18, 1982

No. 36 of 1979

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS

BETWEEN:

THE CENTRAL ELECTRICITY BOARD OF MAURITIUS	Appellants (Defendants)
- and -	
BATA SHOE COMPANY (MAURITIUS) LIMITED	1st Respondents (1st Plaintiffs)
- and -	
EAST AFRICA BATA SHOE COMPANY LIMITED (MAURITIUS DEPARTMENT)	2nd Respondents (2nd Plaintiffs)

CASE FOR THE APPELLANT

Record

1. This is an appeal from a judgment of the Supreme Court of Mauritius (Rault, C.J., and de Ravel, J.) ordering the Appellant (Defendant) to pay to the two Respondents (Plaintiffs) the respective amounts of Rupees 860 000 and Reupees 1 035 000 as damages for loss sustained by them in a fire which broke out in their premises at Plaine Lauzun, Port Louis, Mauritius, on 6th July, 1972. The Supreme Court held that the fire was caused by the negligence ("faute") of the Appellant.

2. The Respondents (to which we shall refer jointly as "Bata") instituted their action for damages in the Supreme Court of Mauritius on 7th June, 1974. The trial commenced on 14th February, 1978. The evidence and addresses were concluded on 31st March, 1978, and judgment was given on 12th June, 1978. On 14th July, 1978, the Supreme Court granted the Appellant leave to appeal to Her Majesty in Council, in terms of the

Mauritius (Appeals to Privy Council) Order, 1968. Although leave was sought and granted, the appeal to Her Majesty in Council lay of right under section 81(1)(b) of the Constitution of Mauritius.

3. There is no intermediate court of appeal between the Supreme Court and the Privy Council. This is therefore a direct appeal from the trial court to the Privy Council against the trial court's findings of fact.

THE FACTUAL BACKGROUND

4. The Appellant is the sole distributor of electricity in Mauritius in terms of the Central Electricity Board Ordinance, No. 32 of 1963. It supplied electricity to Bata, which occupied a store and warehouse in Plaine Lauzun, the industrial zone of Port Louis. The electricity was conveyed by a main cable from a nearby transformer to a fuse box in Bata's premises, known as a HENLEY fuse box. Bata's supply of electricity came from this box. In another part of Bata's premises (a storeroom) a second Henley fuse box was installed. This was never used by Bata. It was, however, utilised by the Appellant (with Bata's permission) as a "section fuse" for the temporary supply of electricity to new industrial undertakings which were being established in other buildings in the vicinity.

The case centred on this second fuse box, sometimes referred to in the court below as Henley II. It was situated on the wall of a locked storeroom (referred to as Room 4) to which the Appellant's servants had access only by asking Bata's servants to unlock it.

5. Henley II was in the event used to supply electricity to three firms -

Southern Cross Diamonds, from 17th March, 1972;

Imprimerie Ideale (the printers), from 17th April, 1972; and

Textile Industries, from May, 1972.

Henley II (a cast iron box with a watertight lid or cover) contained three fuses, each originally consisting of a single strand of 18 gauge wire. From the 26th May each of the three consumers had the additional protection of three "Yorkshire" fuses between Henley II and its own premises.

From late in May and throughout June there were several faults in the supply to the three consumers, including the "blowing" of the Yorkshire fuses, and, on a number of occasions, the fuses in Henley II. On the 28th June, when a fuse in Henley II blew, it was replaced by a fuse consisting of two strands of 18 gauge wire twisted together (a "2 x 18 fuse"). On 5th July another fuse in Henley II blew and was also replaced by a 2 x 18 fuse. Later on the same day the third fuse in Henley II blew: it was replaced by a 2 x 18 fuse on the morning of 6th July.

A few hours later the fire broke out.

6. The fire broke out in Room 4. The previous faults, the coincidence of the rewiring of the third fuse on the morning of the 6th July, and the absence of any other proved cause of the outbreak of the fire, led the Supreme Court to conclude that a fault in Henley II was the cause of the fire. It will be submitted that the coincidence was deceptive, and that this fundamental finding of the court was wrong.

7. The fire was first observed by a Bata employee, Dorsamy Lowtun, who worked in another part of the Bata building. At about 1.15 p.m. on 6th July he heard a "boom". He did nothing, but five minutes later saw smoke coming from a partition adjacent to the storeroom, and gave the alarm. However, the fire spread through the storerooms, which contained much inflammable material, which burnt up before the fire brigade was able to extinguish the fire. VOL.I. p.27

After the fire Henley II was found lying in the debris in Room 4. Its lid had come off, and was eventually found under the debris on the floor of the same room. A piece of the top right-hand corner of the lid was missing. VOL.I. p.22

THE RESPONDENTS' ALLEGATIONS

8. The Respondents in their Statement of Claim alleged that the Appellant had custody of Henley II, and that the fire broke out through the negligence ("faute") of the Appellant. The following particulars of negligence were pleaded:

"THE DEFENDANT

"1. allowed loads to be imposed in excess of the design capacity of the Henly [sic] fuse box and/or failed to ensure that that equipment was of adequate capacity for its intended purpose.

