Privy Council Appeal Nos. 24 and 39 of 1986

Montana Hotels Pty. Ltd. *Appellant*

v.

Fasson Pty. Ltd. *Respondent*

FROM

THE SUPREME COURT OF VICTORIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER 1986

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD MACKAY OF CLASHFERN
LORD ACKNER
LORD OLIVER OF AYLMERTON
SIR IVOR RICHARDSON

*[Delivered by **Lord Ackner**]*

In October 1980 the appellant purchased the Laird O'Cockpen Hotel ("the hotel") which is situated in Gipps Street, Collingwood, Victoria. In May 1980 there was completed a warehouse and office premises ("the Fasson building") which was erected along the eastern boundary of the hotel. In the same month as the buildings were completed the respondent went into occupation as lessees.

In April 1981, water was observed in the cellar area of the hotel, underneath the public bar and in the front western section of the hotel. Tests were carried out to the drains and water sources in the hotel site, but they proved negative. At the end of July 1981 a bucket of water containing a dye was poured by the experts retained by the appellant upon the roof of the Fasson building, where it abuts the hotel. A few days later dye was found in the test holes which had been dug in the footpath along the front of the hotel. The appellant's experts had previously noticed a crack in a downpipe in the corner adjoining the hotel in Gipps Street and which carried the stormwater off the Fasson building roof. Following the dye tests, a closer inspection was carried out by the appellant's experts who

[55]

ascertained that, at ground level where the downpipe joined a curved ceramic pipe connected to the drain, the ceramic section was broken diagonally and in addition, the concrete around the ceramic pipe was also broken. Moreover the drain which ran underneath the footpath was blocked by dirt and unable to carry away any water. They accordingly concluded that stormwater had flowed through the crack and ultimately found its way into the hotel.

On 23rd September 1981, the appellant's solicitors wrote to the owners of the Fasson building that substantial structural damage had been sustained by the hotel as a result of water seepage caused by leakage in the roof drainage system of the Fasson building and gave notice of an intended claim for compensation. This letter was apparently ignored. Accordingly, on 29th October 1981, a letter in similar terms was forwarded by the appellant's solicitors to the respondent. As nothing transpired as a result of this correspondence, the appellant instituted proceedings by writ in the Supreme Court of Victoria. On 27th November 1981 an order was made by His Honour Mr. Justice Gray granting an injunction to the appellant which directed both the respondent and the owners to cease allowing water to flow from the Fasson building on to the hotel, an order which was not opposed. In the beginning of December, following inspections carried out by the respondent, it replaced the downpipe and the faucet and thereafter no further water was observed entering the hotel. However the hotel continued to undergo damage caused by the alteration in the moisture content of the soil beneath and around the hotel.

On 2nd September 1983 the appellant lodged a claim for damages at the Planning Appeals Board against the respondent.

Part I of the Drainage of Land Act 1975 of the State of Victoria confers exclusive jurisdiction upon the Planning Appeals Board, as constituted under the Planning Appeals Board Act 1980 of the State of Victoria, to hear and determine civil causes of action arising out of the flow of waters in such circumstances. The appellant's claim against the respondent alleged nuisance, negligence, breach of the rule in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330 and breach of statutory duty.

Before the Planning Appeals Board there was a strong conflict of evidence as to causation. The respondent called evidence to establish that the downpipe on the Fasson building was, prior to December 1981, not as described by the various witnesses for the appellant. Although the respondent accepted that the connection between the downpipe and a galvanised iron pipe had a gap, this gap, it was

contended, was not capable of allowing the escape of sufficient water to have caused the damage to the hotel. It was argued that, even though water had escaped from the pipe, the catchment area served by the pipe was insufficient to have discharged sufficient quantities of water to have caused the damage alleged. The respondent's case was that if water was observed entering the hotel, then in all probability the source of this water was the Telecommunications trench in the street pavement.

The Appeals Board decided this issue in favour of the appellant. They concluded that the water which finished up in the cellar came from the roof of the Fasson building via the broken downpipe and that the catchment of the Fasson roof was sufficient to cause the damage which the hotel sustained. As to the alleged causes of action, the Appeals Board found for the appellant on the grounds of nuisance and breach of the rule in *Rylands v. Fletcher*. It made no finding in relation to the claim based on breach of statutory duty.

The manner in which it dealt with the claim based on negligence requires careful consideration. In the written claim, the appellant had particularised the allegation of negligence under nine separate headings, to which their Lordships need only refer to two, namely:-

> "(d) failing to inspect properly or at all the said stormwater drains for leakage.
>
> (e) failing to repair the said stormwater drain properly or at all so as to fix the leaking."

