IN THE HIGH COURT OF AUSTRALIA

M. & D.J. BOSSIE PTY. LIMITED

V.

BLACKMAN

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Friday, 8th December 1967.

A. C. Brooks, Government Printer, Melbourne
C.7639/60

M. & D. J. BOSSIE PTY. LIMITED

v.

BLACKMAN

ORDER

Appeal dismissed with costs.

M. & D. J. BOSSIE PTY. LIMITED

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JUDGMENT McTIERNAN J.

M. & D. J. BOSSIE PTY. LIMITED

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I am of opinion that the decision of the trial judge is right both on the question of liability and of damages and the appeal should be dismissed. I agree in the reasons for judgment of my brother Kitto.

M. & D. J. BOSSIE PTY. LIMITED

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JUDGMENT KITTO J.

M. & D. J. BOSSIE PTY. LIMITED

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The respondent was injured by a fall which he sustained while assisting in the erection of a factory building having a type of saw-tooth roof. The roof was substantially flat except that at intervals of 20 feet or so, looking at it end on, there was a raised lantern or monitor of rectangular cross-section extending back along the whole length of the building. On the north side the lanterns provided ventilation for the building and on the south side they provided light. Each lantern was 4 or 5 feet high and about 8 feet wide. Its roof and sides were designed to be covered with corrugated asbestos cement, and its ends with flat asbestos cement sheeting. The ends of the lanterns were in the same vertical plane as the end walls of the building itself.

At the time of the accident the respondent was engaged in the work of fixing the corrugated asbestos cement to the roof and sides of one of the lanterns. He was in the employment of a company which had entered into a sub-contract with the builder to do that part of the work of construction. The end of the lantern was as yet uncovered. To cover it was outside the sub-contract: it was to be attended to by workmen employed by the head contractor, the builder, who is here the appellant.

While the respondent and his fellow employees of the sub-contractor were going about their work, the head contractor's men were going about theirs. The respondent had occasion in the course of his work to move from one side of a lantern to the other. There were several ways in which he might do it. He might climb over the roof of the lantern, but some at least of the asbestos roofing was in position, and there was a possibility of breaking it. He might climb down to the ground and up again on the other side

of the lantern by means of a ladder that was available, but this required some expenditure of time and effort. He might get through the lantern at some places where its walls were still unclad and pass across under the four- or five-feet-high roof, holding to some of the steel elements of the structure and walking along planks that had been laid to assist passage. But at the material time he was at or near one end of the lantern, and he decided to work his way across its uncovered end face by moving his feet along a timber wall-plate which lay along a length of steel on top of the end wall of the building. This was safe enough provided that he had something to hold on to so as not to fall backwards, for of course he would be facing the end of the monitor and leaning slightly outwards from it for the whole distance. Two things presented themselves to him as available for the purpose. One was a length of 6" x 2" timber, called a trimmer, some 7 feet in length, reaching from the end of a purlin near one end of the roof of the lantern to the end of another purlin at the other end. The purlins formed part of the roof structure of the lantern and ran the whole length of it. There was a third purlin midway between the others, but having been cut short it did not reach the end of the lantern with which the case is concerned, and consequently the trimmer could not be attached to it as it was to the ends of the others. The trimmer was fixed with its 6" face vertical. Its function was to provide a backing for the flat asbestos cement sheeting that was to cover the face of the lantern.

The other thing the respondent might have used for a handhold was a length of steel angle-bar which formed the top structural element of the lantern. It was easily accessible, but it was somewhat lower than the trimmer and was 3 or 4 inches further in, that is to say away from the respondent. The respondent, observing nothing to suggest that the trimmer would not serve his purpose satisfactorily, chose to trust himself to its support. In fact it had been fixed

in a temporary fashion only. A single three-inch nail had been driven through it into each of the two end purlins. Each nail, of course, entered for no more than one inch into the end of a purlin, and with the grain at that. When the respondent was part-way across, one nail came out of its purlin, and the respondent, losing the support of the trimmer, fell backwards to the ground.

It is common ground that the trimmer had been placed in position by one of the appellant's workmen, and clearly enough it was not as securely fixed as it ought to have been by anyone who should reasonably have foreseen that it might be used for the purpose for which the appellant used it. I do not think it is material that in fixing it as he did the appellant's workman was following normal building procedure. The whole question in this appeal, as I see it, is whether the appellant through its servants and agents should reasonably have foreseen that in the circumstances of this particular job at the material time one of the sub-contractor's workmen might use the trimmer in the way the respondent used it, and therefore might fall if it were not more securely fastened than it was; for, if so, the appellant owed a duty to the respondent to take reasonable care not to subject him to the danger which so insecure a fastening would entail, and failed in that duty.

