Judgment 18.1.70

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
6 DEC 1971
25 RUSSELL SQUARE
LONDON WC1

No.11 of 1969

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N :

GILCHRIST WATT AND SANDERSON PTY. LIMITED — Appellants (Defendants)

- and -

YORK PRODUCTS PTY. LIMITED — Respondents (Plaintiffs)

CASE FOR THE APPELLANTS

RECORD

1. This is an Appeal by leave of the Supreme Court of New South Wales in its Court of Appeal division against a Rule or Order of the Court of Appeal made on 15th October 1968. By the said Order, the Court of Appeal (Mr. Justice Asprey J.A. and Mr. Justice Walsh J.A., Mr. Justice Hardie A.J.A. dissenting) dismissed the Appeal of the Appellants from the Judgment of the District Court of the Metropolitan District of New South Wales (Judge Levine) whereby a verdict was found for the Respondents for $1648.00. Page 90 Page 89 Page 63

2. The only question arising for consideration on this Appeal is whether at any material time the Appellants were bailees of certain goods for the Respondents.

3. The facts upon which this Action was brought were as follows:-

(i) The Respondents are and at all material times were engaged (inter alia) in the importation of goods into Australia. The Appellants are

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and at all material times were the Sydney Agents of overseas carriers including a shipping company called "Norddeutscher Lloyd" (hereinafter called "the Carrier"). In addition the Appellants conducted in Sydney the business of stevedores under the name "Central Wharf Stevedoring Company".

Page 6 lines 6-12

(ii) The Respondents purchased two cases of alarm clocks from a seller in West Germany. The said cases (hereinafter called "the goods") were shipped on board the Norddeutscher Lloyd vessel "Regenstein" at Hamburg, under an Order bill of lading which named the seller's forwarding agent as shipper, and which named Sydney as the port of discharge. The bill of lading was subsequently forwarded to the Respondents in Sydney.

Page 6 lines 22-26

Page 15 lines 1-2

(iii) On 29th September, 1962, the "Regenstein" berthed at a wharf in Sydney Harbour.

Pages 20-22

(iv) On 2nd October, 1962, the goods were unloaded from the ship and were sorted and stacked into a shed on the wharf by stevedores employed by the Appellants, a record of the whereabouts of the goods being kept by a stacking clerk, employed by the Appellants.

Page 25 Page 27 lines 28-35

(v) The key of the shed was obtained by an employee of the Appellants at the commencement of work each morning from a Customs Officer, to whom it was returned at the close of business.

Page 7 lines 9-13

(vi) The Respondents engaged Frank Cridland Pty. Limited (hereinafter called "the Customs Agent") to clear the goods through customs and to remove the goods from the wharf.

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(vii) The Customs Agent then indorsed the bill of lading in blank. — Page 20

(viii) On 5th October 1962, the Customs Agent, on behalf of the Respondents, paid to the Maritime Services Board, the statutory authority for the Port of Sydney, the sum of eight shillings and nine pence (8/9d.) in respect of wharfage charges on the goods. — Page 7 lines 9-10; Pages 16-18

(ix) On 8th October 1962 the Customs Agent paid to the Appellants the sum of ten shillings and one penny (10/1d.) in respect of stacking sorting and handling charges, and the Appellants stamped on the bill of lading the words "Please Deliver". — Page 15 lines 1-4; Page 18 lines 7-10; Page 19 lines 19-20; Page 53

(x) On 8th October 1962, after the said sum of 10/1d. had been paid to the Appellants, the Customs Agent presented the bill of lading to a delivery clerk employed by the Appellants, and received in exchange a loading ticket. — Page 32 lines 27-40; Page 34

(xi) The Customs Agent then presented the delivery ticket to the stacking clerk. — Page 26

(xii) In the ordinary course of events, the stacking clerk would have located the goods for the Customs Agent; the latter would have then taken the delivery ticket to the shed clerk, who would have issued a gate pass, enabling the goods to leave the wharf. — Page 24; Page 32 lines 34-40; Page 32

(xiii) In the present instance, however, the one of the two cases could not be found when the Customs Agent presented the delivery ticket to the stacking clerk, and the said case has never been delivered to the Respondents. — Page 26; Page 33 lines 18-24

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Page 54 & 58

(xiv) The wages of the delivery clerk and watchman were paid in the first instance by the Appellants, but were then debited to Norddeutscher Lloyd.

