Privy Council Appeal No. 11 of 1987

Bermuda Gas & Utility Company Limited *Appellants*

v.

Warwick Hotel Company Limited *Respondents*

FROM

THE COURT OF APPEAL FOR BERMUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY 1988

Present at the Hearing:

LORD KEITH OF KINKEL
LORD ROSKILL
LORD TEMPLEMAN
LORD ACKNER
LORD JAUNCEY OF TULLICHETTLE

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

This is an appeal from a judgment dated 11th December 1986 of the Court of Appeal for Bermuda (Da Costa and Henry JJ.A., Blair-Kerr P. dissenting) allowing an appeal from a judgment dated 13th March 1986 of the Supreme Court of Bermuda (Collett J.) dismissing with costs the respondents' ("the plaintiffs") claim against the appellants ("the defendants"). The appeal is brought with the leave of the Court of Appeal.

Two issues are raised by this appeal:-

(1) Whether on the evidence before him, Collett J. was entitled to conclude that the defendants had not committed a breach of their contract with the plaintiffs; and

(2) Whether, if the defendants were in breach, the defence of contributory negligence by the plaintiffs is available to extinguish or reduce any damages to which the plaintiffs would be entitled.

At the outset of the hearing of the appeal, their Lordships decided to hear argument directed solely to
[17] the first issue since, unless it was resolved in

favour of the plaintiffs, the point of law raised by the second issue would not require to be decided.

The Facts.

These are set out in considerable detail in the painstaking judgment of Collett J. They may be summarised as follows. The plaintiffs are the owners and operators of the Inverurie Hotel in Harbour Road, Pagent Parish, Bermuda. The defendants carry on business in Bermuda in the sale and servicing and maintenance of gas appliances. They employed Lancelot Roberts as a serviceman and had so employed him for twenty-eight years prior to the incident, the subject matter of the action. When the plaintiffs abandoned their claim in negligence and limited their cause of action to breach of contract, their claim against Mr. Roberts automatically failed, since it was common ground that the plaintiffs never entered into any contract with him. His status in this appeal is that of the principal witness of the defendants.

On 1st November 1979 as a result of a telephone call made by the plaintiffs' chief engineer, the defendants sent Mr. Roberts to the Hotel to deal with a problem which the plaintiffs were experiencing in one of their deep fat fryers in the hotel kitchen, which kept on going out. On his arrival at the hotel Mr. Roberts was informed by Mr. Grimm, the plaintiffs' executive chef, that it was the left hand fryer, a gas operated Vulcan deep fat fryer, which was giving trouble. Mr. Roberts was told that after the fryer had been lit and had been heating the oil for some five minutes, but before reaching the normal temperature for cooking, which had been set on the thermostat, viz. 350°F, it would go out. Mr. Roberts, consistent with the advice given in the instruction manual, focussed his attention on the pilot light. When he lit this, it seemed small with not much gas playing on the thermopile. However, the flame was blue which was the right colour. He then turned on the thermostat and all four of the burners came on. In order to verify that the thermostat was working, he turned it off, with the result that the burners cut out but the pilot remained lit. This indicated that the thermostat was working, but not that it was necessarily correctly calibrated.

In order to investigate whether it would cut out as reported by the chef, he set the thermostat to 350°F, and while waiting for this temperature to be reached, he carried out certain work on the right hand fryer. This occupied him some fifteen minutes and when he returned his attention to the left hand fryer, he found that both the pilot and the burners had gone out. He concluded that this was probably due to the pilot flame being adjusted too low. He therefore

increased the flame, returned the thermostat to 350°F and the burners came on once more. Mr. Roberts' intention was to see whether, with the increased strength of the pilot flame, the oil would now reach the desired temperature without cutting out. If, contrary to his belief, he had not solved the problem and once more the fryer cut out, he would have changed the thermopile and then turned his attention to checking whether there was an error in the calibration of the thermostat, since this would then be a possible explanation for the underheating.

While waiting for the oil to reach the desired temperature, Mr. Roberts went into the chef's office to make a telephone call. Having done so, he browsed through the headlines of a newspaper. Between five to seven minutes after Mr. Roberts left the fryer, Mr. Hoffler, a chef working in the kitchen, noticed flames coming from the left hand fryer. He called Mr. Roberts, but their joint efforts and the efforts of others to extinguish the fire failed. It spread causing substantial damage to the hotel.

The Law.

