

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No. 6 of 1976

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR

B E T W E E N :

THE PORT SWETTENHAM AUTHORITY

Appellants
(2nd Defendants)

- and -

T.W. WU AND COMPANY (M) SDN. BHD.

Respondents
(Plaintiffs)

RECORD OF PROCEEDINGS

Stephenson Harwood & ~~Partners~~,
Saddlers' Hall,
Gutter Lane,
~~Chancery Lane~~,
London EC2V 6BS.

Appellants Solicitors

Waltons & Morse,
Plantation House,
31/35 Fenchurch Street,
London E.C.3.

Respondents Solicitors

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RECORD OF PROCEEDINGS

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IN THE JUDICIAL COMMITTEE
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No. 6 of 1976

O N A P P E A L
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B E T W E E N :

THE PORT SWETTENHAM AUTHORITY

Appellants

- and -

T.W. WU AND COMPANY (M) SDN. BHD.

Respondents

RECORD OF PROCEEDINGS

No. 1

In the High
Court

Statement of Claim

—
No. 1

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Statement of
Claim

Civil Suit No. 5 of 1971

11th January
1971

Between

T.W. Wu & Company (M) Sdn. Bhd.

Plaintiff

and

1. The Sanko Asia Line Ltd.

2. The Port Swettenham Authority

Defendants

10

SPECIALLY INDORSED WRIT

The Honourable Tan Sri Ong Hock Thye, P.S.M.,
D.P.E.S., Chief Justice of the High Court, Malaya,
in the name and on behalf of His Majesty the Yang
di-Pertuan Agong.

To:-

1. The Sanko Asia Line Ltd.,
c/o C.F. Sharp & Co. (M) Sdn. Bhd.,
Sime Darby Building, Port Swettenham
2. The Port Swettenham Authority,
Port Swettenham.

20

In the High Court

No. 1

Statement of Claim

11th January 1971
(continued)

WE COMMAND YOU, that within eight days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of T.W. Wu & Company (M) Sdn. Bhd.

AND TAKE NOTICE that in default of your so doing the Plaintiff may proceed therein and judgment may be given in your absence.

WITNESS, Zaitoon Binti Dato Othman, Senior Assistant Registrar of the High Court in Malaya, this 11th day of January, 1971.

10

Sd: Shearn Delamore & Co. Solicitors for the Plaintiff.

Sd: Zaitoon Binti Dato Othman, Senior Assistant Registrar, High Court, Kuala Lumpur.

(S E A L)

N.B. - This Writ is to be served within twelve months from the date thereof, or, if renewed, within six months from the date of last renewal, including the day of such date, and not afterwards.

20

The Defendant (or Defendants) may appear hereto by entering an appearance (or appearances) either personally or by solicitor at the Registry of the High Court at Kuala Lumpur.

A Defendant appearing personally, may, if he desires, enter his appearance by post, and the appropriate forms may be obtained by sending a Postal Order for \$3/- with an addressed envelope to the Registrar of the High Court at Kuala Lumpur.

30

If the Defendant enters an appearance he must also deliver a defence within 14 days from the last day of the time limited for appearance, unless such time is extended by the Court or a Judge, otherwise judgment may be entered against him without notice, unless he has in the meantime been served with a summons for judgment.

STATEMENT OF CLAIM

1. The First Defendant was at all material times a Carrier of goods for reward from the Port of Hongkong to Port Swettenham and the owner of the vessel "SANSRI MARU".

40

2. The second Defendant is a body incorporate incorporated under the Port Authorities Act 1963.

In the High Court

3. By Bills of Lading dated the 27th March and 28th March and numbered 310 and 311 respectively there was shipped in good order and condition aboard the vessel "SANSRI MARU" at the Port of Hongkong 93 cases of pharmaceuticals for carriage to and delivery at Port Swettenham to the Plaintiff. The said vessel arrived at the aforesaid Port on or about the 5th April 1970.