"2. made the temporary connections to the Henly fuse box omitting to install and protect them in the proper fashion including to provide 'bushes' on the outlet from the Henly fuse box.

"3. employed fuse wire in excess of the design capacity of the fuse box.

"4. failed to investigate the causes of and remedy all or any such defects despite repeated evidence, through faulting and over-heating, of such defects." 10

9. The Respondents averred, in the alternative, that -

"the fire was caused by a fait de la chose, namely the said Henley fused service unit and all the electric cables and installations relating thereto, which were under the garde of the defendant."

(This averment is based on Article 1384 of the Code Napoleon, to be referred to below.)

10. The Appellant denied all the material averments in the Statement of Claim.

THE EVIDENCE 20

11. The Respondents' witnesses consisted of -

(a) Bata employees who observed the outbreak or the course of the fire (Lowtun, Goder Bigaignon);

(b) Bata employees who had, before the fire, observed the Appellant's employees repairing fuses in Henley II (Mandally, Hiss, Dauharry);

(c) witnesses who examined the debris in Room 4 after the fire, and found the remains of Henley II (Inspector Bosquet and Cole, an insurance adjuster);

(d) three expert electrical engineers (Turner, Davidson and Maisey). 30

12. The Appellant's witnesses consisted of -

(a) two of its senior officials (Superintendent Jean and senior inspector Juste);

(b) employees who had carried out repairs of blown fuses (Mungroo, Jupin, Rosalba);

(c) two expert electrical engineers (Woodcock and Sharples);

(d) managers and employees of two of the "downstream" consumers supplied from Henley II (Razack and Mosaheb of Ideal Printing, and Ah Chuen and Chueng Choi of Textile Industries).

Mosaheb and Chueng Choi were key witnesses in the case. The Supreme Court correctly said that if their evidence was accepted, the court "should have felt bound to look for some other explanation" (other, that is, than an electrical fault within Henley II). The Court rejected the evidence of these two independent witnesses. We shall submit that this was a major misdirection.

13. The expert evidence takes up several hundred pages of the Record, apart from the many technical reports which were put in. There were also many physical and documentary exhibits before the Court, including the remains of Henley II, the Appellant's faults log-book and statements made to the police by some of the witnesses after the fire.

THE APPLICABLE LAW

14. The law of tort in Mauritius is to be found in Titre IV of Livre III of the Code Napolean. The chapter on delicts and quasi-delicts remains as it was enacted in 1808.

Mangroo v. Dahal, 1937 Mauritius Reports 43, 73.

Angelo 4 Comparative and International Law Journal of Southern Africa (1971) pp. 60-61.

Chapter II of Titre IV, so far as it is relevant to this case, reads:-

"Des delits et des Quasi-delits

"1382. Tout fait quelconque de l'homme, qui cause a autrui un dommage, oblige celui par la faute duquel il est arrive, a le reparer.

"1383. Chacun est responsable du dommage qu'il a cause non-seulement par son fait, mais encore par sa negligence ou par son imprudence.

"1384. On est responsable non-seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est cause par le fait des personnes dont on doit repondre, ou des choses que l'on a sous sa garde."

This may be translated as -

1382. Any act by which a person causes damage to another binds the person by whose fault the damage occurred to repair such damage.

1383. Everyone is liable for the damage which he does, not only by his wilful acts but also by his negligence or imprudence.

1384. A person is liable not only for the damage which he causes by his own act (fait), but also for that caused by the acts of persons for whom he is responsible, or by things (choses) under his care (sa garde).

The main claim may be regarded as having been brought under Articles 1382 and 1383; the alternate claim under Article 1384.

THE JUDGMENT

15. On the principal allegation of negligence (faute), the Respondents had the burden of proving -

(a) that a fault in Henley II was the cause of the fire, and

(b) that this fault was caused by the negligence of the Appellant.

On these issues the Supreme Court found in favour of the Respondents.

16. The Court considered that there were five possible causes of the fire, namely,

(a) spontaneous ignition of the materials in the Store;

(b) some negligence or imprudence on the part of Bata's employees or others, resulting in the fire;

(c) a deliberate criminal act;

(d) an electrical fault arising in Henley II or the electric installation connected to it;

(e) some other unknown cause which has remained completely unsuspected.

