within the realm of England at the time of the passing of the Act should be applied in the administration of justice in the courts of New South Wales. The territory of New South Wales at that time embraced, not only its present extent, but also the territory now constituting the States of Queensland and of Victoria. So sections 83, 84 and 86 of the 1774 Act became applicable to the whole of that territory.

The Sydney Building Act 1837 has as its long title "An Act for regulating Buildings and Party-walls and for preventing mischiefs by Fire in the Town of Sydney" and proceeds on the narrative "Whereas it is expedient for the safety of the inhabitants of the town of Sydney and the security of property therein that provision should be made for the better

regulation of buildings and party-walls and for the prevention of mischiefs by fire in the said town". The Act has 81 sections and it is evident that the draftsman took the 1774 Act as his model. Here again, the great majority of the sections are incapable on any reading of having any other than local application whether or not they contain any express reference, as many of them do, to the limits of the town of Sydney. Section 71 is, apart from the inadvertent omission of the words "offices for insuring" in the sixth line, in identical terms to section 83 of the 1774 Act. Section 72 differs from the wording of section 84 in two respects only. For the words "whether within the said limits or elsewhere within the kingdom of Great Britain" there are substituted the words "situate within the town of Sydney", and a special provision is added at the end dealing with servants who are convicts. Section 74 is in the same terms as section 86, except that the first day of January is substituted for the twenty-fourth day of June.

By section 1 of the New South Wales Act 3 Vict. No. 14, passed on 3rd October 1839, it was enacted that the Sydney Building Act 1837 should be in force and have effect only within a certain part of the town of Sydney there defined. This restriction was repealed by the New South Wales Act 9 Vict. No. 5 passed on 12th September 1845.

The Melbourne Building Act 1849 13 Vict. No. 39, passed by the New South Wales legislature on 12th October 1849, when Victoria was still part of New South Wales, contains a section, section 58, in identical terms to section 86 of the 1774 Act and section 74 of the Sydney Building Act 1837 (except for a different commencement date), but nothing corresponding to sections 83 and 84 of the 1774 Act.

Queensland was constituted a separate colony by Letters Patent dated 6th June 1859, section 20 of which provided *inter alia* that all laws, statutes and ordinances then in force within the colony should continue to be so.

The Sydney Improvement Act 1879, by section 2, repealed the Sydney Building Act 1837. The New South Wales Acts (Termination of Application) Act 1973, of the Queensland legislature, provided by section 2 that the New South Wales Acts specified in the schedule thereto, which included the Sydney Building Act 1837, should, in so far as they applied in Queensland, cease to do so.

Finally, it is to be noted that in section 58 of the Property Law Act 1974 the Queensland legislature enacted a provision in broadly similar terms to sections 83 of the 1774 Act.

It was argued for the respondents that section 74 of the Sydney Building Act 1837 impliedly repealed section 86 of the 1774 Act as regards the whole of what was then the territory of New South Wales, including the present territory of Queensland. Further, section 86 was not revived as regards Queensland by the repeal in 1973 by the Queensland legislature of section 74 of the 1837 Act.

The first question for consideration is whether section 74 of the Sydney Building Act 1837 was intended to apply throughout the whole of the then territory of New South Wales, or only to the town of Sydney. It is to be observed in this connection that the Sydney Police Act 1833 had, by section 46, provided for the limits of the town to be fixed by survey for the purposes of that Act. If the whole of the 1837 Act applied only to the town of Sydney, then it must follow that section 86 of the 1774 Act continued until 1984 to apply to that part of the 1837 territory of New South Wales which is now Queensland. No question of implied repeal could arise as regards that territory.

There are a number of important indications in favour of the view that the whole of the 1837 Act was intended to apply only to the town of Sydney. In particular the long title and preamble to the Act, taken together, point strongly in that direction. Their terms are by no means identical, *mutatis mutandis*, to their counterparts in the 1774 Act and its predecessor, the Act 6 Anne cap. 31. Then in section 72 it is found that its provisions are expressly restricted to the town of Sydney, whereas the corresponding provisions of section 84 of the 1774 Act are expressed as applicable to the whole of Great Britain. The draftsman of the 1837 Act was plainly following the 1774 Act, making such alterations as were suited to the different locality involved. If the intention were to make the only three sections inherently capable of applying to a wider area than the town of Sydney apply to the whole of New South Wales, the draftsman might have been expected in section 72 to substitute "the whole of New South Wales" for the whole of Great Britain. But instead he substituted the town of Sydney. It is true that in *Re Gorely (supra)* Lord Westbury rejected an argument that because Great Britain was mentioned in section 84 of the 1774 Act and not in section 83 application of the latter was confined to the Bills of Mortality area. But *non constat* that he would have come to the same conclusion if section 84 had been expressly restricted to that area. Then by the Amendment Act of 1839 the application of the whole of the 1837 Act was limited to a certain defined part of the town of Sydney. This would appear consistent only with the legislature having regarded the 1837 Act as applicable only to the town itself, and the

same may be said of the amending Act of 1845, which removed the restriction. Further, if section 74 was regarded as applying to the whole of New South Wales, it is odd that the legislature should have enacted section 58 of the Melbourne Building Act 1849, in identical terms to section 74. The reasonable view would seem to be that the legislature did not intend, by the inclusion in Building Acts of an essentially local character of a few provisions capable by their wording of having wider application, to make these provisions applicable throughout the territory.

