LLOYD'S LIST
LAW REPORTS

Editor:
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CASES CITED.

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Apr. 29, 30, May 1, 5, 1952.

FIRESTONE TIRE & RUBBER COMPANY (S.S.), LTD. v. SINGAPORE HARBOUR BOARD.

Before Lord NORMAND, Lord TUCKER, Lord ASQUITH OF BISHOPSTONE and Lord COHEN.

Public authority—Limitation of action—Straits Settlements — Harbour Board functioning as warehousemen—Loss of goods while in custody of Board—Act (of warehousing) done "in pursuance of any public duty or authority"—Ports Ordinance, 1913 (as amended 1939)—Public Authority Protection Ordinance, 1912 (as amended 1939).

Shipment of rubber tyres received by Singapore Harbour Board (as warehousemen) into their godown at port of discharge—Short delivery to consignees—Claim brought by consignees nearly two years later—Liability of Board as bailees—Plea by Board that claim was out of time by reason of Public Authorities Protection Ordinance, which provided:

> 2. (1) Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution, or intended execution of any Ordinance or rules made thereunder, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Ordinance, rules, duty or authority the following sub-sections shall have effect.
>
> (2) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof.

Decision of Singapore High Court in favour of consignees reversed by Court of Appeal for the Colony of Singapore—Appeal by consignees—Board admittedly a public authority — Whether Board in taking goods into their care and custody in their godown within the precincts of the port of Singapore were acting "in pursuance of any public duty or authority"—Construction of Ports Ordinance, 1913—Board authorized to "carry on the business of . . . warehousemen."

———*Held*, that the Board in operating as warehousemen and levying rates for the storage of goods within their warehouses were supplying facilities essential to the shipping community in one of the ways authorized by the Ports Ordinance by which they were created a harbour board charged with the management and control of the port, and were thus fulfilling one of the main purposes for which they had been given statutory powers; and that they were accordingly entitled to the protection of the Public Authorities Protection Ordinance—Decision of Court of Appeal for the Colony of Singapore affirmed.

Per Lord TUCKER (at p. 6): It is essential to the protection afforded by the [Public Authorities Protection Ordinance] that the act or default in question should be in the discharge of a *public* duty or the exercise of a *public* authority. This assumes that there are duties and authorities which are not public. . . In deciding whether the duty or authority has this public quality it is sometimes relevant to consider whether it arises out of or is imposed by a contract voluntarily entered into by the public authority with an individual with whom it is under no obligation to contract. . . . The mere fact, however, that in the discharge of its duty or the exercise of its authority the public authority may have made a contract does

not of itself deprive the duty or authority of its public quality. The existence or absence of a contract is not a decisive test. . . . Effect must be given to the word "authority." This excludes the test of obligatory as opposed to permissive powers.

———Bradford Corporation v. Myers, [1916] 1 A.C. 242, and *dictum* of Viscount Maugham in Griffiths and Another v. Smith and Others, [1941] A.C. 170, applied.

The following cases were referred to:

Bradford Corporation v. Myers, [1916] 1 A.C. 242;

Griffiths and Another v. Smith and Others, [1941] A.C. 170.

This was an appeal by the Firestone Tire & Rubber Company (S.S.), Ltd., of Singapore, from a majority judgment of the Court of Appeal for the Colony of Singapore (Murray-Aynsley, C.J., and Gordon Smith, J., Evans, J., dissenting) reversing the decision of Brown, J., in the High Court of Singapore and allowing, by a majority, the appeal of the respondents, the Singapore Harbour Board, arising in an action in which the appellant company had claimed damages for alleged breach of a contract of bailment.

By their statement of claim in the action the appellants alleged that they were consignees of a cargo of 3960 loose new rubber tyres and 33 cases of new rubber tubes consigned to them from Bombay in the steamship *Samokla*, which arrived at Singapore on July 4, 1946. The cargo was discharged from the vessel into the respondents' godown No. 1 on July 11, 12, 13 and 14, 1946, but the Harbour Board failed to deliver to the appellants part of the cargo, namely, 17 tyres, to the total value of 2053.10 dols., which sum the company claimed.

The Harbour Board, by their defence, denied liability on various grounds and pleaded that the right or remedy claimed against them was for an alleged act done in pursuance of execution or intended execution of the Ports Ordinance, 1913 (as amended 1939), or an alleged neglect or default in the execution of the Ports Ordinance and/or by-laws made thereunder. They submitted that the action was not maintainable as it was not commenced within six months after the alleged act, default or neglect complained of as required by Sect. 2 (2) of the Public Authorities Protection Ordinance of the Straits Settlements, 1912 (as amended 1939).

