Privy Council Appeal No. 36 of 1979

The Central Electricity Board of Mauritius – – – *Appellant*

v.

Bata Shoe Company (Mauritius) Limited and Another – *Respondents*

FROM:

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH MAY 1982

Present at the Hearing:

LORD KEITH OF KINKEL

LORD ROSKILL

LORD BRANDON OF OAKBROOK

[*Delivered by* LORD BRANDON OF OAKBROOK]

The appellant in this case is the Central Electricity Board of Mauritius, hereinafter called " the C.E.B.". The two respondents are Bata Shoe Company (Mauritius) Limited and East Africa Bata Shoe Company Limited (Mauritius Department), hereinafter referred to jointly as " Bata ".

On 6th July 1972 a fire occurred in a warehouse, hereinafter called " the warehouse ", situated at Plaine Lauzun in the industrial zone of Port Louis in Mauritius. The warehouse was occupied by Bata as lessees and used by them for the storage of their goods.

On 7th June 1974 Bata brought an action against the C.E.B. in the Supreme Court of Mauritius. In that action they claimed damages for the loss suffered by them in consequence of the fire, on the ground that it had been caused by the negligence of the C.E.B., its servants or agents. The case was governed by Articles 1382, 1383 and 1384 of the Code Civile, which make a person responsible for damage caused to another by the negligence or lack of care of that person or of those for whose acts he must answer. Such liability can be regarded, for the purposes of this case at any rate, as being substantially the same as the liability of a person for the negligence of himself, his servants or agents under English law. In this connection it is right to record that counsel for Bata expressly disclaimed any reliance on the last six words of Article 1384, so that their Lordships are not concerned with the possible application, if any, of those words to the facts of the present case.

The trial of the action took place before the Supreme Court, consisting of Rault C.J. and de Ravel J., over some seventeen days in February and March 1978. Eleven witnesses of fact and four expert witnesses were called for Bata, and eleven witnesses of fact and two expert witnesses for the C.E.B., making twenty-eight witnesses in all. There was in addition a substantial quantity of written evidence, including reports by the experts called, a number of photographs, and a number of exhibits connected with the fire or the debris created by it.

On 12th June 1978 the Supreme Court, in a reserved judgment, upheld Bata's claim and ordered the C.E.B. to pay Bata damages totalling 1,895,000 Rupees, the sterling equivalent of which at that time was about £200,000.

The C.E.B. now appeals to this Board against the judgment of the Supreme Court. Its appeal is limited to the issue of liability, the amount of the damages having been agreed in the court below without prejudice to that issue. A further question has been raised by Bata in the appeal. That is whether, if the appeal fails, so that Bata retain their earlier judgment for 1,895,000 Rupees, this Board should make or direct an award of interest on that sum from the date of such judgment.

Before considering the merits of the appeal, it is right to observe that it possesses certain unusual features. First, it is a direct appeal from the trial court, there having been no intermediate appeal to an appellate court in Mauritius. Secondly, the only issue raised by the appeal is an issue of fact, namely, whether the fire was caused by defects in a system for the supply of electricity installed, operated and maintained by the C.E.B., it being admitted on behalf of the C.E.B. that, if the fire was so caused, the C.E.B. was, by itself, its servants or agents, negligent in respect of such defects.

From these two unusual features of the appeal certain consequences follow. The first consequence is that this Board does not have the very valuable assistance, which it generally has in other appeals, of the judgments of an appellate court in the country from which the appeal has come. The second consequence is that it cannot be said against the C.E.B., as it might otherwise have been said, that they are faced with what is often the insuperable obstacle of having concurrent findings of fact against them by two courts below. In so far, however, as the appeal is on fact alone, the C.E.B. remains faced with what must, in most such cases, at least, still be a difficult task. That task is to persuade this Board to reverse a decision of fact arrived at by a court which possessed the incalculable advantage of seeing and hearing the numerous witnesses who were called before it, and so forming a clear opinion with regard to their credibility and reliability, an advantage which this Board, having before it only a transcript of the oral evidence, necessarily cannot possess. This advantage is all the greater in the present case, because much of the factual evidence was given in two languages other than English, French and Creole, and has only been translated into English for the purpose of providing an agreed transcript for use on the appeal.

The background of the case is as follows. The C.E.B. is, under an Ordinance of 1963, the sole distributor of electricity in Mauritius. Bata are manufacturers of footwear of various kinds and occupied the warehouse for the purposes of their business. The warehouse was divided, by a wooden partition running along its whole length, into two separate units, one of which was used for the storage of raw materials and the other for the storage of finished products. It will be convenient in what follows to describe the two separate units in the same way as they were described in the judgment of the Supreme Court, that is to say

to describe the first unit as " the Store " and the second unit as " the Department ". Each of these two units, the Store and the Department, were sub-divided by further transverse wooden partitions into a number of separate rooms.

The C.E.B. had for a considerable time been providing the warehouse with a three-phase 400-volt electricity supply. This supply came from a main cable connected to an outdoor transformer mounted on a framework between poles. This main cable was laid for the greater part of its length in a concrete duct under the ground. It had four branches coming from it and leading in succession into the three business premises situated between the transformer and the warehouse, and then into the warehouse itself. The branch cable supplying the warehouse came up through the concrete floor of what was known as Room 2 in the Department, and ran up a wall of that room to the lower or input end of a fuse box secured to such wall. That fuse box, which contained three fuses fitted to three removable fuse carriers, one for each phase of the electricity supply, was of a frequently used type known as a " Henley box ". From the upper or output end of that fuse box, referred to in the judgment of the Supreme Court as " Henley I ", there ran further cables which provided electricity for lighting, and possibly also for the operation of one or more fans, in various parts of the Department.