The availability of other and more orthodox methods of getting from one side of the lantern to another than by passing across the end of it is relied upon by the appellant as affording one reason why it was not reasonably to be expected that any of the sub-contractor's workmen would adopt the latter course. Moreover the availability of the steel angle-bar as a more certainly safe handhold for a person who might essay to cross the end of the lantern is relied upon as affording a reason why it was not reasonably to be expected that any such person would choose to grasp the wooden trimmer instead. A further contention is that it

was not reasonably to be expected that an experienced workman - the respondent had been doing roof-laying for some fifteen years - would use the trimmer as a handrail without first making sure that it was securely fixed, and the respondent trusted to it only because he thought it was not a trimmer but a purlin, which normally is bolted to the steel framework of the building.

These contentions were all considered closely by the learned trial Judge, but he found for the respondent. His basic reason was that he thought it right to infer that both a Mr. Bossie, who was supervising the work on the building on behalf of the appellant and described himself as a "partner", and also the carpenter who fixed the trimmer, had such knowledge of what was happening on the job that if they had given the matter a thought they would have foreseen that one of the sub-contractor's men might come to harm if the trimmer were attached as insecurely as it was. There was in fact ample evidence that the sub-contractor's roof-fixers were not infrequently using the respondent's method of getting from side to side of the end lanterns. "Nearly all of them (the other men working with the respondent) more or less did the same thing", one of the respondent's workmates said; and the respondent himself said that the others of the sub-contractor's men got from one side of the lantern to the other "once or twice" by going through, "which was harder", but"it was easier to go around than to go through". The appellant's workmen, including the carpenter, who were working concurrently with the sub-contractor's workmen, and Mr. Bossie himself who was frequently in attendance, could hardly fail to know that this was being done. Even if they had not noticed it, the fact that it was the easiest thing to do must have been as evident to the carpenter as it was to them; and no deep reflexion would have been required for a realization that what was easiest to do was likely to be done.

Moreover it was more natural for anyone passing across the end of the lantern to grasp the trimmer than to grasp the steel angle-bar, because the trimmer was in front of and extended higher than the angle-bar and was therefore readier to hand.

I see no reason to take a different view. Mr. Bossie and the carpenter who fixed the trimmer in position with only one three-inch nail at each end must have realized, if they had thought about it at all, that anyone who passed along the end of the lantern would be likely to hold on to so substantial-looking an object, and one so conveniently placed for his purpose, as the trimmer. Its appearance of solidity - it was a plank two inches thick and six inches wide, not some unsubstantial piece of moulding - was such as to offer no little assurance of reliability. Who would expect it to be hardly more than tacked in position? This, of course, would not matter if the carpenter, and Mr. Bossie who was in a position to give him instructions as to the manner of doing his work, had had no reasonable ground to expect that anyone would be likely to pass along the end of the lantern; but the Judge evidently accepted, as he was entitled to do, the evidence that others than the respondent were doing so in the course of the work, and the conclusion seems to me well justified that Mr. Bossie and the carpenter ought to have realized that the latter would be creating a peril for the sub-contractor's men if he put the trimmer in position with as little hold upon the purlin-ends as it had.

A carpenter who was called by the appellant to give evidence and was probably, though not certainly, the one who put the trimmer up, agreed with other witnesses that normally two nails would be driven into each end, and he said that there was no reason why he should place only one in each end. This statement, in its context, seems to me to have meant that even though the trimmer was fixed only temporarily there was no reason why two nails should not

have been used at each end. The carpenter explained in his evidence that the reason for attaching the trimmer in a temporary fashion was that vertical studs had to be inserted to extend down from the trimmer, but it was found more convenient to cut all the top trimmers, go round and nail them in position, and then later on cut all the studs and go round and nail them in. Presumably he meant that only when that had been done would he fix the trimmer permanently. The course he followed would no doubt have been sensible enough in other circumstances, but, as I have said, the sub-contractor's roof-fixers were going about their work at the very time the carpenter was putting the trimmer up, and it seems to me proper to conclude that if he had considered them at all he must have realized that by putting the trimmer up he would be offering them a temptation, which they might reasonably be expected to accept, to rely upon it as being more firmly secured than it was. A need for greater care than an adherence to normal building practice provided was in these circumstances, I think, too clear to be missed by a reasonably thoughtful and careful man in the position of the carpenter.

