

POLYNESIAN AIRLINES LTD v MOIN

Privy Council
Appeal Case No. 9/1983

06 May 1983

Bailment - duty of bailee to take reasonable care of goods - onus of proof on bailee to prove that such care has been taken.

Supreme Court - no jurisdiction to make order relating to procedure for appeal after judgment given.

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Moin hired certain furniture to Polynesian Airlines Ltd for use by its Manager. During the period of hire the furniture was moved by the manager to different premises and was damaged by a fire which occurred in these premises. The Supreme Court held that the manager had failed to take reasonable care of the furniture, and that the company was liable for the loss.

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The Supreme Court later made an order as to the time when an appeal to the Privy Council from this judgment could be filed, since the Court Rules relating to appeal to the Privy Council were no longer in operation.

HELD:

Upholding the decision of the Supreme Court on its merits:

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- (1) The onus of proof was upon the bailee to show that it had exercised the duty of a bailee to take care of goods placed in its possession, and there was ample evidence to support the decision of the Supreme Court that the Company was responsible for the damage to the furniture;
- (2) The Supreme Court had no jurisdiction to make the further order fixing the time for filing the appeal since it was functus officio as soon as it had given judgment.

Privy Council

Judgment

There are two questions in this appeal, namely, whether the Supreme Court was correct in dealing with questions of appeal after pronouncing judgment and whether the judgment on the substantial claim ought to be set aside. Respondent was the owner of certain furniture which he hired for a consideration to appellant for use of its manager. The furniture was removed from the house of the manager where it was originally agreed that it should be used. Repairs were being effected to the second premises known as Sione Mataka's house. Some inflammable material was being used in carrying out such repairs with the result that a fire occurred and the furniture was partly destroyed. There was a dispute whether or not the agent for respondent agreed to the removal. The learned judge did not resolve that dispute saying that it did not affect the duty of care owed by appellant.

In Halsbury's Laws of England 4th Edition Vol. 2 para. 1539 it is stated:

Care and diligence. A custodian for reward must exercise due and reasonable care for the safety of the article entrusted to him. The standard of care and diligence imposed on him is that demanded by the circumstances of the particular case, and is higher than that required of a gratuitous depositary; it should be the rather greater care that a reasonable man would take of other people's articles lent to him at his request for his convenience.

This is later explained by saying that the custodian is bound to take reasonable care to see that the place in which the chattels are kept are fit and proper for the purpose, to see that it is in proper custody and to protect it against unexpected danger should that arise. He is not an insurer, for instance, against fire. Liability arises only if the duty earlier stated is breached.

An important element in a case such as the present is that the law places a duty on a bailee (the appellant) to prove that the loss occurred without any neglect default or misconduct on his part. The question then is whether or not the learned judge was correct when he held that appellant had failed to prove that the loss occurred without the negligence of appellant including, of course, its responsible agents.

The appellant's manager shifted the furniture from the place where it was originally to be used and shifted it to Sione Mataka's place. The manager, who was named as second defendant, stored the furniture in Sione Mataka's place. He knew the type of work which was going on in the way of renovation and the learned judge held as a fact that he knew that inflammable material was stored and was to be used in the house during renovation but that he failed to take any safety steps.

A finding of negligence has been called a value judgment. It is a matter for the trial judge to evaluate the facts to see whether or not appellant's evidence showed that the loss occurred without any neglect on the part of its responsible agents. An appellate Court will not interfere with such a "value judgment" unless it is satisfied that it was wrong. There was ample material in the evidence given in this case for the learned judge to come to the conclusion that, applying the tests laid down, appellant was legally responsible for the loss. The judgment is affirmed and the appeal is dismissed.

