[2013] UKPC 30
Privy Council Appeal No 0073 of 2011

JUDGMENT

General Construction Limited (Appellant) *v* Chue Wing & Co Ltd and another (Respondents)

From the Supreme Court of Mauritius

before

Lord Neuberger
Lord Mance
Lord Clarke
Lord Carnwath
Lord Toulson

JUDGMENT DELIVERED BY

Lord Mance

ON

15 October 2013

Heard on 12 June 2013

Appellant
Gavin Kealey QC
Julia Dias QC
Eric Ribot SC
(Instructed by De Comarmond & Koenig)

LORD MANCE:

Introduction

1. During a cyclone on 10 February 1994 the upper sections of a crane erected for works being undertaken on a multi-story building at the corner of Royal and Bourbon Streets in Port Louis fell onto the neighbouring building. The crane was owned, erected and operated by the appellant, General Construction Co Ltd. Its fall damaged both the neighbouring building, of which the first respondent, Ibrahim Cassam & Co Ltd, was owner and landlord, and the property and business of the second respondent, Chue Wing & Co Ltd, which was its tenant.

2. The trial took place in June 1997 and November 1998 before K P Matadeen J. By a judgment delivered only on 31 May 2004, and upheld by the Supreme Court (Court of Civil Appeal) only on 31 January 2011, the appellant has been held liable to both respondents in damages, on the basis that, although there was no proof of *faute* within article 1382, it had not established that the accident occurred due to *force majeure* within article 1384 of the Civil Code.

3. The appellant, represented by Mr Gavin Kealey QC, Ms Julia Dias QC and Mr Eric Ribot SC, challenges the correctness of this conclusion. It also raises a minor point regarding the Court of Civil Appeal's decision to award interest to the first respondent, which the trial judge had not awarded. The respondents, although represented below, have not been represented before the Board. The second respondent is now in liquidation. The Board pays tribute to the quality of the assistance which it has had from those representing the appellant, who have in accordance with best tradition put the relevant legal material before the Board both helpfully and objectively.

Background facts

4. The crane was a Potain crane model 428 G manufactured in France in 1973, purchased second-hand by the appellant in 1985, and used thereafter in Mauritius. The upper sections detached themselves from the side of the building and fell due to the breakage of the top three-sided *collier* or collar which wrapped round the crane and was supposed to fix it to an anchor extending out from the building.

5. Cyclones are common in the Indian Ocean and not infrequently their path crosses Mauritius. Thus two cyclones hit Mauritius in 1960, one in each of the years 1961, 1962, 1964, 1966 and 1967, one in 1970, one in 1972, one in each of the years 1975, 1978 and 1979, three in 1980, one in each of the years 1981 and 1983, one in 1989 and one, Cyclone Hollanda with which this appeal is concerned, in 1994. Their intensity varies. The majority involved wind gusts well below 200 km per hour (kmph), but there were gusts of respectively 200 and 256 kmph in the two 1960 cyclones, 235 kmph in 1962, 219 kmph in 1962, 280 kmph in 1975, 221 kmph in 1979, 201 kmph in 1980 and 216 kmph during Cyclone Hollanda in 1994. Wind gusts in excess of 200 kmph during cyclones must therefore be taken to be foreseeable in Mauritius.

6. Cyclones develop gradually over periods during which it is not clear that they will become cyclones. Cyclone Hollanda developed with greater than usual speed. What became Cyclone Hollanda consisted of no more than 40 kmph winds on 2 February 1994, it then formed a low pressure area south of Diego Garcia and by 8 February it had developed into a moderate, and by 9 February a severe, tropical depression. It takes six days to dismantle a Potain crane like the present. By the time a cyclone was a real possibility, it was therefore too late to dismantle the crane.

7. The judgments below go little further into the characteristics or propensities of cyclones, though the judges may have known some of these from personal experience. In written material submitted to the Board after the hearing, the appellant noted potential differences between the behaviour and effects of “dry” and “wet” cyclones, of short-lived and longer-lasting cyclones and of wind patterns operating within cyclones (spiralling, funnelled, with short or more sustained gusts). The Board is content to accept that a particular cyclone may present in any of these forms, though it seems to follow that all must also have been foreseeable, or *prévisible*, in 1994.