The C.E.B. had also at some time fixed a second Henley fuse box, hereinafter referred to as " Henley II ", on one of the walls of what was known as Room 4 in the Store. A cable coming from the same main as mentioned earlier led upwards through the concrete floor of Room 4 and, after running up the wall about four feet, entered the lower or input end of Henley II. This cable constituted the fifth and last branch from the main cable coming from the transformer referred to earlier, and accordingly the branch furthest downstream from it. Although Henley II had been fixed and a branch main supply connected to it in this way, it had remained unused, with no further cables running from its upper or output end, until certain events which will be described shortly.

Room 4 in the Store was a store-room in which a variety of materials were kept, some of which were contained in cardboard boxes. Among those materials was a considerable quantity of rubber soles. Room 4 was normally kept locked, with its keys in the possession and control of a storekeeper employed by Bata.

The two Henley fuse boxes referred to above had been manufactured in England by G.E.C. and were in new condition when installed. According to the manufacturers, the current rating of such boxes was 60 amps. per phase, and the recommended fuse wire to be fitted when the box was used for passing currents of that amount was fuse wire of No. 17 gauge.

That being the background of the case, it is now necessary to set out the facts more immediately material to the appeal, as they appear from so much of the oral and written evidence as was expressly or impliedly accepted by the Supreme Court.

On 16th March 1972 the C.E.B. received a written application on a prescribed form for the provision of a three-phase 400-volt electricity supply to the premises of a new business consumer, Southern Cross Company Limited, hereinafter called " Southern Cross ", which were situated only a short distance from the warehouse. The total load specified in the form of application was 16·5 kilowatts.

At the time of this application the C.E.B. did not have available any transformer from which the supply applied for could be provided other than the transformer referred to earlier, which already provided supplies for the warehouse and the three other business premises on the way to it. It was, however, the intention of the C.E.B. to instal another transformer, for that and other purposes, in the near future.

In these circumstances the C.E.B. decided to instal a temporary supply to the premises of Southern Cross from the fuse box Henley II in the Store which had until that time remained unused as before. For this purpose, the C.E.B. ran overhead cables supported on poles from a meter in the premises of Southern Cross, across an intervening courtyard, to the nearest convenient point on the Store. Those cables were taken through Room 3 and the adjoining Room 4 at ceiling level, and then brought down the wall of Room 4 on which Henley II was fixed, through a set of bi-metallic connectors, into the upper or output end of that fuse-box. The cables were secured at intervals to the ceilings of Rooms 3 and 4, but hung loosely from the ceiling of Room 4 where they descended, via the bi-metallic connectors, to Henley II. After the necessary connections to the output terminals of Henley II had been made, the three fuse carriers in that box were fitted with single strands of fuse wire of No. 18 gauge. That fuse wire was of a slightly smaller diameter than the fuse wire of No. 17 gauge recommended by the manufacturers for use in the box when carrying its rated current of 60 amps. per phase.

On 13th April 1972 the C.E.B. received a further application from a firm, Imprimerie Ideale, hereinafter called "Imprimerie", for the provision of a similar supply of electricity to new premises, to which Imprimerie were in the course of moving and which were also only a short distance from the warehouse. The total load specified in the form of application was 28·3 kilowatts. The C.E.B. decided to deal with that application in the same way as they had dealt with that of Southern Cross, that is to say, by erecting a temporary installation with cables running overhead on poles from a meter in the premises of Imprimerie to the Store, across the ceilings of Rooms 3 and 4 of the Store, and then down to the set of bi-metallic conductors previously provided for the supply to Southern Cross.

Each of these two temporary installations, the first for Southern Cross and the second for Imprimerie, were completed within a few days of the respective applications being made, and operated without trouble until 25th May 1972. On that day the C.E.B. received yet a further application from a company, Textile Industries Limited, hereinafter called "Textiles", for the provision of a supply of electricity of the same kind as had previously been asked for by Southern Cross and Imprimerie. The total load specified in the form of application was 20 kilowatts, but oral assurances were given to the C.E.B. by Textiles that the load actually imposed would, for the time being at any rate, be only about 10 kilowatts. On the same day a fault occurred in the installations supplying Southern Cross and Imprimerie, as a result of which the supply of electricity to those two consumers was cut off.

The fault concerned was investigated by employees of the C.E.B. on the next day, 26th May 1972, and was found to have been caused by a short circuit at the premises of Southern Cross, which had resulted in the blowing of the fuses in two of the three phases in Henley II. The cause of the short circuit at the premises of Southern Cross was later identified and repairs done to eliminate it, after which the blown fuses in Henley II were replaced with the same size of fuse wire as that which had been used before, and the supply of electricity to both Southern Cross and Imprimerie was restored.

Following the occurrence of this fault on 25th May 1972, it was decided by the C.E.B. to fit individual fuses to the separate cables supplying Southern Cross and Imprimerie, in order to prevent a fault on one of the two circuits cutting off the supply to the other circuit as well. The fuses employed for this purpose were brown porcelain fuses for outdoor use known as " Yorkshire fuses ", and each of them was fitted with a single strand of No. 18 gauge fuse wire, similar to that used in Henley II. Three fuses were fitted in each of the two sets of cables leading to the premises of Southern Cross and Imprimerie, one fuse for each phase of the electricity supply.