The learned judge in a subsequent judgment held that the Court Rules on appeal to the Privy Council are no longer in force since the enactment of the consolidation of the Law of Tonga in 1967. These Rules have not been reproduced in the consolidation of statutes and subsidiary legislation. The Rules were, before 1967, contained in a volume printed

by the Government Printer in 1929 entitled "A Revised Edition of All Regulations Rules Proclamations, Orders notices etc." in force in January 01 1929. The authority for the Rules is stated as follows:

COURT RULES.

NOTICE.

His Majesty the King has authorized the publication of the following Rules of Procedure which must be followed in all appeals to the Privy Council and which Rules of Procedure were approved of by the Privy Council on 17th May, 1916.

GAZETTE
NO. 16
OF 1916.

By Command,
TU'IVAKANO,
Premier.

Premier's Office,
18th May 1916.

Sir Campbell Wylie in a footnote to the Preface of the consolidation Laws said:

The Court of Appeal Act, 1966 (Act No. 14 of 1966) has been included in the Revised Edition, but the proclamation bringing it into effect had not been made up to 1st January, 1967. Amendments to the Constitution effected by the Constitution (Court of Appeal Amendment) Act, 1966 (Act No. 13 of 1966) and amendments to the Supreme Court Act effected by the Supreme Court (Amendment) Act, 1966 (Act No. 19 of 1966) have also been incorporated in the Constitution (Chapter 2) and the Supreme Court Act (Chapter 8). These amending Acts effect amendments consequent upon the establishment of the Court of Appeal and the proclamations bringing them into effect had not been made up to 1st January, 1967.

In the preface to the second volume of the Tongan Law Reports the learned editor, Hunter J. said:

There is an appeal as of right to the Privy Council from decisions of the Supreme Court in its civil jurisdiction and from the Land Court. As at present constituted no member of the Privy Council, with the exception of the Prime Minister - Prince Tungi - has legal qualifications and on the omission of the Chief Justice from the Privy Council it was enacted that when the Privy Council is sitting as a Court of Appeal the Chief Justice shall be present to advise on points of Law, though he has no voice in the decisions. The decision of the Privy Council is final.

The Court of Appeal Act provides for Rules to be made for its procedure. Sec 9 (1) reads:

The Chief Justice may make rules of court for carrying this Act into effect and for regulating generally the practice and procedure under this Act.

No such rules have yet been made pending the bringing of that Act into operation. The only reference to existing rules is contained in Section 31 which is a "transition provision". It provides that, until new rules are made, the existing rules of the Privy Council will apply in the Court of Appeal. It does not expressly preserve or continue those rules in respect of appeals to the Privy Council. It was presumably anticipated that the Court of Appeal Act would forthwith be brought into force.

To recapitulate the position, the narrow question in the cross appeal is whether or

not the Supreme Court had authority, after it had given its decision, to make a further order relative to the time when an appeal may be commenced by the lodging of an appropriate procedure. By Sec 6 of the Supreme Court Act the Chief Justice or a Judge of the Supreme Court may make rules for the practice and procedure of the courts. Such rules have been made and they appear at page 1334 of Volume III of the Laws of Tonga 1967. Order IX deals with stay of proceedings after verdict. Apart from powers to enforce judgments this appears to be the only jurisdiction after judgment has been given. In any event there are no rules purporting to deal with the right to appeal or any matter in relation thereto. The Civil Law Act does not extend the jurisdiction of the Supreme Court so that it has power, after judgment, to determine between the parties matters concerning appeals from the decision already given. All such matters are, after judgment, questions for the appellate tribunal. In the particular case the Supreme Court became functus officio except in matters relating to the enforcement of the judgment.

The Privy Council finds that it is sufficient to dispose of the cross appeal to say that the Supreme Court had no jurisdiction in the present action to file a subsequent judgment on the rights of the parties to avail themselves of provisions for appeal. The cross appeal is allowed and the further judgment of the Supreme Court is set aside.

The judgment of the Supreme Court awarding damages is affirmed and the appeal against that judgment is dismissed on the merits. The appellant will pay the costs of appeal to be taxed if not agreed on.