No. 1

Statement of Claim

11th January 1971

(continued)

10

4. The said Bills of Lading were delivered to the Plaintiff and the property in the said goods passed to the Plaintiff by reason of such delivery.

5. In breach of contract contained in or evidenced by the said Bills of Lading and/or in breach of its duty as Carrier the First Defendant did not deliver the full consignment of the said goods under the Bills of Lading whereby the Plaintiff has been deprived of the goods not delivered and has suffered damage.

20

6. In the alternative the Plaintiff states that the said consignment was delivered in full on or about the 5th April 1970 and in the like good order and condition to the Second Defendant and that the Second Defendant by accepting such delivery impliedly agreed with the Plaintiff as holders of the said Bills of Lading to deliver the said goods to the Plaintiff on demand and in the like good order and condition.

30

7. In the premises the Plaintiff has suffered loss:-

64 Cases of pharmaceuticals ... \$21,236.04

8. It was the duty of the First Defendant as Carrier and of the Second Defendant as bailee or the Defendants impliedly contracted to exercise reasonable care for the safety of the said goods in or about the delivery of the same to the Plaintiff.

40

9. In breach of the said duty or contract the Defendants, their agents or their servants failed to take reasonable care and were guilty of negligence or wilful default in that behalf whereby the Plaintiff suffered loss.

In the High
Court

No. 1

Statement
of Claim

11th January
1971

(continued)

PARTICULARS OF NEGLIGENCE

10. (a) Failure to ensure the delivery of goods as contained in the Bill of Lading to the Plaintiff;
- (b) Failure to take proper and safe care of their goods;
- (c) Failure to take proper steps to ascertain that the amount of the goods were intact;
- (d) Failure to provide or maintain proper supervision of the goods at the time of delivery. 10

PARTICULARS OF LOSSES

11. The Plaintiff repeats paragraph 7 hereof.
12. In the alternative the Plaintiff says that the Defendants their agents or their servants wrongfully converted the said undelivered goods as a consequence whereof the Plaintiff has suffered the loss set out in paragraph 7 above.
13. And the Plaintiff claims:-
- (a) \$21,236.84; 20
- (b) interest on the above sum from the 5th April 1970 continuing until judgment or payment;
- (c) damages;
- (d) other relief as may be just and proper; and
- (e) costs.

Dated this 7th day of January, 1971.

Sd: Shearn Delamore & Co.
Solicitors for the Plaintiff. 30

And the sum of \$45.00 (or such sum as may be allowed on taxation) for costs, and also, in case the Plaintiff obtains an order for substituted service, the further sum of \$200.00 (or such sum as may be allowed on taxation). If the amount

claimed be paid to the Plaintiff or his advocate and solicitor or agent within four days from the service hereof, further proceedings will be stayed.

In the High Court

—
No. 1

Statement of Claim

11th January 1971

(continued)

10

Provided that if it appears from the indorsement of the Writ that the Plaintiff is resident outside the schedule territories as defined in the Exchange Control Ordinance, 1953, or is acting by order or on behalf of a person so resident, or if the Defendant is acting by order or on behalf of a person so resident, proceedings will only be stayed if the amount claimed is paid into Court within the said time and notice of such payment in is given to the Plaintiff, his advocate and solicitor or agent.

This Writ was issued by Messrs. Shearn Delamore & Co., and Drew & Napier of No. 2 Benteng, Kuala Lumpur, whose address for service is at No.2, Benteng, Kuala Lumpur, Solicitors for the said Plaintiffs whose place of business is at No. 40 Jalan Ampang (1st Floor), Kuala Lumpur.

20

This Writ was served by me at
on the Defendant on _____ the _____ day
of _____ 1971 at the hour of _____.

Indorsed this _____ day of _____ 1971.

No. 2

Defence of First Defendant

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Civil Suit No. 5 of 1971

Between

T.W. Wu & Company (M) Sdn. Bhd.