The first hypothesis was discarded. This is not in dispute. The second hypothesis was summarily rejected because the Bata witnesses had said that there was a strict "no-smoking" rule. There was "neither evidence nor indeed suspicion that the fire could have been started by an act of negligence or imprudence".

The possibility of a deliberate criminal act was excluded after a detailed examination of the evidence concerning Dauharry, the Bata storekeeper, who kept the keys to the storerooms, including Room 4. It had been suggested by the defence that Dauharry's conduct on the day of the fire had been suspicious. He had remained at the store for a period of time which he could not adequately explain; he had admittedly removed materials from the store; and the entries in his stock book were not properly vouched and had some suspicious features which he could not explain. The possibility existed, it was submitted, that he had set fire to the store to conceal his thefts. The Court found that Dauharry was "an unsatisfactory storekeeper, and suspicious entries in his books do not permit us to exclude the possibility that he may have been a petty embezzler".

However, the Court held that he was not shown to have been a "large-scale" embezzler and that the probabilities were against his having committed an act of arson-on the morning of 6th July.

17. The Court concluded that the cause of the fire was electrical. It did so partly because there was no other proved cause of the fire, but also for other reasons.

(a) The Court found that the Appellant's installations were "marked by crude workmanship". In this respect the Court relied, inter alia, on its observation of the extension cables supplying electricity to the Supreme Court. It relied also on the evidence of repeated breakdowns before the fire.

(b) It regarded the remedy of doubling the 18 gauge fuse wires in Henley II as dangerous. It found it "highly significant that the last of those replacements was made on the morning of the 6th July, a few hours before the fire".

(c) It considered that Henley II had been "the victim of sustained overloading", which caused overheating within the box. In this regard it placed particular emphasis on the evidence of one of the Appellant's workmen, Rosalba. His evidence of the condition of a "Yorkshire cut-out" which he repaired on 1st July pointed to overloading as a cause of the blow-outs, and not short-circuits.

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(d) There was expert evidence, including evidence of laboratory tests of Henley fuse-boxes, which tended to show that the probable or possible loads which Henley II may have had to sustain were not beyond its capacity and should not have led to serious overheating or to fire. The Court made no detailed analysis of the expert evidence, or of the conflicts between the experts, but found that the expert evidence did not exclude the possibility that in practice Henley II may have been overloaded in such a way as to generate sufficient heat to start the fire.

(e) The Court also placed much reliance on the condition in which Henley II and its lid were found after the fire. It drew the inference "that the lid was blown away from the box ... that the lid was snapped ... and the most reasonable explanation for this condition is an explosion within the box".

(f) The state in which the lid was found was due to "sustained arcing" within the box, i.e. a condition in which a sustained and powerful short-circut between two points within the box creates an intense heat sufficient to melt the metal.

(g) The Court's explanation of the fire was accordingly the following:-

"(1) The overwiring of the fuses in Henley II permitted overloading which in turn led to overheating of the cables and of the metallic parts of the fuse-box.

"(2) This overloading, occurring repeatedly over a prolonged period, led to a gradual deterioration of the contacts and other components inside the box.

"(3) This in turn would increase contact resistance and lead to higher temperatures than would have occurred if the contacts were clean.

"(4) As a result of accelerated deterioration of the system, the combined build-up of ionized gases and high temperatures inside the box would bring about a runaway condition.

"(5) One effect would be sustained arcing within the box.

"(6) The reprehensible way in which the fuse-box was earthed would permit at the outset a low amperage arcing within the box going on undetected.

"(7) The pressure caused by the ionized gases at high temperatures would build up until it was strong enough to blow off the lid.

"(8) That lid itself, as shown by the damage it suffered from the arcing, would by then have reached such a high temperature that when it was blown off, part of it would have evaporated in a fine shower of incandescent particles, while the bulk of it would be in a molten state and would set fire to the cardboard boxes or any other inflammable material on which it would land.

"(9) It is probable, although not certain, that the bang heard by Lowthun was caused by the lid being blown off.

"(10) The broken pin also supports the "theory that the lid was violently blown off its moorings."

18. As stated above, the Court agreed with the defence that the evidence of Mosaheb and Ah Chueng was wholly inconsistent with the above explanation. Those two witnesses had testified that the electric supply to both the printing works and the textile works had continued for some time after the fire had broken out. If the fire had been caused by arcing in Henley II, this would have been impossible. However, for reasons which will be examined below, the Court entirely rejected the evidence of these two witnesses.

19. The Court's conclusion was that the fire was caused -

"(a) by electrical faults connected with Henley II.

"(b) that these faults themselves were the result of faulty procedures (notably the overwiring and its consequences, the bad earthing, etc.) combined with the negligence of the C.E.B.'s servants and their failure to treat the causes rather than the effect of the repeated break-downs."