Code civil and force majeure

8. Articles 1382 to 1384 read:

> “1382 Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.
>
> 1383 Chacun est responsable du dommage qu’il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.

> 1384 On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde.
>
> …..
>
> La responsabilité ci-dessus a lieu, à moins que …. le gardien de la chose ne prouve que le dommage a été causé par l'effet d'une force majeure ou de la faute exclusive de la victime. …."

9. Before K P Matadeen J the respondents advanced a case of *faute*, alleging that the collars were not fit for the purpose or maintained properly or in accordance with the manufacturer's instructions. The judge rejected this case, finding that the crane had been properly erected, maintained and operated and did not fall through any defect or weakness in its structure. The fall was "due to the unexpected giving way of the 'colliers' [sic]". No reason was assigned for this "unexpected giving way".

10. However, the judge held the appellant liable on the ground that the cyclone was not unforeseeable in either its occurrence or its intensity and therefore did not constitute an event of *force majeure*. The Court of Civil Appeal, sitting in a constitution of five judges presided over by Y K J Yeung Sik Yuen CJ, who gave the judgment, upheld the trial judge after a detailed examination of authorities and principles relating to the concept of *force majeure*.

11. The appellant accepts that the mere absence of *faute* within article 1382 does not prevent a person being liable for damage caused by a thing under his or its guard under article 1384. In effect, the *gardien* of a thing who benefits from its possession (or, at least in some cases, use) is treated as undertaking or bearing the risk of damage which it causes. Nevertheless, some limited exceptions are provided. That presently relevant is *force majeure*. Under article 1384, the onus is on the person in charge of the thing to show that the damage was caused by an event constituting *force majeure*. The consequent exposure is no doubt understood by the *gardiens* of *choses*, at least when they are crane operators, and they can be expected to arrange their insurance protections accordingly.

12. French and Mauritian case-law have traditionally identified three constituent elements of an event of *force majeure*: it must be (i) *extérieur* or *étranger à la chose*, (ii) *imprévisible* and (iii) *irrésistible*. In the French case-law a divergence emerged between the practice of the 2ème Chambre and the Chambre sociale of the Cour de cassation, which insisted on a strict cumulative approach to these three elements, and the 1ère Chambre and the Chambre commercial, which, supported by a strong body of academic *doctrine*, treated *irrésistibilité* as the critical element and *imprévisibilité* as

no more than a relevant consideration in judging whether an event was irresistible. Two decisions of the *Assemblée plénière* on 14 April 2006 (Bull. Ass. Plèn. nos 5 and 6), one in a contractual, the other in a delictual context, insisted upon the need for both *irrésistibilité* and *imprévisibilité*, but did not examine the relationship between them in detail.

13. Academic doctrine has been and remains somewhat sceptical about the relevance and inter-relationship of the three elements of *force majeure*, in both contractual and delictual contexts: see e.g. *Encyclopédie Dalloz V^{o} Force Majeure* para 21, Revue trimestrielle de droit civil ("RTD") Civ 4 oct-déc 1994 pp 871-876, *Ouragan sur la force majeure* par P H Antonmattei [JCP]1996, I 3907, Bruschi, Revue Générale du Driot des Assurances ("RGDA") 1996 pp. 385-392, *Catastrophe naturelle et force majeure* par Fabrice Leduc, RGDA 1997, no 2 p. 421, *Droit de la responsabilité civile*, par Le Tourneau et Cadret, paras 905-906 and, most recently, the Droit de la responsabilité et des Contrats par Le Tourneau Dalloz Action, 2010-2011), paras 1807-1813. The basic academic thesis is that the real relevance of foreseeability is in throwing light on whether the event causing the damage was irresistible. If something is foreseeable at a time when it can be avoided, then it is not irresistible.

14. More recent decisions of both the 1ère Chambre and the Chambre sociale in a contractual context insist upon *imprévisibilité* at the time of conclusion of the contract as well as *irrésistibilité* (Pourvois Nos: 07-17134 of 30 October 2008 and 10-17726 of 16 May 2012). But this is not on any view surprising in a contractual context. If something is foreseeable when the contract is entered into, and no special provision is made for it, then a contracting party may be taken to have accepted responsibility for or despite it, if it materialises. "*La jurisprudence poursuit un objectif de loyauté contractuelle*": Fabrice Leduc in RGDA 1996 no. 2, cited above, p. 423. On the other hand, the Board can gain no real assistance from the passing reference to irresistibility alone in a decision of the Chambre commerciale, of 4 December 2012, 11-25.964, cited to it by the appellant after the oral hearing.

Judgment of Court of Civil Appeal

15. Writing for the Court of Civil Appeal in the present case, the Chief Justice examined the French case-law up to the two decisions of the *Assemblée plénière*, and noted their conclusion that the elements of *imprévisibilité* and *irrésistibilité* must co-exist (paras 68 and 72). But he also concluded that the "emphasis" in France was on whether the event was irresistible and that, if unforeseeability remained a "complementary" element, irresistibility was the irreducible factor. Further, when (in paras 78-90) he came to consider Mauritian authority and its understanding of the legal position (including French authority), he detected a recent "shift" from *imprévisibilité* to *irrésistibilité* (para 81). He concluded, speaking with reference to an

appeal to the Cour de cassation relating to the effects in La Réunion of Cyclone Firinga in 1989 (Cour de cass, 2ème Civ 18 March 1998):

> "89 In other words, while *l'irrésistibilité* of the event is the crucial element, the predictability of same becomes important to find whether precautions could have been taken to avoid the disastrous consequences.
>
> 90 In sum, what is *force majeure* with respect to cyclone Firinga was decided by the French Courts on the basis of its *résistibilité*. The fact that it was *résistible* was decided by the fact that it was *prévisible*. In other words, the *prévisibilité* of the cyclone rendered it possible for people to mitigate the disaster it would have caused."

16. As the Board sees it, this was ultimately the approach which the Court of Civil Appeal held should apply in Mauritius. The Chief Justice said:

> "105 When the Assemblée Plénière speaks of the double need of *prévisibilité* [sic] and *irrésistibilité*, one may need to follow what is the nature of the cumulative character of these two elements. If it is unpredictable and irresistible, there is no doubt, it is a *force majeure*. But there may occur an event which is *prévisible* yet when it strikes, it is irresistible. In that case, it would qualify as a *force majeure*:
>
> *"Quand le danger prévisible était irresistible, il y a bien force majeure"*
>
> para 714, Philippe Le Tourneau, La responsabilité civile, 3ème ed. p.241.
>
> 106 Thus, where an event is predictable but irresistible, it amounts to a *force majeure* where it can be shown that all measures taken to make the event resistible were of no avail. What the courts are looking for is whether all reasonable measures have been taken to render the predictable resistible. ….
>
> "… exigeant des juges du fond qu'ils recherchent si, en l'espèce, toutes les mesures requises pour empêcher l'événement avaient été prises: ...."

17. The word "reasonable" might be read as suggesting that mere absence of *faute* is sufficient to demonstrate irresistibility for the purposes of *force majeure*. The

appellant accepts that this is not so. In its written case before the Board, the appellant submits that standard is not to be regarded as "an absolute standard of impossibility". Rather it is, the appellant submits, the standard of a *bon père de famille* taking "those precautions which are reasonably and practicably possible in the circumstances of the case". For *bon père de famille*, the Board would itself substitute a "responsible crane operator". In its case, the appellant goes on expressly to accept, in this connection, that

> "there is a very real difference between absence of *faute* or negligence and a standard of conduct referable to reasonable and practical possibility. The mere fact that a defendant has not been negligent or at fault does not of itself prove that he took all measures that were reasonably *possible* in the sense of being reasonably and practically available to him. In other words, a concept of *irresistibilité* which incorporates a standard of reasonable and practical possibility still requires a defendant to do much more than prove that he was not negligent. On the contrary, he must go further and show that once the event was foreseeable he did everything which was reasonably possible and practicable, not only that which it might have been reasonable for him to do."

18. The Board is content for present purposes to proceed on this basis. It notes in passing a possible analogy with the legal position under article 17.2 of the CMR Convention scheduled to the United Kingdom Carriage of Goods by Road Act 1965, as explained at first instance by Mustill J in *J J Silber Ltd v Islander Trucking Ltd* [1985] 2 Lloyd's Rep 243. Article 17.2 contains what is on its face a more widely expressed exception than *force majeure*, since it simply relieves international road carriers "of liability if the loss, damage or delay was caused …. by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent". But Professor Malcolm A Clarke in his standard work on International Carriage of Goods by Road (5th ed) (2009) suggests that, so far as irresistibility (or inevitability) is concerned, the standard involved may equate with that involved in *force majeure* under French law (see footnote 146 on p.230 and the accompanying text. He also points out that, under article 17.2, Mustill J in *J J Silber* at p. 247 identified the standard under article 17.2 as being "somewhere between, on the one hand, a requirement to take every conceivable precaution and, on the other hand, a duty to do no more than act reasonably in accordance with prudent current practice". That corresponds closely with the way in which the appellant puts the matter.

19. Subject to the reservation made at the start of paragraph 17 above, the Court of Civil Appeal's approach is, the Board understands, one with which the present appellant is content. The Board for its part also sees much force in the Court of Civil Appeal's approach. However, since the appeal has only been argued on one side, the Board prefers to express no more concluded view than this, and it is unnecessary to do so.

20. What is in the Board's view important is to identify the conjunction of circumstances constituting the event. If these are all foreseeable, then it is difficult to avoid the conclusion that steps should have been taken to address them. But foreseeability needs itself to be understood in a practical sense. Freak accidents can occur against which the most responsible persons may not guard. The duty is to take those precautions which are reasonably and practicably possible in the circumstances of the case, not to make freak accidents absolutely impossible. So, in the present case, it is not by itself sufficient to say that cyclones in general are foreseeable in Mauritius. It is possible that a particular cyclone may occur with unforeseeable characteristics or, perhaps more likely, that it may, in conjunction with other factors, give rise to a freak event against which responsible crane operators cannot be expected reasonably and practicably to guard.

21. The Board notes, in parenthesis, that an approach along these lines appears consistent with that adopted after Hurricane Katrina in United States case-law. In *HRD Corp v Lux International Corp*, 2007 WL 2050366, a bailment case, the US District Court for the Southern District of Texas (citing *Union Pac R.Co v Hartland Barge Mgmt*, 2006 WL 2850064) adopted the definition of an act of God as meaning an "accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected, could have been prevented". This test was followed by the US District Court for the Eastern District of Louisiana in *Coex Coffee International and Insurance Co of North America v Dupuy Storage & Forwarding LLC*, 2008 WL 1884041. Those cases and others are referred to in an interesting article (included in the appellant's authorities) by Professor Kenneth Kristl, *Diminishing the Divine: Climate Change and the Act of God Defense* (2010), Widener Law Review, Vol 15, 325, 360. The author notes that in the post-Hurricane Katrina litigation the focus in United States case-law has been on defendants' hurricane preparation plans.

22. The appellant takes issue with the way in which the Court of Civil Appeal applied its approach to the circumstances of this case. The Board agrees that certain aspects of the Court's judgment are in this respect open to legitimate criticism. The Court's judgment appears to the Board to display several different themes. The first is that cyclones announce themselves several days in advance (para 94). That is no doubt so, but, unless a cyclone announces itself with clarity more than six days in advance, which Cyclone Hollanda certainly did not, the announcement comes too late to do anything about a crane such as the present which requires six days to dismantle. On the evidence, it would have been very foolish to have been caught half way through dismantling the crane when the cyclone struck. In so far as the Court in paragraph 114 of its judgment seems to have suggested that the appellant was or may have been unable to show *force majeure* simply because it did not start dismantling the crane at the time when an area of low atmospheric pressure emerged south of Diego Garcia, because that area of low pressure might develop into a cyclone, that appears to the Board to put the duty on crane operators during the cyclone season much too high, even if it can be seen with hindsight that dismantling would then have been completed

before the cyclone struck. Indeed, in the case of a crane designed to withstand cyclones of the character known to strike Mauritius from time to time, the Board sees no reason why the crane operator should necessarily contemplate dismantling the crane merely because such a cyclone was predicted, even if time did appear to allow such dismantling.

23. The Court's second theme was that Mauritians are familiar with cyclones, but are a resilient people with the means and resources to contain or mitigate their consequences (paras 96-101 and also 122). This is again doubtless the case, but it does not address the present problem which is, what more could or might have been done to avoid the event which befell this crane. No-one suggests that construction work or the erection and use of cranes to build or reconstruct high rise buildings ceases or should cease during the cyclone season.

24. The Court in its third theme went on to acknowledge that, although "the type of cyclones we are used to cannot be regarded for the reasons given [as] *force majeure*", nevertheless "there may occur cyclones of such a nature as may so qualify. In this age of climate change, natural phenomena are taking forms of unprecedented dimensions." This led it to consider whether Cyclone Hollanda was "such a cyclone of the extreme type", and to set out figures for the highest wind gusts over the previous century, which showed that wind gusts in excess of 200 kmph had occurred on most of the occasions which the Board has listed in para 5 above. It does not appear to have been addressed on any other characteristics of this particular cyclone, still less upon any contribution that they might have made to the accident.

25. The Court then referred to evidence given by the appellant's employee, M Curé, an electrician by training, who had worked with the appellant and had experience with cranes since 1988. His evidence had convinced the judge on the issue of *faute*. But the Court of Civil Appeal pointed out that he had singularly failed to give any evidence about the capabilities or suitability of the crane during a cyclone in which wind gusts developed exceeding 200 kmph. Cyclones with wind gusts of over 200 kmph with trajectories hitting Mauritius were, although rare, certainly not unknown in Mauritius. M Curé (who appears to have been responsible only for the operation, not for the selection and suitability of the crane) simply assumed that the crane would be capable of withstanding such a cyclone, if its jib was left free in the manner usual during such events. No evidence was called from the manufacturer, from anyone within the appellant responsible for the selection and use of this crane or from any crane expert. This was so, although, it appears, the appellant had given notice that it had engaged an expert for the trial.

26. M. Curé's evidence, quoted by the Court of Civil Appeal, was as follows:

“Q: En fin de compte, concernant la grue, le technicien voit si c’est bien monté, la grue lorsque c’est installée d’après les données du dessin ?

A: Nous faisons strictement ce qui est demandé dans le livre. Nous faisons tous les tests, tous les réglages de sécurité ; ensuite un ingénieur qui vient vérifier, fait des tests et émet un certificat.

Q: En temps normal ?

A: Oui, quand la machine est montée.

Q: Pas en temps cyclonique?

A: Quoi?

Q: D’après le livre, la grue peut tenir à quelle vitesse de vent?

A : Dans le livre, c’est pas vraiment mentionné aucune part, mais je pense ça devrait tenir à peu près à des vents supérieurs à 200 km selon les spécifications données comme je vous ai dis, nous travaillons selon ce livre, nous faisons ce que ce livre nous recommande – on a toujours fait ca [sic] dans le passé, on n’avait jamais eu de problèmes.

Q: Le livre vous recommande jusqu’ à quelle vitesse de vent ?

A: C’est pas dit.

Q: D’après vous c’est plus de 200 ou de 300 km?

A : Je ne sais pas, je ne suis pas apte à entrer dans les détails techniques.

Q : Est-ce que vous attendiez que la grue allait tomber pendant le cyclone?

A : Non.

Q : C'est tout

.....

.....

Court : He was asked his opinion about what would be the maximum speed of wind that this crane would be able to resist and he expressed the opinion that it may be more than 200 km. Am I right, Sir Marc?

Sir Marc David: Perfectly right, Your Lordship.

XXX 1/332-33 or 2/552-3

27. The Court commented on this evidence in paragraph 117 of its judgment:

"The evidence of this expert witness is to the effect that they went by the books, and to the letter at that, following the Potain Manual. The evidence shows also that they have the *temps normal* in mind when they raise the crane. The clearance certificate is issued with that in mind, once the crane has been erected for operation. That leaves a lot to be desired: Poain Manual is silent on how this artificial structure of over 16 sections tall by 5,750 metres with an overhanging arm of 36 metres long having been imported in a cyclone-prone country would behave in such an environment, more particularly, in cyclonic conditions. And what is more. [sic] General Construction have never seriously bothered about it."

28. The Court commented further on M. Curé's evidence in paragraphs 118-120 of their judgment:

"[118] From the above, it is clear that the cyclone itself did not have any of the characteristics of a *force majeure* and the crane was put up with little thought given to its capacity to resist a cyclone by no means exceptional in intensity or otherwise.

[119] It is our view that where a construction company has put up a man-made structure of such an inverse-L type, of such a height, with an arm of such a length which overhangs people and property, it is not at

> the time of Class 1 warning that it should start bothering about the potential and inherent mischief that such a structure would constitute to life and property, especially in time of a cyclone. The *gardien* of such a *chose* should have done his homework better. He should have carried an up-front assessment of the manner in which his abnormal structure poses risks to the safety and security of life and property well ahead of Class I warning; indeed, well before, from the moment of the very conception of such a structure if it was meant to be imported and used in climates other than cyclone-free France.
>
> [120] As it is, General Construction had never bothered to find out how such a structure made in France in 1973 and imported to be used in Mauritius and bought by itself as a second-hand platform behaves in a cyclonic environment, all the more so when it knows that it cannot be dismantled so easily from the announcement of Class 1 Warning and that such a structure necessarily suffers from metal fatigue in view of its age. No one in his right mind in Mauritius waits for Class 1 warning to start bothering about the capacity of the superstructure he has put up to resist an impending cyclone. What he has to do he has to do well ahead of Class 1. Any failure is at his risk and peril."

29. The appellant complains that the Court's conclusions on this point

> "entirely ignored the evidence that Potain manufactured cranes for use worldwide and that the crane in question had been used by the Appellant in Mauritius for 12 years without any problem."

30. The history of previous cyclones shows, however, that no cyclone with wind gusts over 200 kmph had hit Mauritius during the period since 1985 when this crane was in use there, and there was no evidence of other similar cranes being in use during any cyclone when such wind speeds were experienced. The appellant's attitude, that it must be all right to operate the crane during a cyclone with such wind gusts, was, so far as appeared from the evidence, based neither on enquiry nor on experience. A responsible crane operator is not obliged to ensure a situation in which it is absolutely impossible that an accident could occur. But its duty is to take those precautions which are reasonably and practicably possible in the circumstances of the case. This surely includes checking that its cranes will, at all events barring freak circumstances, be expected to survive cyclones of a type previously known to occur involving wind gusts of over 200 kmph.

31. The appellant complains (case para 80(a)) that "as the point was never raised by the Court [referring apparently to the Court of Civil Appeal but it may be intending

to refer to the judge at first instance] prior to the issue of its judgment, the Appellant was never afforded the opportunity of dealing with it either in evidence or in argument". The point was however the subject of the evidence at first instance which the Board has quoted, and, during the course of submissions in the Court of Civil Appeal, the transcript shows the following exchange took place between counsel for the second respondent and the Court:

> "MR Y ABOO BAKER SC: And, we have in Mauritius we had cyclones with much more wind strength. Therefore, it was *prévisible.*
>
> COURT: The other thing is I haven't seen it. What is the capacity of the crane? What is the wind that it can resist?
>
> MR Y ABOO BAKER QC: I will have a word on that, my Lords because I believe the onus was on the respondent [sic] to bring that to you. Mr Curé comes and says, I believe it must be above 200 kms, 201, 202, 203, we do not know. The onus vested [sic] squarely in view of Article 1384 on the respondent [sic] to bring to your attention".

32. Making allowance for obvious mistakes in the transcript, the sense was and is clear, and the point was raised sufficiently. Mr M Sauzier for the first respondent followed with relevant criticisms regarding the absence of any evidence as to cyclones through which the crane had gone (p.270) and regarding M Curé's inability to say more about the risks or what could be done about them than that he followed Potain's instructions in mounting and dismounting the crane (pp.271-2). Counsel for the appellant, Mr R d'Unienville QC, was present, and could have addressed the Court then, or indeed on the next day when all counsel were back before the Court on another case heard together with this case.

33. The Board considers in these circumstances that the Court's third theme is one which was open to it, and moreover, in the light of M Curé's answers in cross-examination, well-founded. It may be that, if the appellant had called evidence addressing this aspect – the onus being on it to do so – it would have proved that the crane, including its collar in which no defect was evidently found, was designed to withstand cyclones with wind gusts of over 200 kmph and with the other characteristics that such cyclones are known to present. In that event, some specific further cause would have had to be considered; that cause might have been related to some other external event which could be regarded as *irrésistible* - a stone dislodged from the building by the cyclone and falling onto the collar could be an example, or some freak cyclonic action breaking the collar against which a responsible crane operator in Mauritius would not be expected reasonably and practicably to guard by the design of the cranes it acquired and used or by any other means. Combined with

the finding that the crane was properly maintained, there might then have been a good case for treating the accident as being due to *force majeure*. In contrast, a latent defect within the collar (which there was in this case evidently no basis for suggesting existed) would not appear to suffice; it would lack *exteriorité* (quite apart from the fact that it might - possibly, the Board expresses no view - engage liability under a different article of the Code civil - article 1286). On the evidence as it stood, the Board sees, therefore, no reason to differ from the Court of Civil Appeal's conclusion that the appellant has not established that the collapse and consequent damage to the two respondents was caused by an event of *force majeure*.

Interest in favour of second respondent

34. That leaves for consideration the minor point regarding interest. The judge awarded the first respondent "interest at the legal rate as from the date of the notice", i.e. presumably the date of its statement of claim. But he made no reference to any award of interest on the damages he awarded to the second respondent, despite the fact that the second respondent had claimed interest in, and from the date of, its statement of claim issued 11 April 1995.

35. In its judgment dated 31 January 2011, the Court of Civil Appeal said simply that it dismissed the appellant's appeals. But by an "Addendum" on 16 February 2011 it ordered inter alia that the appellant pay interest to the second respondent again from the date of notice. The circumstances in which this occurred are unclear. There was no cross-appeal seeking interest by the second respondent before the Court of Civil Appeal. The second respondent may, perhaps, have raised the matter with the Court, after judgment, though there is no evidence of this and the appellant in its case assumes the contrary. The Court in its judgment on the merits had purported to confirm the trial judge's judgment in relation to both respondents, without mentioning interest even in relation to the first respondent, to which the trial judge had awarded interest. So it is also possible that the initial impetus for the Addendum may have come from the first respondent.

36. The appellant was only informed of the "Addendum" after it was made by a "circular". Through its legal representative on 1 March 2011 it at once swore an affidavit submitting that the Court of Civil Appeal had been *functus officio,* and applied to add to its pre-existing application for permission to appeal to the Board a complaint to this effect regarding the Addendum. Both respondents were represented when the matter came back before the Court of Civil Appeal on the appellant's application for leave to appeal to the Board on both the substance and the interest point. Mr Aboobaker for the second respondent said that his client had no objection to leave being granted, but without any admission as to the grounds. The complaint that the Court of Civil Appeal was *functus officio* is repeated in the appellant's notice of appeal and now pursued before the Board.

37. Rule 44 of the Supreme Court Rules 2000 of Mauritius provides:

> "Clerical Mistakes
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> Clerical mistakes in pleadings, orders or judgments owing to any accidental slip or omission, may at any time be corrected by the Court or by the Master on a motion made to that effect in presence of all parties".

Reliance on this provision could on the face of it have been, but was not, placed by the second respondent before the trial judge. The omission of any award to the second respondent of the interest it had claimed must have been a mistake – an important one in the context of litigation which has been so regrettably drawn out as this has been in the Mauritian courts. The post-judgment Addendum issued by the Court of Appeal could, at least if it had been made on a motion by the first respondent, also be regarded as made under this slip rule, in view of the Court's failure to reiterate the judge's award of interest in its favour.

38. Failing any award of interest in its favour by the trial judge, the second respondent should have given notice of cross-appeal, and the "Addendum" to the Court's judgment in its favour should not have been sought or obtained without prior notice to the appellant. However, there can no real doubt, but that the Court of Civil Appeal would and should have acceded to an application by the second respondent to cross-appeal in respect of interest, if made when the matter was still before it. As to whether the matter was still before the Court, or it was *functus officio*, after it had delivered its judgment on the substantive merits of the appeal on 31 January 2011, the Board retains some residual doubts, partly because it is clear that the Court of Civil Appeal did retain control of the matter for the purpose of hearing and dealing with the application for permission to appeal to the Board, which it determined and dealt with over the period March to June 2011 and partly because of the inflexibility that such a conclusion appears to entail.

39. Once again, the Board is therefore reluctant, but happily it finds it unnecessary, to reach any firm conclusion. What does appear is that, under civil law as practised in Mauritius, a judgment is dated and signed on the day it is pronounced and there is no practice of recording its effect in a separate order. Further, the appellant has produced material which makes a considerable case for saying that the Court of Civil Appeal was thus *functus officio* in respect of any matter of substance, once it had delivered its judgment on the substance on 31 January 2011: see *Encyclopédie Dalloz V° Procédure Vol II F-Z 1956 notes 376-378 and 397.* According to notes 377 -378 once a judge has pronounced judgment publically, he or she cannot withdraw or modify it, because it "belongs to the parties". Note 397 adds that the judge cannot under the pretext of rectifying a slip change even the starting date for the running of interest,

since this would undermine *l'autorité de la chose jugée*, citing a French authority to that effect dating from 3 August 1881.

40. The appellant has, however, very fairly, also put before the Board three prior decisions of the Board, the most recent of which, in which the previous two decisions were considered, is *The Central Electricity Board of Mauritius v Bata Shoe Company (Mauritius) Ltd* (PC Appeal No 36 of 1979). There the Board was concerned with a situation in which judgment had been entered in the Supreme Court for a sum including interest up to the date of judgment, but there was no statute or ordinance in force in Mauritius whereby interest could run or be made to run on the judgment sum. An appeal was taken to and after three years dismissed by the Board. The Board held that it had jurisdiction - rightly or wrongly described in one of the prior cases as a "common law" jurisdiction - to award interest, a jurisdiction founded on the "need, to do, so far as possible, complete justice between the parties".

41. In the present case an order for interest was and is of particular importance in view of the time taken - the Board must say, most regrettably - by both the trial judge and the Court of Civil Appeal to deliver their judgments. The judge should have made an order for interest, and would if asked probably have been able to correct his judgment to do so under the slip rule. The Court of Appeal could have made an order if asked. The Board has little doubt that the Court could also have done so of its own motion to compensate for the long delay before it issued its judgment, though it should then have offered the parties an opportunity to be heard before any order it made for interest was finalised. Here, but only after it had purported to issue the Addendum, the Addendum was brought to the attention of all parties. The second respondent then agreed to leave to appeal to the Board on the point, but made clear that it did not agree to the grounds. Although the second respondent is now in liquidation and not participating in the appeal, it cannot be taken to have wished or to wish anything but the continuation of an order which is in the interests of all its creditors.

42. The matter is now before the Board, over two and a half years after the Court of Appeal's judgment. On the authority of *Bata Shoe* the Board would have jurisdiction to make an order for interest, even if there had not been a purported order to that effect by the Court of Civil Appeal. In the circumstances, all that is necessary is for the Board to determine that, whatever may have been propriety of the order made by the Court of Civil Appeal by the Addendum for interest in favour of the second respondent, an order in the terms of the Addendum is appropriate and should be made, and that interest should continue to run under it at the legal rate from the date of the original statement of claim until satisfaction of the judgment entered in favour of the second respondent.

Conclusions

43. For the reasons given, the Board therefore dismisses the appeal on both the main issue relating to *force majeure* and the ancillary point relating to the award of interest in the second respondent's favour, and makes the order regarding interest indicated in the preceding paragraph.