It was further decided by the C.E.B., in relation to the application by Textiles, to instal a temporary installation for them by taking branch cables from the cables already supplying Imprimerie, and running such branch cables to Textiles' premises. It was also decided to fit in those branch cables going to Textiles three Yorkshire fuses, one for each phase, as had previously been done in the case of the supplies to Southern Cross and Imprimerie. This third temporary installation was completed and brought into operation on 1st June 1972.

Between 29th May 1972 and the morning of 6th July 1972 a succession of interruptions occurred from time to time in the supplies of electricity to Southern Cross, Imprimerie and Textiles. Some of these interruptions were found to have been caused by the blowing of one of the Yorkshire fuses in one of the cables supplying one or other of these three separate consumers. In those cases employees of the C.E.B., having found that a Yorkshire fuse had blown, replaced the fuse and the supply was then restored. On three other occasions interruptions occurred which resulted in the cutting off of the electricity supplies of all three of the consumers mentioned above, and were found to have been caused by the blowing of one or other of the three fuses in Henley II. In those cases employees of the C.E.B., acting on the first occasion on the initiative of the employee concerned, his action being later approved by his superior, and on the second and third occasions on the express instructions of that superior, replaced the single strand of No. 18 gauge fuse wire which had blown with two strands of the same fuse wire twisted together. One fuse was replaced in this way on 28th June 1972, the second on 5th July 1972, and the third and last on the morning of 6th July 1972.

The situation, therefore, at noon on 6th July, the day of the fire, was this. First, the individual supplies of electricity to Southern Cross, Imprimerie and Textiles, all coming from Henley II, were protected separately by Yorkshire fuses in each phase fitted with a single strand of No. 18 gauge fuse wire. Secondly, the combined supply of electricity to all three of those consumers was for the first time protected, and protected only, in each of its three phases by fuses consisting of two strands of No. 18 gauge fuse wire twisted together and fitted to each of the three fuse carriers in Henley II. Finally, it is right to mention that the transformer itself was protected by three 150-amp H.R.C. (high rupturing capacity) fuses.

In this situation, shortly before 13.20 on the same day, 6th July 1972, an employee of Bata, Mr. Rajen Dorsamy Lowtun, who was working in a part of the Department more or less opposite Rooms 3 and 4 of the Store, had his attention attracted by a sound, which he afterwards described as a " boom", coming from that part of the Store opposite to his place of work. He then saw smoke coming through the interstices in the longitudinal wooden partition which separated the Store from the Department. He went at once and reported the presence of the smoke to the warehouse supervisor, who was in another part of the Department. The supervisor went to the place where the employee had been working

and observed himself the smoke coming through the partition. The telephone was then used to summon the Fire Brigade and to inform the manager of the Bata factory, which was situated about a mile away, of the situation.

The factory manager arrived before the Fire Brigade, having collected the keys of Room 4 of the Store from the storekeeper in whose keeping they were. He then climbed on to the roof of the warehouse, and, after breaking certain glass panes with the object of using a fire extinguisher, was able to see what he described as a "glare" in Room 4 of the Store. He then tried with others to enter Room 4 in order to fight the fire, but found it impossible to do so. The Fire Brigade arrived about 20 minutes after they had been summoned and begun fighting the fire with water hoses. It took them a considerable time to bring the fire under control and, before they could do so, extensive damage was done to the warehouse and its contents. At about 16.30 they finally succeeded in extinguishing the fire.

On the morning of the following day the factory manager and an inspector of police went together to examine the scene of the fire. They found that the greatest damage had been done in Room 4 of the Store. Henley II was no longer on the wall where it had been before, but the lugs by which it had originally been fixed to the wall were still in place. There was a large quantity of burnt debris on the floor and this was searched. About 2 feet below the surface of the debris there was found the box part of Henley II without its lid. It had sustained extensive damage and distortion by heat. Lower down, on the concrete floor about 1½ feet further away from the wall than the box, there was found the lid of Henley II. This too had sustained extensive damage from heat, and a considerable part of its top right hand corner had become detached and could not be found anywhere in the debris. Where it had been detached there had been left an irregular serrated edge considerably thinned in places. The greater part of the cables leading up from the concrete floor of Room 4 to the lower or input end of Henley II had been destroyed by heat.

It was pleaded in paragraph 7 of Bata's statement of claim in the action that the fire had been caused by the negligence of the C.E.B., its servants or agents in that they:

(1) Allowed loads to be imposed in excess of the design capacity of Henley II and/or failed to ensure that the equipment was of adequate capacity for its intended purpose.

(2) Made temporary connections to Henley II omitting to instal and protect them in the proper fashion, including failing to provide bushes at the outlet from Henley II.

(3) Employed fuse wire in excess of the design capacity of Henley II.

(4) Failed to investigate the causes of and remedy all or any such defects despite repeated evidence, through faulting and overheating, of such defects.

The C.E.B. in its defence denied both that there had been any negligence of itself, its servants or agents, and that the fire had been caused by any such negligence. They did not plead any affirmative case that the fire had been caused in some other way.

Although the C.E.B. had not pleaded any affirmative case that the fire had been caused otherwise than as alleged by Bata, it appears that they attempted to make a case at the trial that the fire might well have been caused either (a) by the negligence of one or more of Bata's

employees in smoking in the Store, or (b) by arson committed by Bata's storekeeper, Mr. Ahmed Dauharry, hereinafter called " Dauharry ", who was one of the witnesses called by Bata to support their case.

With regard to (a) the Supreme Court found that there was a " no smoking " rule in the Store, and that it was stringently enforced and applied. With regard to (b) the suggestion was that Dauharry had for some time been embezzling his employers' goods, and that he had deliberately started the fire in order to destroy all evidence of what he had been doing.