A good deal seems to have been made at the trial of the respondent's mistake in taking the trimmer to be a purlin. It was contended that his calling it a purlin meant that he expected it to be bolted, and that a cursory examination would have shown him that it was not, and would have drawn his attention to the slightness of its attachment. But the mistake seems to me to have been immaterial in relation to the questions before us.

I find myself in agreement with the learned Judge, and would dismiss the appeal accordingly.

M. & D. J. BOSSIE PTY. LIMITED

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JUDGMENT

TAYLOR J.

M. & D. J. BOSSIE PTY. LIMITED

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BLACKMAN

On 2nd November 1965 the respondent was injured in a fall from the roof of factory premises which were then being erected near Perth for Century Storage Battery Co. Limited. The appellant was the building contractor and the respondent was an employee of James Hardie & Co. Pty. Ltd., the sub-contractors who supplied and had undertaken to fix a fibrolite roof to the structure. Subsequently he brought an action for damages in the Supreme Court for damages based upon the allegation that his injuries had been caused by the negligence of the appellant and succeeded in obtaining judgment for $9011.31. It is from this judgment that the present appeal is brought.

The roof of the structure as designed was mainly flat but at regular intervals there were raised structures called monitors or lanterns which ran from the front to the back of the building - a distance of some 56 feet. The structural work for each of the monitors rose vertically about 7 feet above the general level of the roof and was about 8 feet in width and, when clad with fibrolite and fitted with louvres, it formed part of the roof. The principal structural material in the building was steel though timber formed a secondary material in the roofing structure. In particular, each of the monitors was structurally formed by steel frames to which were bolted three purlins of 7" x 2" timber running the whole length of the building and affixed to the top of the steel structure by bolts. These purlins were equally spaced. Two timber girts of the same sectional dimensions ran along each side of the monitors and these, again, were bolted to the steel structure

But it is important to mention that although the sub-contractor had undertaken to roof the building including the monitors, its contract did not extend to affixing material to the ends of the monitors in line with the ends of the building; this work remained in the hands of the appellant who was proposing to carry out this task by fixing sheets of fibrolite to the ends of the monitors. It seems that this work was proceeding more or less at the same time as the roofing work and, as appears to be customary, "trimmers" were temporarily fixed transversely across the end of each of the monitors. The trimmers were of 6" x 2" timber and did not form part of the structural work of the building or of the roof. They were provided for the purpose of giving rigidity to the large sheets of fibrolite which were to be used to enclose the ends of the monitors. These trimmers were temporarily fixed and, in particular, the one in question here was fixed by a 3" nail at each end driven with the grain of the timber into the extreme end of each of the outside purlins on the top of the monitor structure. At some time later the respondent, being desirous of proceeding from one side of the monitor to the other, attempted to cross at the end of the monitor. In doing so he placed his feet on the wall plate and steadied himself by holding on to the trimmer some five/or six feet above the plate but the trimmer became dislodged and he fell to the ground, a distance of approximately twenty feet.

In his statement of claim the respondent alleged that in climbing around the end of the monitor and while holding "on to the top purlin with both hands and standing on the bottom purlin ... the top purlin came free from its mountings" causing him "to lose balance and fall". The negligence which he alleged was that the defendant

"(a) used nails of inadequate length to attach the purlin to the wall;

(b) failed to check the purlin into the purlin adjoining it so as to provide additional strength; and

(c) should in any event have bolted the purlin to the wall and not nailed it."

There was no allegation that the appellant was the occupier of the building and the case proceeded on the basis that in the circumstances established the appellant owed to the respondent a duty of care and that his injuries had been caused by a breach of that duty. But it seems clear that the case got away to a false start for what was alleged in the statement of claim to be the "top purlin" was not a purlin at all but the "trimmer" which had been placed transversely across the end of the monitor some four inches from the upper steel transverse cross-member of the monitor structure. Admittedly if the trimmer had been a structural member intended to support the roof it should have been bolted or more securely fastened. But it was not of this character and, indeed, it was obvious on sight that it was not for it could not have been bolted to the extreme ends of the purlins without the intervention of angle pieces.