Plaintiff

30

And

1. The Sanko Asia Line Ltd.

2. The Port Swettenham Authority

Defendants

STATEMENT OF DEFENCE
OF FIRST DEFENDANT

1. The First Defendant admits paragraphs 1, 2, 3 and 4 of the Statement of Claim.

No. 2

Defence of
First
Defendant

2nd October
1971

In the High Court

No. 2

Defence of First Defendant

2nd October 1971 (continued)

2. In reply to paragraph 5 of the Statement of Claim the First Defendant states that the goods referred to in paragraph 3 of the Statement of Claim were delivered in like good order and condition unto the custody of the Second Defendant and in accordance with the terms and conditions of the Bills of Lading.

3. The First Defendant denies paragraphs 7, 8, 9, 10, 11, 12 and 13 of the Statement of Claim.

4. The First Defendant shall rely upon the terms and conditions of the Bills of Lading for its full force and effect.

10

5. Wherefore the First Defendant prays that the Plaintiff's claim be dismissed with costs.

Sd: Lovelace & Hastings
Solicitors for the 1st Defendant

Delivered this 2nd day of October 1971

No. 3

Defence of Second Defendant

19th July 1971

No. 3

Defence of Second Defendant

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Civil Suit No. 5 of 1971

20

Between

T.W. Wu & Company (M) Sdn. Bhd.

Plaintiff

And

1. The Sanko Asia Line Ltd.

2. The Port Swettenham Authority

Defendants

STATEMENT OF DEFENCE

1. Paragraph one (1) of the Statement of Claim is not admitted.

2. Paragraph two (2) of the Statement of Claim is admitted.

30

3. Save and except that the Second Defendant

admits that the vessel "SANSRI MARU" arrived at Port Swettenham on or about 5th April, 1970 paragraph three (3) of the Statement of Claim is denied.

In the High Court

—
No. 3

4. The Second Defendant denies that the consignment was delivered to the 2nd Defendant in full. The Second Defendant only received twenty-nine (29) cases of the said goods and the same have been delivered to the 2nd Defendant in full and the 2nd Defendant shall rely on Rule 94 of the Port By-Laws.

Defence of
Second
Defendant
19th July
1971
(continued)

5. The Second Defendant denies that it or its servants or agents were negligent as alleged in paragraph nine (9) of the Statement of Claim.

The Second Defendant took proper care of the goods delivered until they were redelivered to the Plaintiff.

6. The Second Defendant further denies that it or its servants or agents wrongfully converted the alleged undelivered goods as alleged in paragraph twelve (12) of the Statement of Claim.

7. The Second Defendant denies that the Plaintiff has suffered loss as alleged or at all. If, which is denied, it is liable, the Second Defendant's liability shall not exceed that set out in Rule 91(2) of the Port By-Laws.

8. Further the Second Defendant shall rely on Rules 91(i) and 92 of the Port By-Laws wherever applicable.

Save and except hereinbefore expressly admitted the Second Defendant denies each and every allegation contained in the Statement of Claim as if the same were herein set out and traversed seriatim.

The Second Defendant therefore prays that the Plaintiff's claim be dismissed with costs.

Dated this 19th day of July, 1971.

Sd. Skrine & Co.
Solicitors for the Second
Defendant abovenamed.

In the High Court

—
No. 3

Defence of
Second
Defendant

19th July
1971
(continued)

No. 4

Notes of
Proceedings

22nd April
1974

This Statement of Defence is filed by Messrs. Skrine & Co., Straits Trading Building, No. 4, Leboh Pasar Besar, Kuala Lumpur, Solicitors for the Second Defendant abovenamed.

No. 4

Notes of Proceedings

In the High Court in Malaya
at Kuala Lumpur,

In Open Court,

Before Abdul Hamid, J.,

This 22nd day of April, 1974

10

Civil Suit No. 5/1971:

Mr. C.W.M. Abraham for Plaintiffs.