There are also a number of considerations in the opposite direction, in particular the repeal of the 1837 Act by the Queensland legislature in 1973, which suggests that some part of it was thought to be applicable in the territory of Queensland, and the inclusion of section 58 in the Property Law Act 1974, which suggests that section 83 of the 1774 Act was thought not to be applicable there. It must be recognised, however, that no consideration in depth ever appears to have been given to the question of the applicability outside the town of Sydney of the Sydney Building Act 1837 and the corollary question as to the application outside Sydney of the 1774 Act.

In *Reid v. Fitzgerald* (1931) 48 N.S.W.W.N. the life tenant under a will of a cottage which was destroyed by fire had kept up at her own expense a policy of insurance over the cottage which had originally been effected by the testator. A question arose as to whether the life tenant was entitled to the proceeds of the policy, which had been received by the trustees of the will, or whether the remaindermen were entitled to have the proceeds expended on rebuilding the cottage. Harvey, C.J. in Eq. held in favour of the life tenant. In the course of his judgment he had occasion to consider whether section 83 of the 1774 Act applied to New South Wales. He said at page 26:-

> " In my opinion s. 83 of the Act 14 Geo. 3, c. 78, does not apply to New South Wales. In *Nott v. Maclurcan* (20 W.N. 135) there is an expression of opinion by his Honour Judge Heydon that s. 86 of that Act is in force here and s. 83 has been held to be in force in New Zealand: *Cleland v. South British Insurance Company* ((1891) 9 N.Z.L.R. 177) *Searl v. South British Insurance Company Limited* ([1916] N.Z.L.R. 137).
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> In view of the course of legislation in New South Wales I am of opinion that s. 83 is not in force. By the Act 8 Wm. IV., No. 6 a large part of the Act 14 Geo. 3, c. 78 was made applicable to the City of Sydney and in s. 71 of the Act there was an exact reproduction of s. 83 of the English Act except for the accidental and

immaterial omission of three words. Sect. 83 of the Imperial Act, having been declared in *Ex parte Gorely* (4 De G.J. & S. 477) to be of general application there would be every reason why s. 71 of the Local Act should also have been held to be of general application and not confined to the City of Sydney. By the Sydney Improvement Act, 42 Vict. No. 25, s. 2 of the Act, 8 Wm. IV., No. 6 was wholly repealed. In my opinion the repeal of that Act would not have the effect of reviving the old Imperial enactment even assuming it was at one time in force by reason of 9 Geo. IV., c. 83."

The report of the case contains no mention of the arguments put forward, and it is to be seen that the learned judge did not advert to any of the material considerations in favour of the limited application of the 1837 Act mentioned earlier in this advice.

In *Hazlewood v. Webber* (1934) 52 C.L.R. 268 a farmer had lit a fire in his land to burn off stubble. The fire spread to his neighbour's land and caused damage. A jury negatived negligence. The High Court held that the defendant was liable because in Australia burning vegetation in the open in summer was not a natural use of land, but an extraordinary or special use of land involving exceptional danger to others. The liability would appear to have been under the rule in *Rylands v. Fletcher (supra)*. Section 86 of the 1774 Act, assuming it to have applied, would have been ineffective to protect against liability, since the fire was deliberately started: *Filliter v. Phippard (supra)*. Counsel for the respondent argued that section 86 was not in force in New South Wales. It would seem that it was not argued seriously or in detail on the other side that section 86 did apply there. In the judgment of four members of the High Court, including Dixon J., it was stated:-

"The use of fire for such purpose is said by the defendant to be a recognized incident of the proper enjoyment of the land which, he claims, falls outside the application of the prima facie rule of absolute liability. The question whether this claim is well founded is that upon which the decision of the case must turn unless the common law has been superseded by statute. But, on behalf of the defendant, it is contended that in fact statute has abrogated or modified the common law rule in New South Wales. We do not think that this contention is correct. Sec. 86 of the Fire Prevention (Metropolis) Act 1774 (14 Geo. III. c. 78) was, we think, part of the law which, under 9 Geo. IV. c. 83, was originally in force in New South Wales. Its provisions, notwithstanding that the statute in which it occurs