From the evidence it appears that quite a number of planks were provided by means of which those engaged by the sub-contractor as roofing fixers might, as occasion required, pass from one side of the monitor to the other. These planks were so positioned that the fixers - of whom the respondent was one - could cross from one side to the other within the monitor structure itself, but, of course, they could not be availed of if one of the sides of the monitor was entirely enclosed. But at the time of the accident the sides were not entirely enclosed and the respondent might, it seems, have availed himself of this means of crossing, or, he might have crossed upon the steel trusses forming part of the monitor framework steadying himself by holding on to the upper part of the steel structure. But apparently it seemed to him more convenient to climb around the end of the monitor. It should, perhaps, be mentioned also that ladders were provided by means of which the roof fixers might

descend from the roof on one side of the monitor and ascend on the other.

In these circumstances the learned trial judge said:

" ... Mr. Bossie did not claim that he expected them to use the ladders. The reasonable building contractor would not expect it. Indeed planks were placed across the gap for the purpose of passage. Mr. Bossie was also aware that they passed across on the steel structural trusses by using the lowest member as a foothold and the uppermost member as a handhold. A set of those steel trusses was positioned near the end of the monitor. The reasonable building contractor would know that, the wall of the building being plate high, those who crossed the monitor would use the plate as a foothold in preference to the lowest truss member, and they would have the uppermost truss member available as a handhold. The reasonable building contractor would also know that if a timber plank were placed parallel to but on the outerside of that uppermost steel truss member, those who crossed the monitor would accommodate to the plank as a handhold in place of the steel. He would also share human experience that in such situations the place where the foot is to be placed commands the greater visual concentration, while the course of the hands is left to direction by touch. He would also know that 6 inches by 2 inches timber bears an approximation in appearance to 7 inches by 2 inches timber.

That the proximity of the relationship of the parties was close indeed, is apparent from the evidence that the roof fixers were proceeding with their work while the three carpenters were still in course of carrying out carpentry on the building.

That the guilty trimmer was placed in position with the two nails in the manner already described, is plainly to be inferred, and I so hold.

Here was a situation in which the defendant, through its supervisor, Mr. Bossie or its carpenter, had either given the matter a thought, to have foreseen that in effect the placing of rimmer in that position in that manner was likely to cause physical

> injury to anyone who relied on it for support in traversing the end of the monitor. It follows from that and from the proximity of the association of the parties that the defendant owed the plaintiff a duty to take reasonable care."

It must be observed that this was not a case in which an employee sued his employer for a breach of duty which arose from their relationship; it was a case in which it was sought otherwise to establish a duty on the part of the appellant. But what the extent of the duty was that the learned judge thought arose in the circumstances does not appear with any degree of precision. Further, it is impossible to ascertain from the immediately succeeding passage what acts or omissions on the part of the appellant amounted to a breach of that duty. What his Honour next said was:

> "The next question is whether reasonable care in all the circumstances was taken by the defendant, its agents and servants. The foregoing subject matter discussed in considering the question of duty, plainly indicates a breach of the duty by lack of care and I so hold."

It is clear enough from the evidence that some of the respondent's workmates had, as he attempted to do, crossed from one side of the monitor by climbing around the end of it. But there is nothing to suggest that in so doing they had taken hold of the trimmer rather than the adjacent upper steel member. Further, there is no reason why the appellant should have supposed that a roof fixer with fifteen years' experience in the trade - as the respondent was - would have taken a handhold on such an unsubstantial thing as a trimmer particularly when a secure handhold upon the upper steel structural member was readily available. In what respect, therefore, can it be said that the appellant was at fault? It is not suggested that the method of fixing the trimmer to

the ends of the purlins was not standard building practice. But the suggestion seems to be that the appellant should have employed a more substantial method of securing it in case it should be employed, either mistakenly or with full knowledge of the risks involved, as a handhold while roof fixers should be crossing in this particular way from one side of the monitor to the other. But the temporary fixing of the trimmer was by no means an invitation to the roof fixers to use it as a handhold in such circumstances. Nor can it be said, in effect, to have been a hidden trap. Of course, if some part of the structural support for the roof had given way causing injury to the respondent there would be no difficulty in holding the appellant guilty of negligence but I am unable to see that the circumstances required it to depart from standard building practice and affix trimmers by more substantial means or to warn the respondent that trimmers had been temporarily affixed or, in particular, that the trimmer in question was only a trimmer and that he should not rely upon it as a handhold. Indeed, his injuries seem to have been occasioned not by the appellant's failure to fasten the trimmer more securely or by his failure to give any such warning but rather from the respondent's failure to recognize the trimmer for what it was. That this is so, it seems to me, is made clear not only by the allegations made in his statement of claim, but also by the evidence given by him at the trial. I would allow the appeal and set aside the judgment entered in his favour.