Counsel appearing for the appellant, in the course of the final address, provided the Appeals Board with a written statement of its submissions, consisting of nearly forty pages of typescript. This sought in considerable detail to assist the Appeals Board by providing an extensive note on the law and on the facts and evidence on liability and quantum of damage. In the section devoted to "legal matters", paragraph 8 dealing with negligence is in these terms:-

> "As to negligence, we cannot point to anything which the respondent did or failed to do in the period before the broken drainpipe and the source of the water were identified and the attention of Fasson's staff was drawn to those things. Thereafter it appears that water continued to flow until the Supreme Court proceedings resulted in an injunction compelling an abatement of the nuisance by 4.12.81 ..."

Thus the appellant conceded that, prior to being informed (October 1981) of the broken drainpipe and

that this was responsible for water seeping into the hotel premises, it could not be validly claimed that the respondent had been guilty of any negligence, either as particularised in its claim, including two specific allegations, which their Lordships have quoted above, or at all.

This concession seems to their Lordships to be wholly consistent with the state of the evidence at the conclusion of the hearing. The experts appeared to have confined themselves to questions of causation viz. where did the water come from and what was the damage which it caused? It was of course common ground that the respondent had not caused the defect and did not know of its existence prior to the notification by the appellant in October 1981. As to whether the respondent ought to have known of its existence prior to that date, this must depend upon the nature of the care which should reasonably be taken by an occupier in the proper management of new premises of this kind and whether that care would have been likely to reveal the crack in the pipe and that water was flowing out of it. No evidence was directed to these matters. This is not surprising. The building was new and so were the pipes. The building had only been occupied by the respondent for a few months and the crack itself was apparently only just above ground level. No reason was suggested as to why such a pipe should have cracked. Clearly the defect and the failure of the drainage system would only have been revealed as a result of a most careful examination.

The Appeals Board's findings were in these terms:-

> "As to the allegation that Fasson was negligent, the only negligence that the Board could find was that Fasson took no steps to remedy the defective drainage system until the order was obtained in the Supreme Court. It was not possible for the Board to make any findings as to what, if any, damage flowed from that negligence." (Emphasis added)

By reason of their finding as to nuisance, the breach of the rule in *Rylands v. Fletcher*, and the quantum of damage, which the Appeals Board decided the appellant had suffered, the Appeals Board determined that the respondent should pay the appellant A$209,056.61.

Both parties were dissatisfied with the Appeals Board's decision, the appellant as to the quantum of damages, and the respondent both as to liability and quantum of damages and each appealed, pursuant to section 66 of the Planning Appeals Board Act 1980. This section enables any party to appeal to the Supreme Court of Victoria against the determination

of the Appeals Board on a question of law only. The two appeals were heard together before Vincent J. The learned judge held that the respondent was not liable in nuisance, by reason of the Appeals Board's finding of fact as to negligence set out above. He also held that the respondent was not liable under the principle laid down in *Rylands v. Fletcher*, because its use of a defective stormwater system, which allowed water to escape on to the appellant's land, did not amount to a non-natural use of land. Mr. Buckner Q.C., who did not appear before the Appeals Board but for whose able submissions their Lordships are much indebted, without expressly abandoning the point, did not seek to support the Appeals Board's decision on liability insofar as it relied upon a breach of the rule in *Rylands v. Fletcher*. He concentrated his submissions on seeking to support the Appeals Board's finding of liability based upon nuisance.

The principles which their Lordships should apply are well established and little reference need be made to the well known authorities. *Sedleigh-Denfield v. O'Callaghan and Others* [1940] A.C. 880, a decision of the House of Lords, is of course the *locus classicus*. It is only necessary to give the following excerpt from the speech of Lord Wright at page 904:-

> " Though the rule has not been laid down by this House, it has I think been rightly established in the Court of Appeal that an occupier is not *prima facie* responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for nuisance is not, at least in modern law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser, or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it. This rule seems to be in accordance with good sense and convenience. The responsiblility which attaches to the occupier because he has possession and control of the property cannot logically be limited to the mere creation of the nuisance. It should extend to

> his conduct if, with knowledge, he leaves the nuisance on his land. The same is true if the nuisance was such that with ordinary care in the management of his property he should have realised the risk of its existence."

In the *Overseas Tankship (U.K.) Limited v. The Miller Steamship Company Pty.* [1967] A.C. 617 (the "*Wagon Mound No. 2*") Lord Reid, in delivering the judgment of the Board said, when comparing nuisance with negligence, at page 639:-

> "And although negligence may not be necessary, a fault of some kind is almost always necessary and fault generally involves foreseeability, e.g., in cases like *Sedleigh-Denfield v. O'Callaghan* the fault is in failing to abate the nuisance of the existence of which the defender is or ought to be aware as likely to cause damage to his neighbour."

Mr. Buckner frankly accepts that "fault" is a necessary ingredient of the nuisance which the appellant allege the respondent committed. Since it is not suggested that the respondent created the nuisance or knew of its existence prior to the receipt of the appellant's letter in October 1981, Mr. Buckner accepts that the "fault" which must be established is that the respondent ought to have been aware, prior to the appellant's letter, of the defective pipe, i.e. that with ordinary care in the proper management of the property he should have realised the risk of its existence.