Mr. N.A. Marjoriebanks with Mr. Lall Singh Mukher for First Defendant.

Mr. James Puthuchearry with Mr. Wong Chong Wah for Second Defendant.

Agreed Bundle - A.B.

Plaintiffs
Evidence

No. 5

Abdullah
bin Sati
Examination

22nd April
1974

No. 5

Evidence of Abdullah bin Sati

20

PWL: Abdullah bin Sati, affirmed, speaks in English. 312 Jalan 14, United Garden, Klang Road, Kuala Lumpur. Regional Sales Director. Synco Hongkong Limited.

Before joining Synco I was with T.W. Wu & Company until the end of September, 1971. I was the Manager and Director. The Plaintiff Company was dealing in pharmaceutical products.

In April 1970 there was a consignment from Hongkong for the Plaintiff Company.

(Pages 19 & 20 AB referred). This is the Bill of Lading in respect of the consignment. Pages 22, 23 and 24 are the packer's record relating to the consignment.

Pages 25, 26 and 27 are the supplier's invoice.

10 Altogether there were 93 cases of pharmaceutical goods. We only received 29 cases. Din's Trading Sendirian Berhad were our forwarding agents. I made a police report in connection with the particular consignment.

(Page 21 AB referred). This is the report.

20 (Last paragraph referred). Q: How did you get this information? A: When our salesman called on doctors they received a tip off that Kuala Lumpur Pharmacy Sendirian Berhad were dispensing some of those missing goods. This information was received from Abdul Hai c/o Nainam Shah. I accompanied the police to the Kuala Lumpur Pharmacy. We went to raid the premises of the Kuala Lumpur Pharmacy on 20.7.70 with a group of police personnel and we searched the place. We discovered part of those missing ones. I went with Chief Inspector Koh Kim Fook. The other officers who subsequently investigated into the matter were Inspector Hussain Ja'al and a police sergeant.

30 One Lee Cheong Fatt, proprietor of the Kuala Lumpur Pharmacy Sendirian Berhad, was charged in Court. /See Arrest Case No. 356/70 - Klang Magistrate's Court/. I gave evidence there.

In respect of the lost goods I corresponded with Port Swettenham Authority and Messrs. C.F. Sharp & Company (Malaya) Sendirian Berhad, agents of the first Defendant.

40 I produce correspondence between the forwarding agents and Messrs. C.F. Sharp & Company (Malaya) Sendirian Berhad. (Witness reads out letter dated 16.4.70 from Messrs. C.F. Sharp & Company (Malaya) Sendirian Berhad - marked P1).

(Reply from Port Swettenham Authority dated 29.4.70 - marked P2).

In the High Court

Plaintiffs Evidence

No. 5

Abdullah bin Sati

Examination

22nd April 1974

(continued)

In the High Court

Plaintiffs Evidence

No. 5

Abdullah bin Sati

Examination

22nd April 1974

(continued)

I produce Customs Declaration. (Marked P3).

On 6.4.70 I wrote to the forwarding agents to collect the goods. (Letter produced and marked P4).

I produce delivery orders pertaining to the consignment. (Marked P5 A and B).

The forwarding agents informed us that they made a search for the missing cases but they could not find them.

(Two letters from forwarding agents produced and marked P6 A and B).

10

As far as the Plaintiffs' goods are concerned, no other company imports these goods.

I can identify the goods if they are shown to me. The labels were printed bearing our factory name T.W. Wu & Co. Ltd.

So far as this particular consignment was concerned it was nothing special.

Cross-examination

Cross-examination by Mr. Marjoriebanks:

(Pages 19 and 20 AB referred). The ones we received had no prints at the back.

20

Cross-examination by Mr. James Puthuchear:

No criminal case: The accused was discharged not amounting to acquittal. No member of the Port Swettenham Authority was charged for stealing. No member of the Port Swettenham Authority was charged for aiding or abetting.