Pages 2-3
Pages 93-95
Page 82 lines 1-8
Page 88 lines 16-29

5. On these facts, the Respondents claimed damages from the Appellants in respect of the loss of the missing case. The claim was founded on an allegation that the Appellants were in breach of duty as bailees (either gratuitous or for reward), and it was neither pleaded nor argued that the Appellants owed any duty of care to the Respondents otherwise than by virtue of the alleged bailment.

By their defence the Appellants -

(i) denied that they were at any time bailees of the goods for the Respondents, or alternatively that they were bailees thereof for the Respondents at the time of the loss;

(ii) alleged that if a bailment did exist it was upon the terms that the goods were held at the Respondents' risk and that the Appellants were not liable for any loss;

(iii) denied breach of the duty to take care as alleged.

Page 60 lines 6-12
Page 85 lines 44 to Page 86 line 1

6. At the trial the learned District Court Judge held that there had not been made between the Appellants and the Respondents any express agreement of bailment but that a bailment was created after the Appellants notified the Respondents that they had their goods on the wharf and that the Appellants became a Bailee when, having obtained possession and control of the Respondents' goods, they acknowledged to the Respondents that they held the goods for the Respondents. There was, however, no evidence before His Honour of a notification or acknowledgment by the Appellants that they held the goods for or on behalf of the Respondents and Counsel for the Respondents so conceded before the Court of Appeal.

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Nevertheless, His Honour found that the Respondents was in possession of the Appellants' goods, not pursuant to any agreement between them and not for reward, but as a gratuitous bailee. His Honour was not satisfied that the loss of the goods was not the result of a failure by the Appellants to take reasonable care and accordingly, entered a verdict for the Respondents for eight hundred and twenty-four pounds (£824.0.0d.). Page 62.

From this Judgement the Appellants appealed to the Court of Appeal of the Supreme Court of New South Wales.

7. The Appellants did not, and do not now, challenge the finding of the learned trial Judge that if there was a relationship of bailment between themselves and the Respondents, and if the onus was on the Appellants to prove that the loss of the goods occurred without negligence on their part, the Appellants have not discharged this onus.

8. The Appeal was heard by the Court of Appeal on 25th, 26th and 27th September 1968 and on 15th October 1968 Judgment was delivered. Two members of the Court (Walsh and Asprey J.A.) were of opinion that the Appeal should be dismissed; the third member of the Court (Hardie A. J. A.) was of opinion that the Appeal should be allowed and a verdict entered for the Appellants. The order of the Court therefore was that the Appeal be dismissed.

9. Asprey J.A. (with whose reasons for judgment Walsh J.A. agreed) held that from the moment the goods were landed on the wharf the Appellants had exclusive physical possession of them; that the carrier thereafter had no proprietary or other interest in the goods because the Bill of Lading was exhausted except for a contractual obligation to deliver the goods to the holder of the Bill of Lading; that the Respondents' physical possession of the goods was not possession by the carrier; Page 75 lines 27-50

Page 76 lines 20-24

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and that the carrier's bailment was determined when it sub-bailed the goods to the Appellants.

Page 86 lines 33-38

10. Hardie A.J.A. on the other hand held that the obligation of the carrier under the Bill of Lading to deliver did not come to an end when the goods were unloaded from the ship but continued until delivery to the consignee. His Honour said that the learned District Court Judge after pointing out that the Appellants came into possession and control of the goods in the first place in their capacity as agents for the carrier had held that their duties as such agents were completed when they notified the Respondents that they had the Respondents' goods on the wharf. It was not disputed by Counsel for the Respondents that there was no evidence before the learned District Court Judge of a notification or acknowledgement by the Appellants that they held the goods for or on behalf of the Respondents.