At the trial in the High Court Mr. Justice Brown, awarding the appellants 2053.10 dols., with costs, held that the action was not barred by the Public Authorities Protection Ordinance, but the majority view of the Court of Appeal was that the Harbour Board was entitled to its protection. The Firestone Tire & Rubber Company (S.S.), Ltd., appealed.

Mr. Walter Raeburn, Q.C., and Mr. R. Withers Payne (instructed by Messrs. Smith & Hudson, agents for Messrs. Drew & Napier, of Singapore) appeared for the appellants; Mr. Kenneth Diplock, Q.C., and Mr. J. F. Donaldson (instructed by Messrs. Parker, Garrett & Co.) represented the Harbour Board.

Mr. WALTER RAEBURN said that except as to the defence that the Harbour Board was entitled to rely upon the provisions of the Public Authorities Protection Ordinance of the Straits Settlements, the Judge of first instance and the Court of Appeal were unanimously in favour of his clients. He understood that the Harbour Board intended to reopen one of the points upon which they had failed below, and as and when it was raised he would take the opportunity of meeting it if called upon to do so. The point upon which the company appealed was whether, in relation to this transaction, the respondents were, or were not, protected.

The majority view in the Court of Appeal was that the Harbour Board was exercising its functions as a public authority upon the true construction of the Ports Ordinance, and that once it had undertaken to act as warehousemen everything pertaining to that was done pursuant to what had been made by the Board its public duty. Mr. Justice Evans, in his dissenting judgment, in effect, said that the function of the Harbour Board, on the true construction of the Ports Ordinance, was to develop the lands vested in it, and its other functions were permissive only. On the analogy of *Bradford Corporation v. Myers*, [1916] 1 A.C. 242, whether it broke a contract entered into pursuant to one of its permissive functions which amounted to the carrying on of trade, or whether it committed a tort in the course of carrying out such permissive function, it was not within the protection of the Public Authorities Protection Ordinance.

COUNSEL added that the facts as found by the trial Judge were that the cargo was

consigned to the appellants by the Firestone Tyre & Rubber Company of India, Ltd., from Bombay, per the *Samokla*, on the terms contained in a bill of lading dated June 18, 1946, issued to the consignors by the Peninsular & Oriental Steam Navigation Company. Counsel submitted that the respondents agreed, by taking delivery of the goods over the ship's side, to hold them as bailees for the party which in the event presented a delivery order, and in so contracting were acting within the permissive provisions of Sect. 73 (c) of the Ports Ordinance as wharfingers and warehousemen. The duty of the Harbour Board to the consignees (the appellants) arose out of the presentation of the delivery order by the consignees.

COUNSEL distinguished *Griffiths and Another v. Smith and Others*, [1941] A.C. 170, and contended that the Harbour Board was acting primarily for the purpose of carrying on their business of warehousemen in undertaking to store the missing goods (17 tyres) in their godown, and were accordingly acting outside the protection of the Ordinance.

Mr. KENNETH DIPLOCK, for the Harbour Board, submitted that the logical approach to the case was to find out, first, what the Harbour Board was doing; secondly, pursuant to what duty or authority they were doing it; and, thirdly, whether it was done, in accordance with Sect. 2 (1) of the Public Authorities Protection Ordinance, "in pursuance or execution, or intended execution of any Ordinance or rules made thereunder, or of any public duty or authority." The tyres with which the case was concerned were shipped by the Firestone Tyre & Rubber Company of India, Ltd., who were not parties to the action, under a bill of lading to the consignors' order. It gave the shipowners an option to deliver over the ship's side, or to warehouse or wharf, and was to be surrendered in exchange for a delivery order. The bill of lading was never indorsed to the appellants and a copy only was sent to them. On June 28, 1946, the appellants received a delivery order from the representatives of the shipowners addressed to the Harbour Board. The vessel had arrived on June 22, but in 1946 there was, of course, a great deal of congestion at Singapore docks and unloading in fact took place on July 11, 12, 13 and 14, the goods being transferred to the godown and removed as soon as possible by the appellants' agent. Evidence was given that the procedure was in accordance with the normal routine of the port.