20. On the alternative claim based on Article 1384, the Court said that it was not necessary for it to make a finding. But it indicated that, while it regarded itself as bound by Mangroo v. Dahal, supra, that case is to be

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taken as holding no more than that when a motor vehicle driven by a human being causes damage, the victim cannot recover unless he proves some fault against the driver. The victim cannot rely on Article 1384. That ratio decidendi did not apply in the present case.

"The fuse-box was not being directly manipulated by a human being at the time the fire started. The damage was caused by 'un vice inherent a la chose', and s. 1384 clearly makes the custodian of the fuse-box responsible to the victim."

21. It will be submitted that the judgment of the Supreme Court was wrong on the facts and (in respect of the alternative claim) in law.

THE APPELLANT'S SUBMISSIONS - THE FACTS

22. The Supreme Court, in discarding possible causes of the fire other than a fault in Henley II, adopted an incorrect approach. It was not for the Appellant to prove the cause of the fire, but for Bata to eliminate other causes on a balance of probability. Thus the Court summarily rejected the possibility that the fire had been started by the negligence of some Bata employees, on the simple ground that the Bata witnesses had said that the official "no-smoking" rule was strictly enforced. That hardly excludes the reasonable possibility that on a particular occasion an employee may have broken the rule.

VOL.I.p.28

Similarly, the Court too readily rejected the possibility that the fire was started by the storekeeper, Dauharry. The Appellant did not undertake to prove beyond reasonable doubt that he was guilty of arson, and did not have to do so. The factors reviewed by the Court would admittedly preclude such a finding. But the circumstances of suspicion surrounding Dauharry's conduct on the day in question make it impossible to eliminate his deliberate act as a cause of the fire. The Court said that "suspicious entries in his books do not permit us to exclude the possibility that he may have been a petty embezzler". However, the evidence went far beyond that. It showed not merely that the entries in his books were suspicious but that on the day of the fire he had removed goods from the storeroom, for which he could not properly account. He admitted having made two trips from the storeroom in a van. Asked why he had required a second trip, he said there was too much to carry on one trip. But he could account for only a few paltry articles which could easily have been taken in a single trip in the smallest van. He could not account for the time he had spent in the store that same morning; nor for the absence

VOL.I.pp.74-76, 83 - 84

from a list he prepared of the items in the store at the time of the fire of a highly inflammable plastic cement which was admittedly there in substantial quantities.

This does not prove him guilty of arson but it leaves open the real possibility that he may have set fire to the store to conceal his defalcations. Indeed, one of Bata's experts, Maisey, admitted that if he had known that two van loads of goods had left the store and could not be accounted for, it would have "set him thinking". VOL.I. p.261

Nor can one exclude the possibility that the true cause of the fire remains unknown.

23. If the Supreme Court had kept a more open mind on the other possibilities, it might not have so readily accepted the evidence of Bata's electrical experts, and might have given the Appellant's expert evidence the weight which was its due. The Court's account of the probable genesis of the fire (see paragraph 17(g) above) was based on the opinions of the Bata experts, or at least on a selection from those opinions. Although the Court paid tribute to the integrity and competence of all the expert witnesses, its judgment reflects no serious consideration of the evidence of the Appellant's experts, nor of the legitimate criticisms which were made of the conclusions drawn by Bata's experts.

24. Further, having found that the fire was caused by a fault in the Henley II, the Court was again too ready to find that the fault was due to the negligence of the Appellant's employees. On the evidence of the Appellant's experts, which was not expressly rejected, the system of protection provided by the Appellant for the three "downstream" users was adequate, and could not have been expected to cause a fault in Henley II such as to lead to overheating causing the destruction of the box, and a fire.

25. The theory of Bata's experts, which was accepted by the Supreme Court, was broadly as follows.

The function of a fuse wire is to provide a point of weakness which will melt when the current in the system is too high, thus saving the other parts of the system from damage. The doubling of the fuse wires in Henley II permitted them to take a higher current for a sustained period without melting. This sustained "overloading" generated heat within the box which in turn caused damage to points of contact in the box. A fault in the earthing of the box had permitted a continuous low-amperage leakage, but the overheating and the damage caused by it lead to sustained high-amperage "arcing" (i.e. a continuous and

powerful short-circuit). This arcing caused very intense heat, sufficient to destroy the box by blowing off the lid and causing part of it to evaporate in a shower of burning particles. However, throughout this process, and until the destruction of Henley II, the three 2 x 18 fuses in Henley II remained intact and did not melt. Although one of the Bata experts (Maisey) stated that there was no unequivocal evidence that Henley II was the cause of the fire, the Bata experts regarded it as the only reasonable explanation of the fire.