Re-examination: No.

No. 6

No. 6

Abdul Hai s/o Nainan Shah

Evidence of Abdul Hai s/o Nainan Shah

30

PW2: Abdul Hai s/o Nainan Shah, affirmed speaks in English. Sales Representative of Pharmaceutical goods Synco. No. 84, Jalan Ampang, Bangunan Denmark.

In 1970 I was employed by the Plaintiff

company. In April 1970 there was a consignment of Plaintiffs' goods from Hongkong. The entire shipment did not reach the Plaintiff company. I gave information to PW1. I found part of the consignment in a van in Pudu Road. The van belonged to Kuala Lumpur Pharmacy Sendirian Berhad. My attention was attracted before the particular item which I saw was not delivered to us by our forwarding agents. This was Chemimycin w/calcium cap. which was never imported before.

10

Cross-examination by Mr. Marjoriebanks: - No.

Cross-examination by Mr. Puthucheary: - No.

No. 7

Evidence of Ng Boon Bee

PW3: Ng Boon Bee, affirmed speaks in English. Chief Forwarding Clerk, Din's Trading Sendirian Berhad.

20

We were the forwarding agents for the plaintiff company. On 6.4.70 I received P4. After receipt of the Bill of Lading I surrendered both the Bills of Lading to the ship's agent - Messrs. C.F. Sharp & Co., (Malaya) Sendirian Berhad. The delivery order was obtained and I declared to the Customs.

(P3 referred). This was declared by me. We received two original Bills of Lading. (Two Bills of Lading referred to). The originals were handed to the ship's agent when we obtained the delivery order. (Two Bills of Lading marked P7 and P8).

30

After getting the delivery orders I made Customs declaration. I accompanied the customs to examine the goods. The customs examined the goods at Shed No. 8 and the paper was passed and duty was paid. The examination was done on the following day - 10.4.70. When the Customs examined the goods - all the cases - 93 of them were there. I counted them. The Customs Officer counted them.

40

Q: "Removal from Customs Control authorised by" - at the bottom - what is meant by this?
 A: The purpose is to show that the goods had been examined, the duty had been paid and the goods could be removed.

In the High Court

Plaintiffs Evidence

No. 6

Abdul Hai s/o Nainan Shah

Examination

22nd April 1974

(continued)

No. 7

Ng Boon Bee

Examination

22nd April 1974

In the High Court

Plaintiffs Evidence

No. 7

Ng Boon ee

Examination

22nd April 1974

(continued)

To remove the goods from Shed No. 8, we had to pay the inward cargo charges - (pages 29 to 32 AB). The charges were paid on 10.4.70 in respect of the 93 cases.

(Page 29 AB referred. Under "Description" - No. of Cases - 13. Commodity is classified as "special" - for purposes of Port Charges.)

(Page 30 AB referred. Under "Description" - No. of Cases 80. Commodity is classified as "special" - for purposes of Port Charges). 10

(Page 31 AB referred. Under "Description" - No. of Cases 10. Commodity is classified as "special" - for purposes of Port Charges).

Out of the 13 cases on page 29 AB only 3 cases were cleared. (See back of page 29 AB).

Out of the 80 cases on page 30 AB only 23 cases were cleared.

On page 31 AB on April 15, 1970 only one case was cleared. Also on April 15, 1970 2 cases were cleared. 20

In all, 29 cases were cleared.

I paid Customs Duty on April 9, 1970. On April 8, 1970 I saw all the 93 cases. When I went to clear the cargo, at first we found only 25 cases. The balance we could not trace. So I informed PW1. He came to our office and we went to the Port Authority Godown to see whether we could locate the balance. We found four cases.

P6 A and B were written by me. These were tracers informing the Port Authority of the shortage. 30

The goods leaving Port Authority Godown were checked. After loading the Shed Clerk would check the cargo on the lorry and issue gate passes. With the help of the gate pass, another check will be made before the goods leave the Port Area.