related to London, have been held of general application (*Richards v. Easto*). It soon ceased, however, to be the formal expression of the law in New South Wales. Its provisions were transcribed in sec. 74 of the local statute of 8 William IV. No. 6, called the Sydney Buildings Act 1837. This section should, in our opinion, also be construed as of general application. The repetition of the section by the colonial legislation operated as an implied repeal of the British enactment so far as it applied to New South Wales. But, in its turn, the statute of 1837 was repealed. The repeal was effected by the City of Sydney Improvement Act 1879 (42 Vict. No. 25). In *Reid v. Fitzgerald*, Harvey, C.J. in Eq., held that another section of 14 Geo. III. c 78. viz., sec. 83 was not in force because it had been exactly reproduced by sec. 71 of 8 William IV. No. 6 which should be held like its prototype, to be of general application. He said: 'In my opinion the repeal of that Act would not have the effect of reviving the old Imperial enactment, even assuming it was at one time in force by reason of 9 Geo. IV. c. 83.' It appears to be correct that the repeal would not revive the Imperial provision which the repealed statute had, in its application to New South Wales, previously repealed. For sec. 4 of the Acts Shortening Act (22 Vict. No. 12), uses the term 'enactment', a term apt to include Acts of the British Parliament in force by virtue of 9 Geo. IV. c. 83. The Act of 1774 may, therefore, be regarded as not in force in New South Wales."

These observations were adopted by Latham C.J. in *Wise Bros. Pty. Ltd. v. Commissioner for Railways New South Wales* (1947) 75 C.L.R. 59, a High Court case in which the actual decision was that a new trial should be ordered on the ground of wrongful rejection of evidence tending to establish natural use of land on which a fire had started. He said at page 62:-

" In my opinion the case of the plaintiff, in so far as it depends upon the contention that the defendant is subject to an absolute liability independent of negligence for the damage done by a fire originating upon its premises and spreading to the plaintiff's property, is answered by the decision of this Court in *Hazlewood v. Webber*. In that case it was held that the law of New South Wales did not include the Fire Prevention (Metropolis) Act 1774, which re-enacted with some modifications 6 Anne, c. 58, and 12 Geo. III., c. 73. These statutes provided that the occupier of premises was not liable for the results of a fire which was kindled by accident, although he would be liable even in the case of an accidental fire if it were due to

negligence (*Filliter v. Phippard*). The Act of 1774 became part of the law of New South Wales by virtue of 9 Geo. IV., c. 83. The provisions of this Act were adopted by a New South Wales statute which therefore impliedly repealed the Act. The local statute was subsequently repealed. In *Hazlewood v. Webber* the question arose whether the effect of the repeal was to restore the English statute or to leave the position as it was at common law. It was necessary for the Court to determine whether 'the common law has been superseded by statute'. The Court held that the 1774 Act was not in force in New South Wales, and that the common law had been restored."

Finally on the authorities, mention should be made of *Kellett v. Cowan* [1906] St.R.Qd. 116, in the Full Court of Queensland. The proprietor of a hotel had started a fire in a room for the purpose of fumigating it and the fire spread to the whole building, destroying it and also the goods of the plaintiff, who was a lodger. The Full Court held that the proprietor was liable for the damage caused by the fire because he had not established that its spread was due to inevitable accident. Power J. said at page 122:-

" Under the common law a person was responsible for any damage caused by a fire which spread from his house to neighbouring premises, even if the origin of the fire was accidental. The common law liability has been limited to some extent by statute. The first Act was 6 Anne, c. 31, and the Act now in force is that of 14 Geo. III., c. 78 s. 86, which is practically a re-enactment of the earlier statute, and which provides that 'no action, suit, or process whatsoever 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 accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby; any law, usuage, or custom to the contrary notwithstanding'."

It is fair to notice that, although it was argued for the appellant that section 86 of the 1774 Act precluded liability, it was not argued for the respondent that section 86 did not apply in Queensland. The case is, however, cited in Fleming on the Law of Torts, 6th Edn. 1983, for the proposition that the 1774 Act was then in force in Queensland.

Their Lordships recognise that great respect falls to be accorded to the expressions of opinion in the cases originating in New South Wales to the effect that the relevant provisions of the Sydney Building

Act 1837 superseded those of the 1774 Act throughout New South Wales, even though they may not have been strictly necessary for the decision of these cases and proceeded upon arguments which did not examine the issue in depth. Their Lordships are persuaded, however, that those expressions of opinion are incorrect, and that the indications in favour of a purely local intendment in the 1837 Act outweigh those pointing in the opposite direction. They come to that conclusion with less hesitation than might otherwise have been the case because it will have no significance for the decision of future cases either in Queensland or in New South Wales. As has already been mentioned, the Imperial Acts Application Act 1984 has disapplied the 1774 Act so far as Queensland is concerned. As regards New South Wales, the same result has been brought about by section 8(1) of the Imperial Acts Application Act 1969.

Their Lordships are accordingly of the opinion that at the time of the fire which is the subject of the present action section 86 of the 1774 Act was in force in Queensland. The Sydney Building Act 1837 having been intended to have purely local application as regards all its provisions, there is no question of its having impliedly repealed any of the provisions of the 1774, except as regards the town of Sydney. It is accordingly unnecessary to consider any of the other issues argued before the Board.

Their Lordships will for these reasons humbly advise Her Majesty that the appeal should be allowed, that the judgment of the Full Court dated 14th December 1984 should be reversed, and that the respondents' demurrer should be refused. The respondents must pay the appellants' costs before the Board and in the Full Court.