They observed that the fire broke out a few hours after the third fuse in Henley II had been doubled, and shortly after the three consumers had re-commenced work after the lunch break.

26. There are a number of factual difficulties with the evidence of the Bata experts which must be noted, before the expert evidence to the contrary is considered.

(a) First, they were apparently unaware when they first reported and reached their conclusions that each of the three consumers was protected, between Henley II and their own premises, by three fuses known as "Yorkshire cut-out".

VOL.I p.225

(b) The theory of sustained and powerful arcing in Henley II, leading to the disintegration of the box, which was fundamental to their own final conclusions, was not referred to in Davidson's original report, and seems to have been an afterthought. (It was added as paragraph (k) to Davidson's report when he gave his evidence-in-chief.) In Maisey's report, arcing is merely referred to in passing as one of a number of things which may have happened, without any suggestion that it was necessary to the theory that the fire originated in Henley II.

VOL.I pp.184-185

(c) Both of these experts, in their original reports and in their evidence, relied heavily on evidence given by two Bata employees (Mandally and Hiss) as indicating that Henley II had been subjected to intense overheating. Their reliance on this evidence was entirely misplaced, as will be shown. Similarly, the third Bata expert, who carried out various laboratory experiments on the effect of overloading fuses, worked on the false assumption that the 2 x 18 fuses in Henley II had repeatedly blown, whereas in fact only the single (1 x 18) fuses had blown.

VOL.I pp.162, 167, 218, 266

27. HISS AND MANDALLY

The "observations" of these two Bata employees are referred to repeatedly in the reports and evidence of Davidson and Maisey. Hiss said in his evidence that on the 26th May, when the fuses in Henley II blew, and the Appellant's employees opened Henley II, he saw that "the bottom of the fuse carrier had melted completely and part of the top as

VOL.1 p.54

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well". The fuse carrier was there and then replaced. Mandally went even further. He said that on the morning of the fire he saw that the cable ("wire") going into Henley II had been burnt, and had to be cut away and replaced with another piece which the Appellant's employees brought from their van. VOL.I p.50

This evidence was conclusively refuted by the workmen concerned and by Jean, the Appellant's commercial superintendent, and Juste, a senior inspector. Not only did they say that what Hiss and Mandally had described did not happen, but they explained that if the damage alleged had occurred, it could not have been immediately repaired. Spare parts would have had to be obtained from the engineering section, and the repairs would not have been completed for several hours at least, during which time several consumers would have been without power. The workman who changed the fuse on the first occasion, Mungroo, stated clearly that the terminal had not melted but only the fuse. The other workman, Rosalba, made it equally clear that he had not and could not have cut the cable on the morning of the 6th July. The improbability of the descriptions given by Hiss and Mandally was also demonstrated by Woodcock, one of the expert witnesses. Accordingly, Bata's experts based their conclusions on seriously faulty premises.

VOL.II pp.292-295,335-337, 348-351
VOL.I.pp.372-373
VOL.II.pp.390-391
VOL.II.pp.442-444

28. ROSALBA

The Supreme Court did not accept the evidence of Hiss and Mandally, but it placed considerable reliance on a portion of the evidence of Rosalba. One of the questions which arose in the case was whether the failures of the various fuses during the weeks before the fire were due to sustained overloading or to short-circuits causing a momentary surge. On 1st July Rosalba had repaired a Yorkshire cut-out serving Textile Industries. The fuse had blown and, he said, his recollection was that the terminal was "somewhat dark" and "somewhat oxidized". He could not state the cause of the oxidation which he saw. The Court found that Rosalba's recollection of the appearance of this fuse "distinctly points to overloading". Overloading of a fuse may cause oxidation; but the expert evidence showed that short-circuits could produce the same appearance. The Court's reliance on this highly equivocal piece of evidence was therefore misplaced.

VOL.II.p.387
VOL.II.pp.451-452,550,581

29. The evidence of the Appellant's experts, Sharples and Woodcock, was, it is submitted, clear and impressive. It pointed to the unlikelihood of overheating of Henley II as a cause of the fire. It also showed that the fuses in Henley II were not overwired. Moreover, their views were borne out by the evidence of two independent witnesses, Mosaheb and Chung Choi, employees respectively of Imprimerie Ideale and Textile Industries.

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THE APPELLANT'S EXPERTS

30. As stated above, Bata's case and the Court's finding are grounded on two suppositions - the first was that the doubling of the fuses in Henley II permitted sustained overloading, and therefore overheating, in the box. The second was that this overheating led to sustained arcing within the box with temperatures high enough to start a fire, to cut off a corner of the heavy lid or to dissolve it in a "shower of incandescant particles", and to cause an explosion which blew the lid off the box. The repeated blowing of the single fuses in Henley II and in the Yorkshire cut-outs in the period before the fire show on this view that the box had been submitted to "strain and stresses" which "in the long run would tend to aggravate themselves".