It would, in their Lordships' view, have been sufficient ground for rejecting this last suggestion that, when Dauharry was called, it was never put to him in cross-examination, as it should have been if it was intended to rely on the matter, that he had himself deliberately set fire to the Store for the suggested or any other reason. It appears, however, that this point was not taken by counsel for Bata and the Supreme Court accordingly dealt with the suggestion on its merits. The Court were prepared to accept that Dauharry was an unsatisfactory storekeeper and that there were suspicious entries in his books which did not permit the Court to exclude the possibility that he might have been a petty embezzler on a small scale. It concluded, however, on the whole of the evidence, and for reasons which it set out at some length, that he had not been guilty of arson.

Having rejected those two suggestions with regard to the cause of the fire, the Supreme Court went on to make a careful examination of the relevant factual evidence and of the opinions expressed by the experts on either side on the basis of it. Having done this the Court said that it considered that the only explanation which took all the proved facts into account was 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 ionised gases and high temperatures inside the box would bring about a runaway condition.
>
> (5) One result 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 ionised 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 was probable, although not certain, that the bang heard by Lowtun 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."

Some further explanation is required in relation to paragraphs (4), (5), (6) and (10) above. The expression " runaway condition " used in paragraph (4) has been taken from the evidence of Mr. Turner, an electrical engineer called as an expert witness by Bata. Asked what he meant by the expression he said:—

> " In this case the heating by the arcing produces more ionised gas which causes restriking, which causes more ionised gas which causes to restrike once more."

The reference in paragraph (5) to " sustained arcing within the box " must, it seems, refer to arcing between one of the three phases and earth as constituted by the box itself, including the lid.

The reference in paragraph (6) to " the reprehensible way in which the fuse box was earthed " is a reference to evidence given by one of the expert witnesses called for the C.E.B. that the lead sheath and armour of the main cable were not bonded to neutral earth at the substation where the transformer was, as they ought, in accordance with proper practice, to have been.

The reference in paragraph (10) to " the broken pin " is a reference to one of the pins holding together the hinges of the lid of Henley II. While the pin securing one of the two hinges had disappeared, presumably because it had been melted by heat, part of the pin securing the other hinge was still in place and appeared to have been snapped by the application of a powerful force to it.

Counsel for the C.E.B. relied on two main grounds and one subsidiary ground of appeal against the judgment of the Supreme Court. The first main ground was that the Supreme Court had categorised as liars two independent witnesses of fact called for the C.E.B., who gave evidence, not challenged in any way in cross-examination, which, if accepted, was so inconsistent with the explanation of the cause of the fire arrived at by the Supreme Court as to render that explanation untenable. The second main ground was that the Supreme Court, faced with a conflict of evidence between the expert witnesses called on either side with regard to the cause of the fire, erred in preferring the evidence of the experts called for Bata to that of the experts called for the C.E.B. The subsidiary ground was that the Supreme Court had misdirected itself with regard to the evidence about smoking by employees of Bata, and, because of that, had ruled out too readily the possibility that the fire had been caused by a lighted cigarette end being negligently dropped or left in the room of the Store in which the fire began.

It will be convenient to examine the subsidiary ground of appeal first. Three witnesses called for Bata gave evidence on the subject of smoking. The first witness was Mr. Benjamin Goder, the warehouse supervisor. He was asked in cross-examination whether the men ever smoked. He answered that he had never caught anyone in the act of smoking. The second witness was Mr. Roger Bigaignon, the factory manager. He was asked in examination-in-chief whether smoking was allowed in the Store. He said that it was not. The third witness was Dauharry, the storekeeper mentioned earlier, who was asked in examination-in-chief whether smoking was allowed in the Store. He answered that it was not, and that he did not smoke himself. He was asked further

questions on the subject of smoking in cross-examination. He said that men did smoke. One of them who worked under him smoked, although he had no right to do so. There were perhaps two or three men who smoked. The rule, however, was that there was to be no smoking.

As was indicated earlier, the Supreme Court found that there was a " no smoking " rule in the Store and that it was strictly enforced and applied. It had earlier described Mr. Goder and Mr. Bigaignon as witnesses whose evidence was both honest and accurate, and Dauharry as an unreliable witness, whose evidence could not be accepted without corroboration. On that assessment of the credibility of the three witnesses concerned, the Supreme Court was clearly entitled to make the finding of fact in relation to smoking which it did make. For these reasons their Lordships are of the opinion that there is no substance in this subsidiary ground of appeal.

The first main ground of appeal arises in this way. One of the witnesses of fact, called for the C.E.B., was Mr. Ahmed Mosaheb, hereinafter called " Mosaheb ". He stated in examination-in-chief that, on the day of the fire, he was working for Imprimerie, by whom he was employed, at their premises at Plaine Lauzun. His work involved him in using a printing press, the motor of which was driven by the temporary three-phase 400-volt electricity supply coming from Henley II. He first became aware of the fire when, in the course of his work, he heard people outside shouting " Fire ". He remained at his work, and the electric motor operating his press, which had been working normally before the shouts of " Fire ", continued to do so afterwards. About 4 or 5 minutes later smoke began to come into the place where he was working through an open window. At that time the electric motor was still working. Later the electricity supply was cut off and the motor ceased working.

Mosaheb was asked a considerable number of questions by counsel for Bata in cross-examination. It was, however, never put to him at any stage that the evidence which he had given about the motor which operated his press continuing to work normally for an appreciable time after the outbreak of the fire was either mistaken or deliberately untrue. Indeed, the form of the last three questions which counsel for Bata put to the witness in cross-examination gives the impression that he was impliedly accepting that evidence.