At the back of pages 29, 30, 31 and 32 AB, gate checks are shown. Under "Signature for Receipt" the signature is that of the forwarding 40

agent. My assistant Sallehuddin signed.

Under the column "Gate Clerk" the Port Authority official signed.

Cross-examination by Mr. Marjoriebanks: - No.

Cross-examination by Mr. Puthucheary:

I cannot remember the name of the Customs Officer who examined the goods. He examined them on April 8, 1970. The signature of the Customs Officer was the authority to remove the goods.

10

The first consignment of 80 cases was of 8.825 cubic feet. It was worth \$14,373.

The second consignment of 13 cases was of 1.3 cubic feet. It was worth \$15,556.76.

The cargo was not valuable cargo because for the 13 cases the measurement was 1 ton 10 cwt. = 55 cubic feet. For the other lot of 80 cases the measurement was 6 tons 08 c.w.t. = 240 cubic feet. Both occupy one complete load. 8.825 metric tons = 320 cubic feet. Each case is 4 cubic feet.

20

There is no reason why we did not declare the cargo as valuable cargo. We have to pay higher charges for valuable cargo.

I prepared the Customs declaration. My Manager signed it.

The Plaintiff company had been importing this type of goods for a number of years. There were no losses before.

Re-examination:

30

Classification: This is done by the Port Authority. We could request that the cargo be classified as valuable cargo.

We cleared cargo for Messrs. T.W. Wu & Co. (M) Sd. Bhd. before in the same way - we declared the cargo as special cargo.

Customs Declaration: The Customs inspected and counted the goods. The Customs do not make any note on the Customs Declaration Form of goods

In the High Court

Plaintiffs Evidence

No. 7

Ng Boon Bee Examination

22nd April 1974 (continued)

Cross-examination

Re-examination

In the High Court

Plaintiffs Evidence

No. 7

Ng Boon Bee

Re-examination

22nd April 1974

(continued)

Further cross-examination

No. 8

Sallehuddin bin Hamzah

Examination

22nd April 1974

lost or missing. If on examination with the Customs, we find part of a consignment missing, the Customs will endorse on the original declaration form and we have to prepare Form Customs No.3. We declare the number of packages found and the duty paid on them.

P3 is Form Customs No. 1.

Mr. Puthucheary with Court's leave:

Cross-examination:

If the cargo is declared as valuable the Port Authority itself would have tallied it. The officer himself would have certified in the tally sheet.

10

No. 8

Evidence of Sallehuddin bin Hamzah

PW4: Sallehuddin bin Hamzah, affirmed speaks in English. 815, Jalan Kota Raja, Kampong Jawa, Kelang. Transport Supervisor, Din's Trading Sendirian Berhad.

In April 1970 I was a Forwarding Clerk with Din's Trading Sdn. Bhd. I remember clearing cargo for Messrs. T.W. Wu & Co. (M) Sdn. Bhd. PW3 asked me to clear the cargo. He gave me the delivery orders and the consignment note. This was in respect of 93 cases of cargo. I went to the Port Authority and paid the Port Charges for the 93 cases. (See pages 29, 30, 31 and 32 AB).

20

(Page 30 AB referred). I took delivery of 23 cases from Shed No. 8.

The total number of cases I took delivery was 29.

Cross-examination by Mr. Marjoriebanks: - No.

30

Cross-examination

Cross-examination by Mr. Puthucheary:

PW3 paid the Customs duty. Now I say I cannot remember who paid the Customs Duty.

Re-examination:

In 1970 I did not remember paying the Customs duty.

∟Court is adjourned to 2.00 p.m.∟

∟Hearing continues at 2.00 p.m.∟

∟Parties as before∟

∟Mr. Abraham recalls PW3∟

PW3 recalled - on former oath. (P3 referred).