Apart from the suspect factual foundations of this theory, already referred to, it was effectively demolished by the Appellant's experts, Sharples and Woodcock. According to their evidence -

VOL.II.pp.433, 498 (a) the laboratory test carried out in England demonstrated that a Henley II could sustain without serious damage a current about twice the maximum which could possibly have been generated in the Henley II at the Bata premises;

VOL.II.pp.524-525, 54-549 (b) although the doubled fuse wires could theoretically have permitted overheating, an examination of the total power demands of the three downstream consumers showed not only that sustained overheating had not been proved, but that it could not have occurred;

VOL.II.pp.508, 544,561,580 (c) the failure of the fuses was due to momentary overloads or to short-circuits, not to sustained overloading;

VOL.II.pp.444-445 (d) the existing fault in the earthing of Henley II could have permitted a continuous arcing of only 3.77 amps - which (as became common cause) was quite insufficient to cut or melt the lid of the box;

VOL.II.pp.454-455, 526 (e) if damage to insulation of the cables or any other fault had led to highpower arcing, that would have caused an almost instantaneous cut-out of the system.

31. A. The tests. The Supreme Court said that laboratory tests do not necessarily reproduce conditions on the site. This is obviously true, but the carefully prepared tests at the very least cast considerable doubt on the "explosion" theory, and together with the other factors referred to by Sharples and Woodcock, should have led to the rejection of that theory.

VOL.II.pp.486 et.seq B. The diversity factor. This was explained by Sharples in his report and his evidence. All electrical engineers recognise that not all the items of a single consumer's electrical equipment are likely to be in operation at their maximum rating simultaneously. Similarly, not all consumers are using their equipment at the same time. The ratio between potential maximum demand and the expected demand in practice is

referred to as "the diversity factor", and is expressed as a figure (above 1.0) by which the maximum installed load is divided. Thus, to take an illustration given by Sharples, all the consumers of electricity in Mauritius may have an aggregate installed capacity of 500 000 kilowatts, but the total capacity of Mauritius power stations is not more than 100 000 kilowatts, i.e. the diversity factor is at least 5.

Based on his very extensive experience and professional judgment, as well as on a detailed examination of the potential and actual demands of the consumers (particularly Textile Industries), Sharples arrived at a "group diversity factor" for the three firms of 1.3 and an "after diversity demand" on the Henley II of a maximum of 61.3 amps. The average load based on actual consumption during June, 1972, was probably not above 45 amps. This could not bring about overheating. VOL.II.pp.492-493, cf.VOL.II.pp.305-306

Of course, at times the load would be considerably higher, for example if a welding machine were in use, or a three-phase motor were started up. But these operations would cause surges which were momentary, or of only a few seconds duration. The surges could not have caused sustained overheating. VOL.II.pp.341-342, 508,564

There was in fact no possible source of sustained overheating, and therefore overheating could not have been the cause of damage and arcing in Henley II. VOL.II.pp.525-526

The Supreme Court referred to "Mr Sharples' brilliant expose on diversity factors" but did not have regard to his conclusions, on the ground that these factors "do not necessarily apply to an individual situation or a particular group of consumers". But, as explained by Sharples, they did in fact apply in the situation in Plaine Lauzun. The Court's Supposition to the contrary was purely speculative, as the Court itself seemed to acknowledge.

C. The blowing of the single fuses. The repeated blowing of the single fuses, described by the Court as "alarming", took place because the single fuses were underwired in relation to the occasional surges of power referred to above, and because of short-circuits in the installations of the three consumers. The repeated blowing of the fuses in fact prevented damage to Henley II; it

did not cause it. The doubling of the fuses was admittedly not good practice in that it could have allowed overheating in the box. But, for the reasons given by Sharples, there was in fact no source of sustained heating.

There is no basis, therefore, for the Court's suggestion that there had been continuous stresses on Henley II.

D & E. The arcing. The theory of an explosion and of the melting or cutting of part of the lid cannot stand unless there was very high-powered and sustained arcing. Sharples and Woodcock could visualise types of short-circuit in the box which might give rise to arcs of very high amperage. But these would have led within fractions of a second to the destruction of the fuses in the box itself, or to the cutting out of the HRC (high resistance current) fuses on the transformer upstream of Henley II. There could have been no sustained arcing and therefore no cutting or melting of the lid; nor would the lid have blown off.

VOL.II.pp.502-503,512-513

Further, if there had been high-powered arcing, or an explosion within the box, the motors and lights in the consumers' premises could not have remained on. Sharples and Woodcock therefore both concluded that the cause of the fire could not have been Henley II. The damage to Henley II was caused, in their opinion, by a fire which started elsewhere in the storeroom.