Page 86 line 44 Page 87 line 4

The verdict for the Respondents could only stand if the proper inference to draw from the relevant facts - which were not in dispute - was that at a point of time prior to their loss possession of the goods had passed from the carrier to the Appellants. Such control and custody as the Appellants had was referable to their duties as ship's agent i.e. to ensure compliance with certain statutory obligations of the carrier and to enable the carrier to exercise its rights and perform its obligations contained in the Bill of Lading. The fact that the goods were held in a shed belonging to the Maritime Services Board awaiting delivery to the holder of the Bill of Lading did not afford any evidence that the carrier gave up or was deprived of the possession which it had under the Bill of Lading. A very similar point was decided by the Supreme Court of Victoria in Duncan Furness & Co. Pty. v. R.S.Couche & Co. [1922] V.L.R. 660 and the reasoning applied in that decision supported the view that in the instant case possession of the goods remained through the relevant period in the carrier and that its local agent had no liability as bailee for the consignee.

Page 87 lines 20-40

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11. The Appellants respectfully submit that the dissenting judgment of Hardie A.J.A. is to be preferred to those of the learned trial Judge and of the majority in the Court of Appeal. The Appellants' contentions may be summarised as follows :-

(1) The shipowners remained in possession of the goods until the moment of the loss. Their possession did not terminate with discharge onto the quay.

(2) The Appellants were never in possession of the goods. Alternatively,

(3) If the Appellants had possession of the goods, they did so as bailees for the shipowners, not for the Respondents.

12. As to the first contention, the Shipowners came into possession of the goods at the time of shipment in Hamburg. In the Appellants' submission nothing happened to terminate this possession before the goods were lost. They respectfully submit that Asprey J.A. was in error in holding that under the terms of the Bill of Lading, the carrier fulfilled its obligations as to delivery when the goods were discharged from the ship and free from ship's tackle and that the Bill of Lading was then exhausted. These findings are not in accord with the reasoning applied by the House of Lords in its decision in Barber v. Meyerstein (1870) L.R. 4 H.L.317 where Lord Hatherley L.C. said (at p.329)

Page 75 lines 28-39

> "The next proposition of law we have to consider is this laid down by all the Judges who have delivered opinions in this case, and, as it appears to me correctly laid down by them. It is stated by Mr. Justice Willes in his very elaborate judgment in which he says 'I think the bill of lading remains in force at least as long as complete delivery of possession of the goods has not

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been made to some person having a right to claim then under it.' Mr. Justice Keating says, in the same way, that he considers 'there can be no complete delivery of goods under a bill of lading until they have come to the hands of some person who has a right to the possession under it'" ...

Lord Hatherley continued (at p.330):

"When /the goods/ have arrived at the dock, until they are delivered to some person who has the right to hold them the bill of lading still remains the only symbol that can be dealt with by way of assignment, or mortgage, or otherwise. As soon as delivery is made, or a warrant for delivery has been issued, or an order for delivery accepted (which in law would be equivalent to delivery) then these symbols replace the symbol which before existed. Until that time the bills of lading are effective representation of the ownership of the goods and their force does not become extinguished until possession, or what is the equivalent in law to possession, has been taken on the part of the person having a right to demand it."

Reliance is also placed on Barclays Bank Ltd. v. Customs & Excise /1963/ 1 Lloyd's Rep. 81.

13. The Appellants respectfully submit that there is no provision of the bill of lading which assists the Respondents. Clause 4, upon which the Respondents relied as showing that the Shipowners parted with possession when the goods were released from ship's tackles has no bearing in the present dispute, since that Clause is concerned only with the situation which arises when the vessel is diverted in an emergency to an alternative port of discharge (as in Renton v. Palmyra /1957/ A.C. 149), and is not concerned with events at the named port of destination. Indeed, the express terms of

Pages 101-2

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the bill of lading support the Appellants' contention, since it conferred on the Shipowners a lien, not only for freight but also for various charges: Clauses 2, 12 and 15. Such a lien would be worthless if the Shipowners lost possession immediately on discharge. Reference may also be made to the preamble of the bill of lading, where it is stated that the cargo is to be taken to the port of discharge "and there to be delivered or trans-shipped on payment of the charges thereon, and on due performance of all obligations of the shipper and consignee and each of them."