Looking at the relevant provisions of the Ports Ordinance, the most important was the heading itself, which was "To constitute Boards for the Management and Control of the Ports of Singapore and Penang." Where, as in this case, there was a body with limited powers, it was normal to cast the powers in permissive form, because the exercise of the functions of such a body must necessarily be dictated by the funds at its command. Sect. 46 of the Ports Ordinance placed on the Board an obligation to frame a scale of rates for a number of matters, which included the "landing, shipping, wharfage, cranage, storage or demurrage of goods." These and other matters described were all part of, rather than merely incidental to, the carrying on of the port. Sect. 73, it was plain, did not impose duties in the sense that they were enforceable by process of law, but it was a common way of empowering a body to carry out the duties for which it was formed. Sect. 75 was the one section in the Ordinance which was couched in words of obligation and said that the Board "shall" provide landing places. It could hardly be contended, and had not been contended, that that was the only obligation on the Harbour Board. In COUNSEL'S submission, reading Sect. 75 with Sect 73, what the Legislature was really saying was that the Board must control and administer the ports of Singapore and Penang properly; they had a discretion as to the way they did it in general, but in the course of doing it they must provide public landing places. The correct test for ascertaining whether the Public Authorities Protection Ordinance applied was to ask: Was the authority carrying out the purpose for which statutory powers were conferred upon them? His contention was that in this particular case what the Harbour Board did was a necessary part of the carrying out of an object for which they were created.

Mr. WALTER RAEBURN, in reply, said that Mr. Diplock had first submitted that the object of the Board's incorporation was the management and control of the port, and, next, that their Lordships could take judicial notice of the nature of the port of Singapore. From that emerged the third point, that such a port must have warehouses, and finally it was argued that therefore the business of warehousemen was a necessary activity of such a port. He was rather wondering of what it was that Mr. Diplock felt justified in asking their Lordships to take judicial notice. No doubt

Singapore was a very big port in the Far East, but when it came to looking at the limits of the functions of such a port he would have thought that went beyond what their Lordships could be asked to take judicial notice of. No doubt their Lordships knew there were warehouses in the Port of London owned by parties who were household words in the commercial world, other than by the authority itself.

COUNSEL said that for the purpose of seeing what this port was doing and was authorized to do by way of its main objects, and what it was doing by way of an incidental activity in the particular carrying on of a trade, one was driven back—as Mr. Diplock had frankly submitted—upon the Singapore Ports Ordinance itself. One of the things to which recourse was had for the purpose of showing that the business of warehousemen came within the scope of the Board's main objects was the power of levying rates and the power of making by-laws. The power of levying rates in respect of storage, however, meant no more than the power of fixing the charges which the harbour board was entitled and empowered to recover from those persons who took advantage of the storage facilities. The landing and storage of goods at any port had to be regulated in some way, irrespective of who it was who carried them out, in order that a port could function at all. The fact that the Ordinance provided for the making of by-laws, just as it provided for the fixing of rates, carried the case no further in the attempt to differentiate under Sect. 73 (*c*) between the business of "wharfingers and warehousemen" and any of the other businesses mentioned in the section, which, on the face of them, he submitted, were businesses outside the main objects.

COUNSEL said that the business of warehousemen carried on by the Harbour Board was not confined to shipping companies, and there was nothing at all to stop the Board from warehousing goods for local merchants. Such a case was awaiting the result of the present appeal. Supposing it was right to say that the Board was acting as a harbour authority when warehousing goods for a party directly shipping goods, but not so acting in the case of a party not actually shipping goods, then in his submission in this case the Board was in fact storing the goods not for the consignors or the shipowners but for the consignees, to whom the goods were delivered once they came off the slings.

Their LORDSHIPS reserved judgment.

Tuesday, June 10, 1952.

JUDGMENT.

Lord TUCKER: On Dec. 9, 1949, Mr. Justice Brown, sitting in the High Court of the Colony of Singapore, gave judgment for 2053.10 dols. in favour of the appellants, who were the plaintiffs in an action brought by them against the respondent Board claiming damages for the loss of 17 tyres, the property of the plaintiffs, which had been received by the Board in one of their godowns in the harbour of Singapore but never delivered to the plaintiffs. On appeal by the respondent Board to the Court of Appeal for the Colony, the judgment of the trial Judge was (by a majority) reversed and judgment entered for the respondent Board on the ground that the action was barred by Sect. 2 (2) of the Public Authorities Protection Ordinance of the Straits Settlements, not having been commenced within six months next after the act, neglect or default complained of. This plea had been rejected by the trial Judge. The plaintiffs appealed to Her Majesty in Council by leave of the Court of Appeal. It was common ground that if the Court of Appeal decision with regard to the Public Authorities Protection Ordinance was correct, the appeal must fail, but Counsel for the respondent Board was desirous of arguing, should it become necessary so to do, that the Board were in certain events entitled to succeed on other grounds. The only issue, however, debated before their Lordships was the applicability of the Ordinance.