VOL.II.pp.454-455, 526

32. The Court drew far-reaching deductions from the fact that when the lid of the box was eventually found it was under other debris, and about five feet away from the wall to which the box had been fixed; and from the fact that the missing corner of the lid was never found. But these facts are entirely consistent with what one might expect if the box had fallen from the wall as a result of the fire. According to Sharples, the material of the lid was brittle, and could well have broken when it fell to the floor. And the broken corner could easily have been missed when the debris was examined. Thus (as Davidson conceded) none of the porcelain parts from Henley II had been found either - for which he could give no explanation.

VOL.II.pp.522, 575-577

33. MOSAHEB AND CHUNG CHOI

The evidence of these two independent witnesses is at the heart of the case. The Supreme Court rightly said that if their evidence was to be accepted, some explanation for the fire other than a fault in Henley II would have to be sought. In the event it rejected their evidence. It is

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submitted that there was no justification for doing so. Their evidence should have been accepted, with the consequence that Bata's case should have been dismissed.

(a) Mosaheb had been employed at Imprimerie Ideale for six years before the fire. After lunch on the day of the fire he was at work at a printing press. He heard a shout of fire, and a few minutes later saw smoke. During that time and for some minutes thereafter the motor of his press remained on and was working normally on all three phases. After the power failed he went outside and saw that the fire was at Bata's premises. VOL.II.p.403 VOL.II.p.404 VOL.II.p.405 VOL.II.p.408

(b) Chung Choi joined Textile Industries as its accountant on 21st June, 1972. His office was on the ground floor. There were cutting machines on the ground floor and sewing machines upstairs. The lights were on in his office on the day of the fire. Some time after the lunch break he heard shouts of fire, went outside and saw smoke coming from the Bata building. He returned to his office. The lights were still on. When he had gone outside the machines were running but he could not remember whether they were still running when he returned. A few minutes after he had returned to his office the lights went off. He said cross-examination that previous power cuts had been repaired by his firm's own electricians. He had first made a statement for the purposes of the case in December, 1977. VOL.II.pp.420-422 VOL.II.p.424

(c) The Court found that both these witnesses were liars. In the case of Mosaheb, it found that he had "deliberately tried to deceive the Court by asserting that there never was an electric welder at Imprimerie Ideale" - a strange finding apparently based on an ambiguous answer to an ambiguous question. He was referred to as a "clumsy liar" because he said that he went on working after he had heard the shouts of "fire", instead of rushing out to see what was happening. VOL.II.p.406

Chung Choi was called "a rather more cautious liar". But his evidence was found to be "equally unacceptable", because of his "demeanour in the box", because he was incorrect in saying that all electrical repairs had been done by his firm's own employees, and because "with the same iron nerves as Mosaheb" he returned to his office after he had seen the fire at Bata's. VOL.II.p.423

(d) It is submitted that these findings were entirely unjustified and, with respect, unfair to the witnesses. The Court's findings of dishonest are not borne out by anything in the record.

No motive for dishonesty was suggested by the Court, still less put to the witnesses in cross-examination. In fact, neither the cross-exmainer nor the Court put to them that their evidence was false or even mistaken. In these circumstances it was not proper for the Court to reject their evidence. In Browne v. Dunn (1893) 6 The Reports 67 (H.L.), Lord Herschell, L.C., said:

> "It seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought "not to be believed, to argue that he is a witness unworthy of credit ... It will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explaination by reason of there having been no suggestion whatever in the course of the case that his story is not accepted ..."

Lord Halsbury said:

> "to my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed "either to their credit or to the accuracy of the facts they have deposed to ..."

(e) The finding was also extremely unfair to the Appellant. Had the evidence of Mosaheb and Chung Choi been challenged, the Appellant might well have called other witnesses to corroborate them. In the absence of any challenge, the Appellant was not required to do so.

34. Had Henley II overheated and disintegrated in accordance with the theory accepted by the Court, then (as the Court itself found) the electricity must have failed at the downstream consumers' premises. The

evidence of Mosaheb and Chung Choi shows that this did not happen. On this basis alone Bata's claim should have failed.

35. Alternatively, it is submitted that even if the fire were proved to have been due to a fault in Henley II, the Court should not have found that the fault and the fire were caused by negligence on the part of the Appellant in terms of Article 1383 of the Code.