"Ought to have known" cannot mean more than "would have known, if he had taken the precautions which a reasonable landowner would take" (per Tucker L.J. in *Caminer and Another v. Northern and London Investment Trust Limited* [1949] 1 All E.R. 874 at 877.

The "fault" relied upon by Mr. Buckner is in the respondent's failure properly to inspect the stormwater drains for leakage and to remedy the defects which would have been thus disclosed - the very particulars of negligence pleaded in the claim which were so clearly abandoned in the concession made in the final address. In their Lordships' judgment, what appears to have happened before the Appeals Board is that it was overlooked that "fault" was a necessary ingredient in the nuisance alleged. Although the *Wagon Mound No. 2* was one of the authorities specifically mentioned and the very page of Lord Reid's judgment to which their Lordships have referred is noted in the written statement of submissions, there is no mention in this extensive document of the nature of the "fault" which the appellant relied upon. Indeed, towards the end of the detailed note on "legal matters" the following

statement is made concerning "the evidential principles to be applied":-

> "The claimant bears the onus of proof. The standard of proof is this - that the claimant must establish its case on the balance of probabilities. In other words the claimant has to show that it is more probable or more likely than not that the respondent's drainpipe was broken, that water escaped therefrom and flowed into the claimant's land, and that damage to the building on that land resulted. It is quite unnecessary for the claimant to exclude or disapprove all other possible hypotheses which may explain the occurrence of the damage. As long as the Board is satisfied that it is more probable than not that the facts and events occurred as the claimant contends then the claimant is entitled to succeed even though the Board acknowledges the existence of other possible or plausible explanations. We submit that the Chairman should direct this division of the Board in accordance with the principles which we have formulated."

It seems to their Lordships that this is precisely what the Chairman did, thus concluding that the appellant had established liability by reason only of the Appeals Board being satisfied that the drainpipe was broken, that water escaped therefrom and flowed into the claimant's land and that the damage to the building thus resulted. "Fault" was thus treated as an unnecessary ingredient.

In their Lordships' judgment, Vincent J. was entirely correct in concluding that, since up to the stage when the problem was identified, there was no finding of fault by the Appeals Board and no basis upon which such a finding could be made, the respondent could not be held liable in nuisance.

Before their Lordships an alternative submission was advanced to this effect:-

> "That in an action for private nuisance once the nuisance is proved and it is shown to have been caused by defect on the defendant's land, the legal burden shifts on to the defendant to justify or excuse himself."

Mr. Buckner relied upon *Southport Corporation v. Esso Petroleum Co. Limited* [1954] 2 Q.B. 182 at pages 197 to 199 and the cases therein cited. In their Lordships' view, there is a short and simple answer to this alternative submission. Once it was conceded on behalf of the appellant that it could not "point to anything which the respondent did or failed to do in the period before the broken drainpipe and the source of the water were identified and the attention

of Fasson's staff was drawn to those things", "fault" ceased to be a live issue and questions of onus thereupon became wholly irrelevant.

Two further matters call for comment. Relying upon the well known and somewhat criticised case of *Wringe v. Cohen* [1940] 1 K.B. 229, Mr. Buckner sought to suggest that there is an exception to the general rule that an occupier is not liable for a nuisance which he did not create unless he continued it with knowledge or means of knowledge of its existence. He submitted that if a tenant occupies land pursuant to a lease which obliges him to keep the premises in repair, then he is liable in the tort of nuisance if by reason of his failure to comply with his repairing covenant a nuisance arises.

Quite apart from the fact that their Lordships have no information as to the nature of the respondent's obligation to its landlord to repair the premises, its liability to third parties arises from its status as an occupier of the premises. The duty to repair which it may have undertaken to its landlord cannot enlarge its obligations in tort. *Wringe v. Cohen* was concerned with the obligation in a lease to repair which rested not upon the tenant but upon an absent owner. That case provides no support for the appellant's contention. The appellant's written case asserts that it was the alleged failure of the respondent "to take any reasonable means to bring it [the nuisance] to an end" which constituted the respondent's breach of duty, *qua* tenant, to keep the premises in good repair. But the failure "to take any reasonable means ..." cannot be sustained in the light of the concession which the appellant made, let alone the absence of any relevant evidence on this issue.

Finally, a submission was made which was never raised before the Appeals Board or even before Vincent J. It was argued that the defective stormwater drainage system was a system for the diversion of stormwater which came on to the respondent's land. This system imposed an obligation upon the respondent to take care that the diversion system was sufficient to prevent mischief from an overflow on to the appellant's land and that it was *prima facie* liable if such an overflow took place. Their Lordships do not consider that, without any evidence of the state of the land prior to the erection of the building, it would be proper at this stage to entertain this submission.

Accordingly their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs.