

COUNCIL OF EUROPE

EUROPEAN COMMISSION OF HUMAN RIGHTS

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY

Application No. 5460/72
by The Firestone Tire and Rubber Company,
Firestone Tyre & Rubber Company Ltd., and
The International Synthetic Rubber Co. Ltd.
against the United Kingdom

The European Commission of Human Rights sitting in private
on 2 April 1973, the following members being present:

MM. G. SPERDUTI, Acting President (Rule 9 of the
Rules of Procedure)

J.E.S. FAWCETT
T.B. LINDAL
E. BUSUTTIL
L. KELLBERG
B. DAVER
T. OPSAHL
K. MANGAN
J. CUSTERS

Mr. A.B. McNULTY, Secretary to the Commission

Having regard to Art. 25 of the Convention for the Protection
of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 28 March 1972
by The Firestone Tire and Rubber Company; Firestone Tyre & Rubber
Company Ltd., and The International Synthetic Rubber Co. Ltd.
against the United Kingdom and registered on 28 March 1972 under
file No. 5460/72;

Having regard to the report provided for in Rule 45, 1 of
the Rules of Procedure of the Commission;

Having deliberated,

Decides as follows:

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THE FACTS

The facts of the case as submitted by the applicants may be summarised as follows:

The first applicant, The Firestone Tire & Rubber Company of Akron, Ohio, United States of America, is a corporation organised under the laws of the State of Ohio. The second applicant, Firestone Tyre & Rubber Company Ltd., of Bretford, England, is a limited liability company incorporated under the laws of England. The third applicant, The International Synthetic Rubber Co. Ltd. of Southampton, is also a limited liability company incorporated under the laws of England.

All three applicants are represented before the Commission by Dr. F.A. Mann, a lawyer practising in London, to whom they have given powers of attorney.

The application has been submitted to the Commission in the following terms:

"The Patent"

1. On 17 January 1963, the General Tire and Rubber Company of Akron, Ohio, USA ('General Tire') was granted Patent No. 737,086 in the United Kingdom for improvements in the manufacture of pneumatic tyres ('the Patent'). The Patent expired on 25 October 1970.
 2. The Patent disclosed a method of softening tough synthetic rubber by the addition of large quantities of oil. This renders the rubber plastic and suitable for processing on tyre making machinery.
 3. The Patent contained 36 claims, almost all of which included as a limitation the direction that 'mastication' (that is, grinding or kneading) was to be avoided or minimised, in any event until the rubber had completely absorbed the oil. Claims 16 and 17 were exceptional and did not contain this limitation.
- 3.A. A United Kingdom patent specification is in two parts, a description of the process, and - at the end - a series of 'claims'. The function of the claims in United Kingdom patent law is to define the area of monopoly of the patent. Each claim is to be considered separately. It follows that if one claim is held invalid in infringement proceedings, other claims are not necessarily invalid. But in that event, the patentee must establish affirmatively that the invalid claim was 'framed in good faith and with reasonable skill' before he can recover any damages or other relief for infringement of the valid claims. The law on these matters is set out in sub-sections (1) and (2) of Section 62 of the Patents Act, 1949. The text is set out below:

'62. (1) If in proceedings for infringement of a patent it is found that any claim of the specification, being a claim in respect of which infringement is alleged, is valid, but that any other claim is invalid, the court shall grant relief in respect of any valid claim which is infringed:

Provided that the court shall not grant relief by way of damages or costs except in the circumstances mentioned in the next following subsection.

(2) Where the patent is dated before the first day of November, nineteen hundred and thirty-two, or the plaintiff proves that the invalid claim was framed in good faith and with reasonable skill and knowledge, the court shall grant relief in respect of any valid claim which is infringed subject to the discretion of the court as to costs and as to the date from which damages should be reckoned.'

The Proceedings

4. The proceedings in question concerned the validity of the Patent. Although infringement was formally in issue, it is not material for the purposes of this application. The proceedings were a consolidation of three actions. Because the issue of validity in all three actions were indetical it is sufficient for present purposes to refer only to one of the three actions, that brought in 1964 by General Tire against the Firestone Tyre & Rubber Company Limited of Brentford, Middlesex, England ('Firestone') a wholly-owned subsidiary of the wellknown United States Company, Firestone Tire and Rubber Company of Akron, Ohio ('Firestone USA'). The other two actions were (i) a petition to revoke the Patent by the International Synthetic Rubber Company Limited ('ISR') and (ii) an action brought by General Tire against Firestone USA, Firestone, ISR and certain other companies.

5. By their Statement of Claim (in the action by General Tire against Firestone) General Tire alleged infringement by Firestone of the Patent. By their Defence and Counterclaim Firestone denied infringement and alleged that each claim of the Patent was invalid. The specific grounds of invalidity upon which Firestone relied were set out in the Particulars of Objections.

6. Among the grounds of invalidity relied upon in Firestone's Particulars of Objections was the allegation that each claim of the Patent lacked novelty in view of, or was 'anticipated' by, the publication in the United Kingdom before the priority date of the Patent (20 November 1950) of two patent applications

"filed in the German Patent Office by Semperit A.G., an Austrian company. The specifications of both these patent applications disclosed a process for mixing tough synthetic rubber with large quantities of oil for the purpose of rendering the rubber soft and suitable for processing on tyre making machinery.

7. The consolidated proceedings were tried in October 1969 by Mr. Justice Lloyd Jacob but he died before he was able to give judgment. A rehearing without oral evidence and based only on the record of the earlier hearing took place before Mr. Justice Graham in April 1970.

8. It was argued on behalf of the Defendants in the action (the present applicants) at the hearing before Mr. Justice Graham that even if the two Semperit patent applications did not disclose a process for mixing oil and rubber in such a way that mastication would be avoided or minimised (with the result that they would not anticipate - and therefore would not invalidate most of the claims of the Patent) they must in any event anticipate - and therefore invalidate - Claims 16 and 17, which, as stated in paragraph 3 above, do not refer at all to 'mastication', much less to the need to avoid or minimise it.

Had this separate argument on Claims 16 and 17 succeeded, General Tire would have been put to proof that those claims were drafted in good faith and with reasonable skill, and had they failed to prove this, they would not have been entitled to damages or other relief for infringement of any of such remaining claims (see paragraph 3.A. above).

Accordingly the separate issue raised by the applicants on Claims 16 and 17 was of crucial importance to the outcome of the case.

9. Mr. Justice Graham gave judgment on 29 June 1970 and held that each claim of the Patent was valid, but did not refer to or deal at all with the separate issue raised on Claims 16 and 17 which is referred to in paragraph 8. He dealt with (and rejected) the argument that the two Semperit patent applications anticipated the Patent, on pages 42 to 44 of his judgment. He held that there were no instructions in either of the Semperit documents to mix the oil with the tough synthetic rubber ('undegraded Buna') so as to avoid or minimise mastication. This point is not relevant in considering whether the Semperit documents anticipate Claims 16 and 17 because neither of those claims refers at all to 'mastication'.

10. On 7 August 1970 the applicants gave Notice of Appeal against the judgment of Mr. Justice Graham. Paragraph 13 of the Notice referred to the separate argument and stated:

'the Judge should have held in any event that Claims 16 and 17 are invalid for lack of novelty and/or obviousness.'

"11. The appeal was heard by the Court of Appeal (Lords Justices Sachs, Buckley and Orr) in April 1971 and the separate issue on Claims 16 and 17 (referred to in paragraph 8) was again developed on behalf of the applicants. General Tire did not make any reply directed specifically to Claims 16 and 17 in their address to the Court of Appeal, and the concluding words of the applicants' Counsel's final reply to the Court were:

'May I remind your Lordships that the Respondents' (i.e. General Tire) 'have not said anything about Claims 16 and 17.'

12. On 23 July 1971 the Court of Appeal gave judgment and dismissed the appeal. Like Mr. Justice Graham, the Court did not refer to or deal at all with the separate issue raised by the applicants on Claims 16 and 17.

The Court of Appeal referred to the two Semperit documents on pages 48 to 53 of their judgment, and found that neither contained any instruction that the compounder was to mix oil and rubber so as to avoid or minimise mastication. Accordingly they held that the Semperit documents did not anticipate the Patent. Like Mr. Justice Graham, the reasoning of the Court of Appeal for rejecting the Semperit documents as anticipations was not relevant to the applicants' separate defence on Claims 16 and 17 because neither of those Claims refers at all to mastication.

13. On 28 July 1971 the Court of Appeal refused leave to the applicants to appeal to the House of Lords. At the hearing that day Counsel for the applicants pointed out that no specific decision had been obtained from any of the four Judges who had then heard the case, on the validity of Claims 16 and 17.

14. On 27 August 1971 the applicants lodged a petition to the House of Lords for leave to appeal to that House. The separate issue on Claims 16 and 17 was fully developed in their petition.

15. The petition was heard by a Committee of the House of Lords on 18 November 1971. In the proceedings before the Committee the separate issue on Claims 16 and 17 was yet again developed by Counsel for the applicants.

16. At the conclusion of the hearing the Committee of the House of Lords rejected the petition for leave to appeal.

17. Accordingly the applicants have exhausted the local remedies available to them in England and they are making this application within six months from the date of the decision of the House of Lords."

COMPLAINT

The applicants complain that they have been the victim of a violation of Art. 6 of the Convention.

Submissions of the applicants in support of their allegation of a breach of Art. 6.

18. The facts hereinbefore summarised establish that what has been described as the separate defence on Claims 16 and 17 of the Patent was not considered either by Mr. Justice Graham or the Court of Appeal. At any rate there is no evidence of any kind that these defences were considered. Accordingly the applicants were denied a fair hearing for this particular separate defence which, as mentioned in paragraph 8 above, was vital to, and capable of disposing of the case as a whole, yet was disregarded by the courts in unexplained and inexplicable circumstances.

On this short but compelling ground the applicants are entitled to relief under Art. 6. If this was not granted it would be tantamount to saying that a Court may, consistently with Art. 6, ignore clearly formulated and fundamental defences of a party to proceedings. The Commission, it is submitted, will not give Art. 6 an interpretation which permits so grave a conclusion.

19. Alternatively, the applicants submit that if, contrary to the evidence, the separate defence was considered by the courts, it was rejected for unstated and, therefore, unknown reasons and that this would be equally inconsistent with Art. 6 which requires a court to give reasons for its decision. Were this not so it would be impossible, as it is in this case, for the parties to ascertain whether their civil rights and obligations have been duly determined. It is for this reason that Mr. J.E.S. Fawcett, The Application of the European Convention on Human Rights (Oxford 1969) says at p. 148:

'Motivation of decision. The requirement that the decision of a court be motivated rests upon the principles that justice must be seen to be done, and the hearing seen to be fair and that procedural obstacles must not be put in the way of appeal or revision by a defective statement of the facts or law on which the decision is based. It is an element in that openness, which is essential in any tribunal.'

20. The submission made in the preceding paragraph is not in conflict with, but on the contrary is supported by, the Commission's decision No. 1035/61, Yearbook VI, p. 180 where it was held that a court of final appeal need not give reasons because they are not material to the party.

"21. In the case of decisions by lower courts, however, reasoning has universally been held to be necessary, one of the principal reasons being that a party is not only entitled to know the reasons for the failure of its case but must know them in order to be in a position to decide whether and on what grounds an appeal should be lodged.

The national systems of law which constitute the background of the European Convention on Human Rights have not left any doubt on this point and in the following paragraphs some of the relevant material will be summarised.

It will make it clear that in regard to the necessity for motivation there is no distinction between patent actions or any other actions. The European Convention on Human Rights guarantees procedural fairness without distinguishing between criminal and civil cases or between groups or types of civil cases.

It requires a wholly general standard of procedural propriety which in unexplained circumstances was manifestly disregarded in the present case.

The separate defence on Claims 16 and 17 of the Patent was, as has been pointed out, material and indeed fundamental to the whole case, but unless a point is frivolous or de minimis there is, as a matter of principle, no room for distinguishing between more or less important or more or less material rights or obligations. The construction of the Convention does not permit any such arbitrary distinctions. If this were not so it would be open to a court simply to dismiss an action or to give judgment against a defendant without saying anything at all about its reasons. The result would be a mockery of the standard of procedural fairness which the Convention guarantees."

The applicants submit that in other countries it is a well established rule that judgments shall be motivated and they cite examples from several European countries, including Belgium, the Netherlands, Cyprus, France and Germany, and also from the United States of America. It is admitted that in England the requirement that courts should give decisions is not expressly laid down either by statute or by judicial authority. The applicants quote however an extra-judicial statement by Lord Denning in which he urges all judges to give reasons for their decisions. They also observe that a duty is imposed on a Minister or administrative tribunal under the Tribunals and Enquiries Act 1958 to furnish a statement of the reasons for their decision if so required.

After developing this line of argument the applicants' submissions continue as follows:

"27. It may, therefore, be submitted with confidence that if contrary to the evidence and the applicants' primary submission the separate defence in the present case is held to have been considered at all, then the absence of motivation renders the hearing unfair within the meaning of Art. 6 of the Convention which is in this respect supported and illumined by the teaching of the national legal systems upon the practice and spirit of which it is based."

The remedy sought by the applicants is set out in the final paragraphs of the application.

"28. The applicants submit that they suffered grave and readily identifiable damage for which they respectfully invite the Commission to hold the British Government responsible in international law.

29. The damage consists in the amount which, as a result of the judgment referred to in paragraph 9 above, they will have to pay to General Tire and for their liability for the costs of General Tire which they have been ordered to pay as a result of such judgment."

The applicants were subsequently ordered to pay approximately £1.4 million damages as a result of the earlier judgment.⁷

30. The applicants appreciate that they cannot say with certainty that the separate defence would have succeeded but they do submit that the defence would in all probability have been successful. As mentioned in paragraph 11 above, no answer was at any time made by the plaintiffs, General Tire. It is indeed difficult to see what the answer would have been but if there was no answer, as the applicants submit, and if Claims 16 and 17 ought to have been held invalid the plaintiffs could not recover damages or other relief unless they proved affirmatively that the bad claims were framed in good faith and with reasonable skill. That they would have succeeded in this is unlikely as the applicants propose to develop if any dispute on this point should occur."

The applicants have submitted a substantial number of documents concerning the English proceedings in support of their application. These include an extract from the transcript of the hearing before Mr. Justice Graham, the complete judgments of Mr. Justice Graham and the Court of Appeal, the Notice of Appeal against Mr. Justice Graham's decision, an extract from the transcript of the hearing before the Court of Appeal, the Petition to the House of Lords for leave to appeal and the transcript of the proceedings before the Appeal Committee of the House of Lords.

THE LAW

1. The first issue to be determined, which has not been expressly raised by the applicants, is whether the proceedings in this case constituted the "determination of civil rights and obligations" within the meaning of Art. 6 (1) of the Convention. The Commission finds that the proceedings between private individuals or groups of individuals in which infringement of a patent is alleged, or in which the validity of a patent is challenged, are clearly within the scope of Art. 6 (1).

It follows that this application cannot be rejected as being incompatible *ratione materiae* with the provisions of the Convention.

2. The second issue that arises is whether the applicants were denied a fair hearing because, as they have argued, either the "separate defence" which they relied on was not considered, or it was rejected for unstated and therefore unknown reasons.

The Commission observes that the applicants' argument is to the effect that the requirement of a fair hearing is not respected if reasons for a decision are missing or incomplete. The Commission accepts the view expressed by the applicants that Art. 6 requires reasons to be given by a court for its decision and considers that this applies to civil as well as criminal proceedings (cf. the decision of the Commission in application No. 1035/61, Coll. 10, pp. 12 and 18, which refers only to criminal proceedings). However, if a court gives reasons, then *prima facie* the requirements of Art. 6 in this respect are satisfied, and this presumption is not upset simply because the judgment does not deal specifically with one point considered by an applicant to be material. It does not follow from Art. 6 that reasons given by a court should deal specifically with all points which may have been considered by one party to be essential to his case; a party does not have an absolute right to require reasons to be given for rejecting each of his arguments. The situation here may be considered to some extent analogous to that under Art. 6 (3) (d) of the Convention, in respect of which the Commission has consistently held that a party does not have an absolute right to have all witnesses called whom he proposes. In each case the domestic court retains a certain measure of discretion. On the other hand if an applicant were to show that the court had ignored a fundamental defence, which had been clearly put before it and which, if successful, would have discharged him in whole or in part from liability, then this would be sufficient to rebut the presumption of a fair hearing and it would be open to the Commission to find that Art. 6 had been violated.

In the present case the Commission has examined the documents submitted by the applicants concerning the proceedings before Mr. Justice Graham, the Court of Appeal and the House of Lords. The Commission first notes that the judgments of Mr. Justice Graham and of the Court of Appeal were long and detailed, containing 76 and 102 pages respectively. It is therefore clear that the present case is far removed from the situation feared by the applicants when they refer to the

danger of a court simply dismissing an action or giving judgment against a defendant without adequate hearing or in any way indicating its reasons. Furthermore, it also appears that the applicants were fully aware whether, and on what grounds, an appeal against each of the judgments could and should be lodged, since they raised the point now submitted to the Commission both to the Court of Appeal, though at that stage only briefly, and subsequently at some length to the House of Lords. The applicants were not therefore put at the sort of disadvantage indicated in paragraph 21 of their application, i.e. that a party must know the reasons for the failure of his case in order to be in a position to decide whether, and on what grounds, an appeal should be lodged.

In view of the long and detailed judgments of the two courts, the Commission finds that *prima facie* the requirement stated above that a court should give reasons for its decision has in the present case been satisfied.

3. The Commission has gone on to consider whether this presumption is rebutted because the applicants' "separate defence" was omitted from the judgments of Mr. Justice Graham and of the Court of Appeal. The Commission has taken into account in particular the following passage from the transcript of the hearing before Mr. Justice Graham which has been submitted by the applicants.

"Mr. MacCRINDLE: Having said that, may I get out of the way one point which is small but not insignificant: I do not know whether one would call it 'appreciable' in the terms of the patent in suit. - This alleged distinguishing feature, this integer of uniform distribution before appreciable deterioration, is not in fact an integer of all the claims of the patent in suit. The point here is a short one. If you look at Claim 16, which happens not to be relied upon in this action, you will not find in that claim - nor, indeed, in such claims as depend on it, 17 - any such integer.

.....

Mr. JUSTICE GRAHAM: You say that, whether or not the other claims are anticipated, those certainly are?

Mr. MacCRINDLE: Those certainly are. Therefore, the patent cannot stand on any view without something being done about them.

Mr. JUSTICE GRAHAM: Without some amendment.

"Mr. MacCRINDLE: Yes, and that will bring in Sec. 62 and so on. Leaving those aside, which are rather specialist claims, one comes to the nub of this, which is this business of appreciable deterioration ..."

The Commission notes especially the reference to: "a small, but not insignificant" point, and the remark that: "that will bring in Sec. 62 and so on".

The Commission observes further that in the Notice of Appeal against Mr. Justice Graham's decision no reference at all was made to Sec. 62 of the Patents Act. The relevant ground of appeal simply reads: "That the Judge should have held in any event that Claims 16 and 17 are invalid for lack of novelty and/or obviousness". Furthermore, although the argument concerning Claims 16, 17 and 21 was developed to a certain extent by the applicants' counsel in the hearing before the Court of Appeal, there is no reference in the extract from the transcript of this hearing to Sec. 62 and reliance upon it. A further study of the documents submitted by the applicants shows that it was not until the applicants were applying to the Court of Appeal and to the Appeal Committee of the House of Lords for leave to appeal to the House of Lords that the arguments concerning this section and its relation to Claims 16, 17 and 21 were in the forefront of the applicants' submissions.

The Commission finds that the applicants:

- (i) in raising the "separate defence" did not represent either to the court of trial or the appellate courts in clear terms in what respects Claims 16, 17 and 21 differed in substance from Claim 1, so that their separate invalidity, if found, could discharge the applicants from liability without further proofs by the Plaintiffs; and in particular they did not show whether the fact that the process, covered by Claims 16, 17 and 21, did not avoid or minimise mastication was an essential or purely secondary feature; and consequently
- (ii) have not shown to the satisfaction of the Commission that the courts were not justified in giving little or no weight to the "separate defence" in their judgments.

The Commission therefore concludes that the presumption that the long and reasoned judgments delivered at different stages in the case rested upon a fair hearing has not been rebutted.

An examination by the Commission of the application as it has been submitted, including an examination made ex officio, does not therefore disclose any appearance of a violation of the rights and freedoms set forth in the Convention and especially in the article invoked by the applicants. It follows that the application is manifestly ill-founded within the meaning of Art. 27 (2) of the Convention.

For these reasons, the Commission

DECLARES THIS APPLICATION INADMISSIBLE

Secretary to the Commission

President of the Commission

(A.B. McNULTY)

(G. SPERDUTI)