Later, a further witness, Mr. Roger Cheung Choi, hereinafter referred to as " Choi ", was called for the C.E.B. He said in examination-in-chief that, on the afternoon of the day of the fire, he was working in an office on the ground floor of the premises of Textiles at Plaine Lauzun. The electric lights in his office were on and he could hear the considerable noise being made by the cutting machines on the ground floor and the sewing machines upstairs, both of which were electrically operated. In this situation he heard shouts of " Fire " from people outside. On hearing those shouts he went outside himself and saw that smoke was coming from the warehouse. He had a quick look and then returned to his office and resumed his work. The electric lights in the office, which had been on before he went outside, were still on. He could not remember whether the cutting and sewing machines were still working or not. Later the lights in his office went out.

This witness also was asked a number of questions by counsel for Bata in cross-examination. As in the case of Mosaheb, however, it was never put to him that his evidence that the lights in his office remained on for an appreciable time after the outbreak of the fire was either

mistaken or deliberately untrue. The most pertinent question put to Choi was one put by the Court, which elicited the information that the first time when he had been asked to give a statement about these matters was in December 1977, some 5½ years after the event.

The evidence of Mosaheb and Choi set out above was clearly of potentially crucial importance, for it showed, if it was accepted, that both Imprimerie and Textiles were still receiving their normal supplies of electricity from Henley II well after the fire had broken out. This would not have been possible if the fire had been caused in the manner arrived at by the Supreme Court.

The potentially crucial importance of the evidence concerned must have been apparent to all by the time that the expert witnesses called for the C.E.B. had given their evidence, and it is to be inferred that counsel for both sides directed their attention to it in their speeches to the Court after the conclusion of the evidence.

The Supreme Court, when it gave judgment, referred directly to the evidence concerned and, having done so, dealt with it with robustness, indeed with gusto. It said:—

> " On the other hand, if the facts recited in (b) and (c) were proved, we should have felt bound to look for some other explanation. In our opinion the fault in the box was bound to prevent the three-phase motor in Imprimerie Ideale from working in the way claimed, and in spite of Mr. Turner's ingenious explanation, it is probable that the lights as well would have gone out. But we need not pursue the matter further, for we have no hesitation in rejecting the evidence of Witness Mosaheb. Early in his cross-examination he deliberately tried to deceive the Court by asserting that there never was an electric welder at Imprimerie Ideale. But what showed him as a clumsy liar is his claim that after people were shouting ' Fire ' at a distance of less than 20 yards from his workshop, and smoke was already coming in, he went on working with complete unconcern. Now cries of ' Fire ' raise a primaeval fear and curiosity in almost all human beings, and in Mauritius in particular. We have seen and heard Mosaheb, and are completely unable to visualise him in the stance of the boy on the burning deck—although in his case his splendid isolation would have been slightly marred by the fact that he was surrounded by a bevy of workers as intrepid, and incurious, as himself.
>
> " Witness Ah Cheung Choi was a rather more cautious liar, but after closely watching his demeanour in the box we have come to the conclusion that his evidence is equally unacceptable. He had been employed at Textile Industries since 21st June, and he claims that up to the date of the fire there was no outside electrical fault requiring them to call in the C.E.B. Yet we know that in fact they were called at least on 27th and 28th June, as well as on 1st and 5th July, and on the morning of the fire. He also makes a claim to the same iron nerves as Mosaheb; when he heard people call ' Fire ', he went out, saw the fire, glanced at it, and returned to his office where he (very conveniently) observed that the lights went on burning. We may also note that he apparently never gave a statement concerning that important bit of evidence prior to December 1977."

Counsel for the C.E.B. submitted that, since it had never been put to Mosaheb and Choi in cross-examination that the potentially crucial parts of their evidence referred to above were either mistaken or deliberately untrue, it was not proper for the Supreme Court to reject their evidence.

In support of this submission he relied on two passages in the speeches of Lord Herschell and Lord Halsbury in *Browne* v. *Dunn* (1893) 6 The Reports (H.L.) 67.

It is not necessary, in their Lordships' view, that these passages should be set out in full. Their effect can be summarised in this way: where it is intended by counsel for one party to proceedings to contend later that the evidence of a witness called for the other party was either inaccurate or deliberately untrue, justice requires that questions should be put to that witness in cross-examination, indicating that it is intended so to contend, and giving him an adequate opportunity to deal with the suggestion by explanations or otherwise.

Their Lordships would not wish to disagree in any way with the principles stated by Lord Herschell and Lord Halsbury in the passages from their speeches relied on by counsel for the C.E.B. There can be no doubt that, if counsel for Bata wished to suggest later that the potentially crucial evidence given by Mosaheb and Choi was either inaccurate or deliberately untrue, it was his duty to put questions to them in cross-examination which indicated that that was his intention, and give them a proper opportunity to deal with that suggestion.

This failure on the part of counsel for Bata, however, does not stand alone. It was paralleled by, and most probably contributed to, by the failure of counsel for the C.E.B., when the electrical experts called by Bata were giving evidence, to lay a proper foundation for the case which he was intending to make by asking at least one of them to assume that evidence on the lines of that of Mosaheb and Choi would later be given, and asking them whether, if such evidence was true and accurate, his theory about the cause of the fire could still be sustained. In fact no question of that kind was put to either of the electrical experts called for Bata when they originally gave evidence, although it was put subsequently to one of them, Mr. Turner, when he was recalled at a much later stage of the trial, well after Mosaheb and Choi had given their evidence.