36. "FAUTE"

Even if it should be found that the fire originated in Henley II, this in itself does not prove negligence (faute) on the part of the Appellant or its employees. Res ipsa non loquitur. The Supreme Court found that the repeated blowing of the single fuses had given ample warning to the Appellant that "their installation was not working properly", and that the Appellant, by doubting the fuses in Henley II, had suppressed the symptons but had failed to investigate the causes of the break-downs. "For this failure they must be held responsible." The Court also referred to the poor earthing of the box (which had permitted low-amperage arcing) and to the crude workmanship of the Appellant's employees as evidenced by the Court's observation of the extension cables supplying the Supreme Court.

The Court did not however grapple with the problems of causation and forseeability.

The Appellant had no reason to believe that the repeated blowing of the fuses was due to any fault in its own installation; it was rather due to faults in the consumers' installations. The Henley II was opened on at least three occasions before the fire. Any sustained overheating of Henley II would have been detected, but it existed. Accepting that the doubling of the fuses was bad practice, the employees of the Appellant could not reasonably have foreseen that either the limited operations of the consumers or the minor earth fault could have led to a degree of overheating which the sturdy Henley II could not withstand. The "runaway" condition which the Bata experts suppose to have developed would have been extraordinary. No expert suggested that it was foreseeable or that it was within the experience of ordinary electrical engineers. VOL.II.pp.523-524, 580

If the fire is to be explained only by the complex chain of circumstances found by the Court (and set out in paragraph 17(g) above), it goes too far to suggest that this was a reasonably foreseeable consequence of the doubling of the fuse wires.

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37. FAIT DE LA CHOSE

The Supreme Court appears to have held, alternatively to a finding of negligence that if the fire was caused by a fault in Henley II, the Appellant as "gardien de la chose", was liable under Article 1384. The Court assumed that it was bound by Mangroo v. Dahal, 1937 M.R. 43, but limited that case to its own facts.

It is submitted that the reasoning in Mangroo v. Dahal is wider than that suggested by the Court below. It appears that in the case-law and jurisprudence of France a similar article in the civil code may have been interpreted as imposing a strict or absolute liability on the custodian of an article which has caused damage. But in Mangroo v. Dahal the Supreme Court held the liability for a "fait de la chose" presupposes some "faute" on the part of the custodian. See per Nairac, C.J., at pp.82-83, 84, 93. Nairac, C.J., emphasised that if a rule of liability without fault is to be introduced into Mauritius, it is for the legislature and not the courts to do so. See also Angelo, "The Mauritius Approach to Article 1384(1) of the French Civil Code", 4 Comparative and International Law Journal of Southern Africa (1971), 57, 66, 68.

Angelo, "Article 1384(1) of the Mauritius Civil Code - the continuing storey", 13 Comparative and International Law Journal of Southern Africa(1980), 204

Mangroo v. Dahal has, as appears from the above articles, been subject to criticism. But it is submitted that it remains for the legislature, if so advised, to introduce strict liability for damage caused by "choses".

See also

Savanne Bus Service Co. Ltd. v. Govinden, 1964 M.R. 64.

Rungen v. Walter, 1968 M.R. 69.

Enamally v. Petron, 1975 M.R. 29.

Quebec Railways Light, Heat and Power Co. Ltd. v. Vandry, (1920) A.C. 662 (P.C.)

38. The Appellant humbly submits that this appeal should be allowed for the following among other

REASONS

(a) BECAUSE the Supreme Court erred in finding that the fire was caused by the Henley II fuse box.

(b) BECAUSE the Plaintiffs failed to prove that there had been overloading or overheating of Henley II.

(c) BECAUSE the Supreme Court erred more particularly in accepting the theory propounded by Davidson and Maisley, and in failing to accept the opinions expressed by Sharples and Woodcock.

(d) BECAUSE the Supreme Court erred in rejecting the evidence of Mosaheb and Chung Choi.

10 (e) BECAUSE there was no good ground for finding that the Appellant or its employee were guilty of any "faute", or alternatively that any "faute" on their part caused the fire.

(f) BECAUSE Article 1384(1) of the Mauritius Civil Code does not impose strict liability on the custodian of things causing damage.

(g) BECAUSE the judgment of the Supreme Court was wrong and should be reversed.

S. KENTRIDGE

20 J. RAYMOND HEIN

No. 36 of 1979

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF MAURITIUS

B E T W E E N:

THE CENTRAL ELECTRICITY BOARD OF MAURITIUS — Appellants (Defendants)

- and -

BATA SHOE COMPANY (MAURITIUS) LIMITED — 1st Respondents (1st Plaintiffs)

- and -

EAST AFRICA BATA SHOE COMPANY LIMITED (MAURITIUS DEPARTMENT) — 2nd Respondents (2nd Plaintiffs)

C A S E FOR THE APPELLANTS

BERNARD SHERIDAN & CO.,
14 Red Lion Square,
London WC1R 4QL

Solicitors for the Appellants