10 The total value of the entire consignment was
 \$31,489.41 - 93 packages - average \$340 per
 package. Taken individually there were only
 6 cases whose value exceeded \$2,000 per case.

Cross-examination by Mr. Marjoriebanks: - No.

Cross-examination by Mr. Puthucheary:

For the goods examined on April 8, 1970 the
 duty was paid on April 9, 1970. The delivery was
 on April 10.

20 The Customs examination on April 8 took about
 6 hours. The papers were despatched to the main
 office for purpose of payment of duty. The duty
 was paid on April 9.

We had no lorries to take delivery on
 April 9.

We were allowed three days free in the godown.

N

No. 9

Evidence of Inspector Hussain bin Ja'al

30 PW5: Inspector Hussain bin Ja'al, affirmed, speaks
 in English. Klang Police Station. Area Inspector
 Klang and Port Klang.

I am the I.O. in respect of Police Report
 2398/70 (page 2 AB). As a result of investigations
 I have in my custody pharmaceutical products.

In the High
 Court

Plaintiffs
 Evidence

No. 8

Sallehuddin
 bin Hamzah

Re-
 examination

22nd April
 1974

(continued)

Ng Boon Bee
 (recalled)

Examination

Further
 cross-
 examination

No. 9

Inspector
 Hussain
 bin Ja'al

Examination

22nd April
 1974

In the High Court

Plaintiffs Evidence

No. 9

Inspector Hussain bin Ja'al

Examination

22nd April 1974
(continued)

I have in all, six packages containing 174 tins. I can identify the tins by way of the labels. There are 40 tins bearing "T.W. Wu & Co. Ltd." label (sample marked P8) and 112 tins bearing "Kuala Lumpur Pharmacy" labels (sample marked P9) and the other label (marked P10). The other tins are 22 in number - big and small (unlabelled tin samples marked P11 and P12).

(P8 referred). The Lot No. on P8 is 8151D. I do not know what that stands for.

10

From the record it is revealed that 174 tins were obtained from the premises of the Kuala Lumpur Pharmacy.

Cross-examination: No.

No.10

Abdullah bin Sati (recalled)

22nd April 1974

No. 10

Abdullah bin Sati (recalled)

(PW1 recalled on former oath). On P8 the lot No. is 8151D. This is our Manufacturing Code Number in our factory in Hongkong. For different products there are different code numbers.

In respect of this product there is a price list. (Produced and marked P13).

Cross-examination: - No.

20

No.11

Proceedings
22nd April 1974

No. 11

Proceedings

(Plaintiffs' case is closed).

(Mr. Marjoriebanks: There are original Bills of Lading in respect of the consignment. Bills of Lading are produced and it is agreed that they be marked as exhibits. They are marked as Exhibits D1 and D2).

(First defendant is not adducing any evidence. First defendant rests its case).

30

(Second defendants' case opens).

No. 12

Evidence of Hamidon bin Yunus

DW1: Hamidon bin Yunus, affirmed speaks in English.
Assistant Traffic Manager North Port 1970. Acting
Traffic Manager.

I am now Traffic Manager of Cargo Handling
and Stevedoring, P.S.A.

10 In 1970 Shed No. 8 and Warehouse F were at
North Port. I was in charge of the work of North
Port. I cannot remember what happened when this
ship came to the Port.

Goods from a ship would be delivered at the
Wharf and then taken into the Shed on pallets by
means of forklift. There were occasions when goods
were delivered direct to either road vehicles, i.e.
lorries or railway wagons.

20 The Port Authority did not tally but we relied
on the tally of Shipping Agents. The doors of the
Shed through the goods are brought in face the
ship. The forklift has to travel for about 40
feet from the ship's side to the Shed.

Shed No. 8: This Shed is about 400 feet long
and 100 feet wide. It has 8 doors in the front and
8 doors on the opposite side. Its wall is made of
brick and corrugated iron sheet. When ships were
delivering goods and if there was no delivery, the
doors on the other side would be closed and only
the doors nearer the ships would be opened.