It may well be that, in theory at least, a problem of this kind, arising from failures of counsel on both sides to conduct their cases, in relation to the potentially crucial evidence of Mosaheb and Choi, in the manner in which they should have been conducted, could best be resolved by ordering a new trial before a differently constituted court. Neither party, however, invited the Board to follow that course, and, after the lapse of four more years since the original trial, it is difficult to believe that a new trial could possibly serve the cause of justice. Some other solution to the problem must therefore be found.

Having regard to the facts, first, that the potentially crucial parts of the evidence of Mosaheb and Choi were not challenged in cross-examination, and, secondly, that no factual evidence to contradict what they had said was called, their Lordships are of the opinion that the Supreme Court went further than it was legitimate for it to do in categorising these two witnesses as liars. On the other hand no tribunal of fact, whether it be a court consisting of one or more judges, or a jury, is ever obliged, as a matter of law, to accept and act on the evidence of any witness, even though such evidence has not, for whatever reason, been challenged in cross-examination or contradicted by other evidence inconsistent with it. If a tribunal of fact, after seeing and hearing a witness in the witness-box, forms of its own motion a clear view that it cannot safely rely on his evidence, even in respect of matters to which no cross-examination has been directed, and with regard to which no contradictory evidence has been called, that tribunal cannot, in their Lordships' view, be held to be committing an error of law in giving effect to that view

In the present case their Lordships are, as indicated earlier, of the opinion that the Supreme Court went too far, in all the circumstances of the case, in categorising Mosaheb and Choi as liars. It would, however, have been open to the Supreme Court to say that, having regard to the length of time which had elapsed between the date of the fire and the date of the trial, and to the unsatisfactory way in which the two witnesses gave their evidence on other matters, it did not feel able to accept their recollection of the events concerned as accurate.

It is one thing for their Lordships to express the view, as they have done, that the Supreme Court ought not, in the circumstances, to have treated the evidence of Mosaheb and Choi as perjured. It is quite another thing, for the reasons already given, to say that the Supreme Court was obliged, as a matter of law, to accept that evidence as accurate, despite the highly adverse impression which the Court gained with regard to it.

In what must be regarded as the very special circumstances of this case, their Lordships are of opinion that the right way to resolve the problem is to uphold the Supreme Court's rejection of the potentially crucial evidence of the two witnesses concerned, but to found such rejection, not on their having deliberately given evidence which they knew to be untrue, but rather on their recollection more than 5½ years after the event not having been accurate.

The result of that opinion is that the first main ground of appeal put forward for the C.E.B. cannot be sustained.

It is necessary now to turn to the second main ground of appeal put forward for the C.E.B., that the Supreme Court, faced with a conflict of evidence between the experts called on either side as to the cause of the fire, erred in preferring the evidence of the experts called for Bata to that of the experts called for the C.E.B.

As indicated earlier, four expert witnesses were called for Bata. The first expert was Mr. Cole, an experienced fire loss adjuster. The second expert was Mr. Turner, a physicist and chemist with special experience in relation to electric fuses, switches and control gear, and in research work into fires created by electrical failures. The third expert was Mr. Davidson, a highly experienced electrical engineer. The fourth expert was Mr. Maisey, an electrical engineer with 20 years' experience of research into the causes of fires and explosions.

As also indicated earlier, two expert witnesses were called for the C.E.B. The first expert was Mr. Woodcock, an electrical engineer with long experience of all forms of electricity supply and servicing. The second expert was Mr. Sharples, an electrical engineer with extensive experience of the electricity supply industry, both in the United Kingdom and in Malaya.

The oral evidence given by the six expert witnesses referred to above occupies about 360 pages of the record. Their written evidence, consisting of reports, records of tests commissioned by them, photographs and diagrams of various kinds, occupies a further 120 pages or so. A detailed examination and analysis of this mass of evidence would not be helpful for two reasons. First, a good deal of the evidence was based on assumptions about the facts which were not, for one reason or another, established at the trial. Secondly, an even larger portion of the evidence, although quite properly adduced at the trial, is no longer relevant because it is not related in any way to the theory with regard to the cause of the fire accepted by the Supreme Court.

In these circumstances it seems that the most helpful course to follow is to set out, first, the matters on which there was substantial agreement between the expert witnesses on either side, and, secondly the questions on which there was a clear conflict between them.

The relevant matters about which there was substantial agreement between the expert witnesses on either side were these. (1) That the fire began in Room 4 of the Store, in which Henley II was situated. (2) That the normal rating of a Henley fuse box, as prescribed by its manufacturers, was 60 amps. per phase. (3) That the kind of fuse wire prescribed by the manufacturers as suitable for use in a box operated at that normal rating of 60 amps. per phase was a single strand of No. 17 gauge fuse wire. (4) That a fuse consisting of a single strand of No. 18 gauge fuse wire, as used by the C.E.B. originally in Henley II, was suitable only for a Henley box operated at below its normal rated capacity, namely, at 45–50 amps. per phase. (5) That the current necessary to blow such a fuse quickly was 80–100 amps. (6) That the effect of using in a Henley fuse box fuses consisting of two strands of No. 18 gauge fuse wire twisted together was to treat the box as if its normal rated capacity was not 60 amps. but 100 amps. (7) That such doubled fuses would not blow quickly until the current passing through them reached 160–170 amps. (8) That a Henley fuse box, fitted with such doubled fuses, would be able to carry a load of 120–140 amps for a substantial length of time without the fuses blowing. (9) That, if such a box was made to carry such a current for a substantial length of time, it would become dangerously overheated, with risk of fire being caused in one way or another. (10) That, when estimating the amount of current used by a consumer, it was necessary to apply a power factor in order to convert kilowatts to kva, and a diversity factor in order to take account of the fact that not all the electrical appliances at the consumers' premises would be in use at the same time. (11) That the current caused to flow by a short circuit, including arcing, between two phases inside a Henley box would be of the order of more than 2,000 amps., so that such a short circuit would immediately blow the 150-amp. H.R.C. fuses at the transformer. (12) That due in part to the high earth resistance existing generally in Mauritius, but mainly to the failure of the C.E.B. to bond properly to neutral earth at the transformer the armour and sheath of the main cable from which Henley II drew its current, the resistance to earth of the box and lid of Henley II was about 61 ohms. (13) That by reason of this inappropriately high resistance between Henley II and earth, the current flowing in any arc from one phase to earth inside the box would not exceed 4 amps.