It was common ground at the trial that it was an implied term of the contract between the plaintiffs and the defendants for the repair of the fryer that the repair work would be carried out by a competent workman, in a proper and competent manner, and that he would exercise due care and skill in the repair work. Accordingly the essential issue was whether Mr. Roberts had been negligent in leaving the fryer unattended. Collett J. correctly defined the question which he had to ask himself, in these terms:-

> "Whether or not Mr. Roberts as a skilled and experienced serviceman had or should reasonably have had in mind the possibility that fire might occur during the next ten to fifteen minutes after he had lit the left hand fryer for the second time."

The learned judge was correctly applying the principles stated by Lord Reid in the Privy Council case of *Overseas Tankship (U.K.) Limited v. The Miller Steamship Co. Pty.* [1967] A.C. 617 when he observed "since the precaution required to prevent that possibility was very simple, merely involving him in staying on the spot, even a perception of a slight risk would be enough to cast upon him the duty to stay put".

The Decision of the Trial Judge.

Collett J. concluded that there was nothing which should have alerted Mr. Roberts that there was even a

slight risk of fire occurring during the few minutes of his absence. He reached that conclusion essentially for the following reasons:-

1. Mr. Roberts had not disconnected any of the gas links to the fryer. Accordingly, not only was the machine protected from overheating by the thermostat which prevented the temperature of the oil rising above 400°F but there was a further safety device, the high limit control. This operates independently of the thermostat control and automatically switches the machine off if the temperature of the oil should rise 50°F in excess of the highest temperature at which the thermostat can operate i.e. 450°F.

2. Mr. Kelner, one of the two experts called by the defendants, who is a consultant to the gas industry, confirmed that the failure of a high limit control is extremely rare, having occurred on only three occasions during his thirty-three years of experience and in all three of these, failing in the switch-off position, so that the gas was turned off. His evidence, which was accepted by the judge, was that the failure of the high limit control and the thermostat systems simultaneously was unheard of. Mr. Roberts, whose evidence the judge also accepted, said he had never known a high limit control to fail. Such a failure was therefore characterised by the judge as assuming "a legal character similar to an act of God".

3. There was nothing to indicate instability in the composition of the oil in the pan which might have caused it suddenly to have caught fire.

4. Mr. Kelner gave evidence to the effect that the fryers were designed for unattended automatic cooking purposes, that Mr. Roberts did not omit anything which a careful and skilled serviceman would have done, and in particular there was nothing wrong in his leaving the fryer as he did. Moreover in addition to Mr. Kelner's evidence, the defendants called another expert, a Mr. Craddock, who under cross-examination gave his view that it was entirely proper for a serviceman like Mr. Roberts to have walked away while the fryer was heating up.

5. There was no countervailing expert evidence called on behalf of the plaintiffs.

The judge was unable to say which of the two hypotheses was the more probable cause of the ignition - the breakdown of the high limit control and the thermostat system simultaneously, or the decomposition of the oil. He observed that the

latter "seems less improbable" and concluded that "whatever the cause of the fire, its outbreak cannot be fairly regarded as due to any failure upon Mr. Roberts' part to demonstrate the ordinary care and skill of an experienced serviceman that morning".

The Decision of the Court of Appeal.

In the Court of Appeal, both majority judgments relied essentially on an answer which Mr. Roberts gave under cross-examination as recorded in his notes by Collett J. in these terms:-

> "I agree that gas fryers can be potentially dangerous; gas can escape and oil, if overheated, can cause a fire, such as one which happened elsewhere while I was working on it."

Both Da Costa J.A. and Henry J.A. commented on the failure of the judge to refer in his judgment to this admission. Each concluded that in the light of this admission, Mr. Roberts must have foreseen a real risk of fire, however slight.

Their Lordships do not consider that the learned trial judge was in error in not referring or commenting on this admission. As observed by the learned President in his dissenting judgment:-

> "... any machine which functions by the burning of gas may be said to be 'potentially dangerous'. So is a domestic gas cooker, or a coal fire for that matter. One does not go away for the weekend leaving a blazing coal fire in one's lounge, or a boiling pot on the gas cooker. But there would be nothing rash in going upstairs for twenty or thirty minutes to hoover the carpets while the fire burns or the food in the pot continues to cook on the gas cooker."

Their Lordships further agree that, as regards the statement that, on some other occasion, there had been a fire in a fryer while Mr. Roberts was working on it, the court was left entirely in the dark as to what had caused the fire, what was the make or type of fryer upon which Mr. Roberts was then working, what was the problem he had been asked to investigate, and at what stage of his investigation the fire had occurred. This was a matter which was not pursued by either side.

For the reasons which he gave, their Lordships are wholly satisfied that Collett J. was entitled to conclude that on the evidence before him Mr. Roberts had not been negligent and accordingly the defendants had committed no breach of their contract. Accordingly the second issue does not arise. Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be allowed. The respondents must pay the appellants' costs before their Lordships' Board and in the courts below.