The parties are hereinafter referred to as "the appellants" and "the Board." The material facts which are not now in dispute are as follows:

(1) On or about June 25, 1946, the Firestone Tyre & Rubber Company of India, Ltd. (hereinafter referred to as "the consignors") consigned a cargo of 3960 rubber tyres and 33 cases of rubber tubes to the appellants in Singapore from Bombay per the steamship *Samokla* on the terms of a bill of lading dated in Bombay, June 18, 1946, between the consignors and the Peninsular & Oriental Steam Navigation Company. A copy of the bill of lading was sent on June 25, 1946, to the appellants by the consignors. By the bill of lading the

goods were shipped to consignors' order with an option to the shipping company (the P. & O.) to deliver "either over the ship's side or from lighter or store ship or hulk or Custom House or warehouse or dock or wharf or quay at consignee's risk." It also provided that the bill should be surrendered duly indorsed at port of destination in exchange for delivery order.

(2) On or about June 28, 1946, Messrs. Islay, Kerr & Co., Ltd., of Singapore, as agents for the shipping company (the P. & O.) supplied to the appellants a delivery order dated June 28, 1946, addressed to the Board requesting them to deliver the cargo to the appellants.

(3) On or about July 4, 1946, the delivery order was sent by the appellants to the Board.

(4) On July 4, 1946, the *Samokla* arrived in Singapore and berthed at godowns Nos. 1 and 2.

(5) On July 11, 12, 13 and 14, 1946, the cargo was discharged from the *Samokla* by the servants of the Board and was received by the Board in one of their godowns.

(6) On or about the dates aforesaid the cargo was delivered out of the Board's godown to the appellants or to their order with the exception of the 17 tyres in respect of which the action was brought, which were never delivered. Loss of the goods was reported to the Board's clerk on duty at the godown at the time and formal notification in writing given on Aug. 1, 1946.

(7) The writ in the present action was issued on June 19, 1948.

These being the facts, the Board failed to discharge the onus that lay on them as bailees to prove that the goods were lost without negligence on their part, and apart from the Public Authorities Protection Ordinance were accordingly liable to the appellants unless they could rely on some contractual protection; and it was on this aspect of the case that Counsel for the Board desired to reserve his right of further argument. For present purposes it is assumed that but for the Ordinance the appellants would be entitled to hold the judgment of the trial Judge in their favour.

The material provisions of Sect. 2 of the Public Authorities Protection Ordinance, 1912 (as amended 1939), are as follows:

> 2. (1) Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution, or intended execution of any Ordinance or rules made thereunder, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Ordinance, rules, duty or authority the following subsections shall have effect.
>
> (2) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof.

This language is for all practical purposes identical with the English Public Authorities Protection Act of 1893.

Although the words "public authority" do not appear in the section, it has long been settled law that the words "any person" must be limited so as to apply only to public authorities or persons acting on behalf of public authorities.

In the present case it has been admitted throughout that the Board is a "public authority" within the meaning of the Ordinance so interpreted. The sole issue accordingly is whether in taking the appellants' goods into their custody for delivery to them they were doing an act "in pursuance . . . of any public duty or authority." In this connection it is also well settled that this question cannot be resolved merely by ascertaining whether the act or activity in question was *intra vires* the authority. The protection of the Ordinance does not cover all the lawful and authorized acts of a public authority. Some acts are excluded. The difficulty is to define what acts or classes of act are excluded. In *Bradford Corporation v. Myers*, [1916] 1 A.C. 242, at p. 250, Lord Buckmaster, L.C., said:

> The difficulty is to draw a line between the class of cases that are within and those that are without the statute, and I am conscious that this opinion does not establish as clear and distinct a line as I should like to see. But the statute itself is so framed that such distinction is not easy, and there may well be cases about which greater doubt may arise and more uncertainty be felt than about the present, which to my mind lies clearly outside the area of statutory protection.

In the same case Viscount Haldane said (at p. 251):

> What causes of action fall within these categories it may be very difficult to say abstractly or exhaustively. It is hardly