There was a clear conflict of evidence between the experts on either side with regard to four crucial questions. (1) What was the maximum total current per phase which the three consumers concerned might reasonably be expected together to have drawn from Henley II for a substantial length of time? (2) Why were the box and lid of Henley II found in different positions and at different levels after the fire was extinguished? (3) Why had a considerable part of the top right hand corner of the lid of Henley II apparently disappeared altogether? (4) Why was the edge of the lid, where the top right-hand corner of it was missing, in a thinned and unevenly serrated condition?

Question (1) presents considerable difficulties. No measurements of the peak or average amounts of current used either separately or together by the three consumers concerned were ever taken by the C.E.B. The experts on either side, Mr. Davidson for Bata and Mr. Sharples for the C.E.B., made theoretical calculations about these amounts. Such calculations, however, had to be made on the basis of assumptions, in

some cases no more than informed guesses, about a number of different matters. The first matter was the number and nature of all the electrical appliances installed at the premises of each of the three consumers concerned. The second matter was the efficiency of those appliances in their use of electricity (the power factor). The third matter was the proportion of those appliances which it was likely would be in use at the same time (the diversity factor). Making calculations on the basis of their differing assumptions with regard to these three matters, Mr. Davidson, giving evidence for Bata, concluded that a demand for combined currents of 125 amps. per phase might well have been imposed on Henley II, while Mr. Sharples put the figure at less than 50 amps. per phase.

The Supreme Court, rightly in their Lordships' view, approached this question by concentrating, not on the obviously fallible theoretical calculations of Mr. Davidson and Mr. Sharples, but on the proved history of the fuses which blew and had to be replaced, in one way or another, during the period of just over a month before the fire. The fault book kept by the C.E.B., together with the oral evidence given by its employees, established that history as being as follows—

June 5	One Yorkshire fuse blown at Imprimerie. Replaced with similar No. 18 gauge fuse wire.
June 16	One Yorkshire fuse blown at Textiles. Replaced with similar No. 18 gauge fuse wire.
June 27	One Yorkshire fuse blown at Textiles. Replaced with similar No. 18 gauge fuse wire.
June 28	One single strand fuse blown in one phase in Henley II. Replaced with two strands of similar No. 18 gauge wire twisted together.
July 1	One Yorkshire fuse blown at Textiles. Replaced with similar No. 18 gauge fuse wire.
July 5	One Yorkshire fuse blown at Textiles. Replaced with similar No. 18 gauge fuse wire.
July 5	One single strand fuse wire blown in another phase in Henley II. Replaced with two strands of similar No. 18 gauge fuse wire twisted together.
July 6 (morning)	Last remaining single strand fuse blown in Henley II. Replaced with two strands of similar No. 18 gauge fuse wire twisted together.

Summarising these faults, there were four occasions at Textiles, one occasion at Imprimerie and three occasions at Henley II, when a single strand of No. 18 gauge fuse wire was found to have blown. There was no evidence, in any of these eight cases, which pointed to the blowing of the fuses having been caused by a short circuit anywhere. On the contrary, the evidence was all the other way, that the blowing was due to overload, in that, as soon as the fuse was replaced, at Textiles and Imprimerie by one strand of similar fuse wire, and at Henley II by two strands of similar wire twisted together, the supply which had been cut off was immediately restored.

The most reasonable inference from a Yorkshire fuse blowing once at Imprimerie and no fewer than four times at Textiles is that each of those two consumers was at times drawing currents of 80–100 amps. per phase, which alone, apart from a short circuit, could have produced that

result. Yet at the same time as Imprimerie or Textiles were drawing currents of that amount, the other two consumers were also drawing combined currents of perhaps 30–40 amps. per phase.

So long as the three fuses in Henley II consisted of a single strand of No. 18 gauge fuse wire similar to the Yorkshire fuses, it was to be expected that, when a combined overload of 80–100 amps. per phase occurred, one or other of those fuses would blow. But as these fuses were successively replaced, after blowing, by two strands of No. 18 gauge fuse wire twisted together, there was then nothing to stop combined overloads of at least 120 amps. per phase, and possibly more, being imposed on Henley II.

For the reasons given above their Lordships are of opinion that the finding of the Supreme Court that, during the period of a little over a month before the fire, Henley II was the victim of sustained and repeated overloading, was amply justified.

With regard to questions (2), (3) and (4), the Supreme Court listened to conflicting theories propounded by one or more of the experts on either side. Having done so, they concluded with regard to question (2) that the lid was blown off by an explosion while the box itself was still secured to the wall, and, with regard to questions (3) and (4), that the top right hand corner of the box had been cut away in an irregular fashion by a low current arc from one phase to earth which had continued undetected for a long time.