Page 100 lines 36-46
Page 107 lines 25-41
Page 109 lines 34-38
Page 98 lines 15-19

14. The Appellants' second contention is that they were at no time bailees of the goods on behalf of any bailor. It is true that they handled the goods, and exercised physical control over them, but these acts were carried out in the course of the Appellants' duties as stevedores and ship's agents, and they did not cause the Appellants to become bailees of the goods, any more than the stevedores in Midland Silicones Ltd. v. Scruttons Ltd. [1962] A.C. 446 were bailees.

15. The Appellants' third contention is that if they had possession of the goods at any time they did so as bailees for the Shipowners, not the Respondents. If a bailment ever came into existence, it must have done so when the Appellants first began to handle the goods. At this time, the Shipowners retained possession, and the bill of lading remained in force; so that it was for the Shipowners that the Appellants were bailees, if at all. Nothing happened thereafter to change the character of this bailment. The acts of the Appellants were referable either to their work as stevedores (which did not involve a bailment) or to their duty as ships agents to ensure compliance with the Customs Act and Regulations and the Maritime Services Act and Regulations, or to other their duties as ship's agents. The latter extended to doing, on behalf of the carrier, one or more of the following things :-

In Pocket

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(a) retaining some control over or access to the goods to enable the consignee to collect them;

(b) ensuring that any claimant to the goods produced proper documentary title;

(c) exercising, if necessary, the lien which is retained by the carrier until the goods are collected.

In respect of all these matters such custody or possession of the goods as the Appellants had was derived from and exercised on behalf of the carrier, not the Respondents.

16. It is true that if the Appellants had, with the consent of the shipowners, acknowledged to the Respondents that they thereafter held the goods on the latter's behalf - i.e. if they had attorned to the Respondents - then the bailment (if such there was) would have been transformed into a bailment for the Respondents. It was, however, conceded by Counsel for the Respondents, on the hearing of the Appeal, that there was no evidence of a notification or acknowledgment by the Appellants that they held the goods for or on behalf of the Respondents. The only act which might be relied upon by the Respondents is the stamping of the words "Please Deliver" on the bill of lading. There is no evidence that this happened before the loss of the goods, so that even if a bailment was created, this occurred too late to found the Respondents' claim.

Page 85 lines 44- Page 86 line 1

17. Finally, the Appellants rely on the decision of the Full Court of the State of Victoria in Duncan Furness Pty. Ltd. v. Dalgety & Co.Ltd. [1922] V.L.R. 660 which in the Appellants' submission is directly in point. The previous decision of McArthur J. in Makower, McBeath & Co. Pty. Ltd. v. Dalgety & Co. Ltd. [1921] V.L.R. 365 may be distinguished on the ground that the Plaintiffs took away part of their cargo, and left behind the part which was subsequently lost. This was held to constitute an authorisation by the Plaintiffs

to the Defendants to hold the goods on their behalf. If Makower, McBeath v. Dalgety cannot be distinguished on this ground, it cannot stand with Duncan Furness v. Dalgety, and in the Appellants' submission was wrongly decided.

SUBMISSION

The Appellants therefore respectfully submit that the order of the Supreme Court of New South Wales in its Court of Appeal Division should be set aside and this Appeal be allowed for the following (amongst other)

R E A S O N S

1. BECAUSE the Shipowners retained possession of the goodsuntil the time of the loss.

2. BECAUSE possession of the goods did not pass to the Appellants at any point of time prior to their loss.

3. BECAUSE the Respondents were in possession of the goods, if at all, as bailees for the Shipowner.

4. BECAUSE the Appellants never became bailees of the goods of the Respondents.

5. BECAUSE neither by contract nor otherwise did the Appellants at any time acknowledge to the Respondents that they held the goods for the Respondents.

6. BECAUSE the judgments of Mr. Justice Walsh J.A. and Mr. Justice Asprey were wrong and should be reversed.

7. BECAUSE the judgment of Mr. Justice Hardie A.J.A. was right and should be upheld.

M.J. MUSTILL

S.O. OLSON

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B E T W E E N :

GILCHRIST WATT AND SANDERSON PTY. LIMITED
Appellants
(Defendants)

- and -

YORK PRODUCTS PTY. LIMITED
Respondents
(Plaintiffs)

CASE FOR THE APPELLANTS

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