These conclusions of the Supreme Court were founded on an acceptance of the theory as to the cause of the fire put forward by Bata's electrical experts, Mr. Turner and Mr. Davidson, that it resulted from overloading of Henley II, and a rejection of the evidence of the C.E.B.'s electrical experts, Mr. Woodcock and Mr. Sharples, that it could not possibly have been so caused. In preferring the evidence of Bata's electrical experts in this way, the Supreme Court was no doubt much influenced by two considerations. The first consideration was that the fire occurred within a few hours of the C.E.B. fitting doubled fuse wires to the last of the three phases in Henley II. The second consideration was that the C.E.B. was unable to call any expert witness who was able to put forward any different theory as to the cause of the fire which had any degree of plausibility about it.

Reference was made earlier to the advantages which a trial court has over an appellate court in assessing the reliability of witnesses. That advantage, while it is of most importance in relation to witnesses of fact, is of lesser but still significant importance in relation to expert witnesses. The Supreme Court was at pains in its judgment to say that it regarded the expert witnesses on either side as men of integrity and learning, whose competence in their respective fields could not be challenged. In the end, however, having seen and heard those witnesses in the witness-box over long periods, it found the electrical experts called for Bata more convincing with regard to the cause of the fire than those called for the C.E.B.

Their Lordships recognise that, if they had themselves been trying the case at first instance, they might well have reached the conclusion that, at the end of the day, the probable cause of the fire was still left in doubt, and that Bata's claim failed accordingly. Their Lordships, however, do not consider that it would be right for them, sitting as an appellate tribunal, with only a transcript of the evidence before them, to say that the Supreme Court's finding as to the cause of the fire was demonstrably wrong.

On the view taken by their Lordships, the second main ground of appeal put forward for the C.E.B., like the first main ground and the subsidiary ground dealt with earlier, fails and must be rejected. It follows that the appeal as a whole must be dismissed. It remains for their Lordships to consider the further question raised by Bata with regard to their right, consequent on the affirmation of the judgment of the Supreme Court, to be awarded interest on the damages awarded to them from the date of such judgment until payment.

It was common ground that there was no statute or ordinance in force in Mauritius having an effect comparable to that of the Judgments Act 1838 in England. It was contended, however, for Bata that this Board has now, and has always had, a common law jurisdiction to award interest, or to direct the award of interest, in any case where the doing of complete justice between the parties to an appeal so requires.

In support of that contention counsel for Bata relied mainly on two authorities of long standing. The first authority was *The Bank of Australasia v. Breillat* (1847) 6 Moo.P.C.C. 152, 206, an appeal from a colonial court in Hong Kong. The second authority was *Rodger v. The Comptoir D'Escompte de Paris* (1871) L.R. 3 P.C. 465, an application in an appeal from the Supreme Court of New South Wales.

In the first case it was held that where appellants, having failed in a monetary claim in the courts below, succeeded on appeal to this Board, the latter had a common law jurisdiction to award to the appellants interest on the amount of the moneys finally recovered from the date on which they should have obtained judgment for such amount in the first court below.

In the second case it was held that where appellants, who had satisfied a money judgment of the court below, subsequently succeeded, on an appeal to this Board, in having such judgment reversed, this Board had jurisdiction to order that the money paid by the appellants should be repaid to them by the respondents with interest from the date of the original payment.

The present case differs from both of the two cases referred to above in that Bata succeeded in the court below, and have succeeded again in this appeal. The C.E.B. did not obtain a stay of execution of the judgment of the Supreme Court pending their appeal to this Board. It appears, however, that there was an implied agreement or arrangement between the parties or their legal representatives that matters should proceed as if a stay of execution had been granted. The situation is, therefore, that the C.E.B. have had, for a period of nearly four years, the benefit of the use of moneys which should, according to the rights of the case, have been paid by them to Bata at the beginning of that period.

The principle on which the Board acted in the second case referred to above was explained at considerable length by Lord Cairns at pages 475–476 of the report. It can be summarised as being that, in order to do complete justice between the parties, money paid in satisfaction of a judgment subsequently reversed by this Board should be repaid with interest from the date on which the money concerned was paid.

In their Lordships' view, although the situation in the present case differs, in the respects stated, from the situation in each of the two cases referred to above, the same general principle, founded on the need to do, so far as possible, complete justice between the parties, can and should be applied, by analogy, in the present appeal.

Their Lordships are, therefore, of the opinion that they have jurisdiction, which has in one case at least been described, whether rightly or wrongly, as a common law jurisdiction, to order the C.E.B., as one of the consequences of the dismissal of the appeal, to pay to Bata interest on the total amount of the damages awarded to them by the Supreme Court from 12th June 1978, the date of the judgment of that Court, until payment. Their Lordships are further of the opinion that, in the circumstances of this case, it would be just for them to exercise that jurisdiction.

Their Lordships, however, take the view that the Supreme Court, by reason of its knowledge of conditions in Mauritius during the period for which interest is to be awarded, is far better placed than they are to determine the appropriate rate or rates at which such interest should be paid, and that the determination of such rate or rates should accordingly be remitted to that Court for determination.

In the result, their Lordships will humbly advise Her Majesty that the appeal should be dismissed, and that the appellant should pay to the respondents interest on the total amount of the damages awarded from the date of the judgment of the Supreme Court appealed from until payment at such rate or rates as the Supreme Court shall hereafter determine. The appellant must pay the respondents' costs of the appeal.

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In the Privy Council

THE CENTRAL ELECTRICITY BOARD OF MAURITIUS

v.

BATA SHOE COMPANY (MAURITIUS) LIMITED AND ANOTHER

DELIVERED BY
LORD BRANDON OF OAKBROOK

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