30 On the delivery side there would be Delivery
Clerks. Their functions were to do visual tally
when the goods were loaded to the lorries.

When the goods were delivered to consignees,
it depended on where the goods were delivered. If
the goods were delivered from Shed No. 8 to lorries,
the first check would be at the door where the
goods were being loaded to the lorries and the
second check would be at the gate after the
lorries leave the Port Area.

40 In the Shed itself the Port Authority some-
times checks the goods in case any pallet contains
the goods belonging to more than one consignment.
We have loading platforms outside the shed.

In the High
CourtDefendants
Evidence

No.12

Hamidon
bin Yunus
Examination22nd April
1974

In the High
Court

Defendants
Evidence

No.12

Hamidon
bin Yunus

Examination

22nd April
1974

(continued)

Security Precautions in the Port Area:

The Shed is closed during meal hours and when it is not worked.

We have plainclothes police as well as uniform police inspecting around the Port Area and in the Shed. We have police personnel at the gate.

The whole of the Port Area is fenced off with 10 feet chain link fencing. At the seaside there is marine police guarding at all hours. There were a few attempts of thefts. 10

We handle cargo at a rate of approximately 2.8 million tons - import in 1970. Export - about 900,000 tons. In all we handle 3 to 4 million tons.

Valuable cargo: Valuable cargo is cargo which is advised by consignee that for each package the measurement is less than 40 cubic feet and more than \$2,000 in value.

Exceptions are where the consignee requests that cargo of lesser value be treated as valuable cargo. 20

On such advice first and foremost we charge port charges for the cargo in accordance with port charges for valuable cargo. Then we take precaution to ensure that the cargo is safe by providing special tally clerk with special tally sheet. The tally is done when the cargo is discharged from the vessel on to the Wharf. From then on, the cargo is sent to a valuable cargo shed accompanied by the tally clerk himself or at times the cargo is sent together with the police. 30

This security precaution is taken because the cargo is valuable cargo and because it is easily pilferable.

No one can enter the Port Area without a pass. No one can take out goods without proper documents.

The Port Authority confer with the Customs from time to time to find ways and means to improve its turn-round - quick loading and unloading. The Customs co-operative with the Port Authority by speeding the examination and checking in the cargo 40

received. One of the ways is the Customs do checking at random. The Customs will check about 10% of the consignment and sample those items of different commodities. In 1970 this was the percentage. They would not check the whole consignment if everything is normal.

The Customs would sometimes count the number of cases in a consignment.

[Court is adjourned to 9.30 a.m. tomorrow].

10

This 23rd day of April, 1974

[Hearing continues at 9.50 a.m.]

[Parties as before]

[DWI re-affirmed]

Cross-examination by Mr. Abraham:

I was the Assistant Traffic Manager for three years - up to 1971. In the first year I was attached to the North Port.

20

Functions of Assistant Traffic Manager of North Port: He is responsible for operational aspects of port working. His duties are administrative insofar as staff deployment and discipline are concerned. I made visit to the godowns in North Port twice a day - mostly routine.

I have no personal knowledge of this consignment. My assistant - the Commercial Traffic Officer - would have more knowledge of it. He is not called but the Chief Delivery Clerk is competent to give evidence. He was directly under the Commercial Traffic Officer

30

The Chief Delivery Clerk spends half his time in the Shed and the other half in the office.

Shed No. 8: We had in 1970 one Chief Clerk (Wharf and Shed, Clerk in charge of Shed, one assistant clerk and two tally clerks. These people mainly have access to Shed No. 8. They work round the clock in three shifts.

In the High Court

Defendants Evidence

No.12

Hamidon bin Yunus

Examination

22nd April 1974 (continued)

23rd April 1974

Cross-examination

In the High Court

Defendants Evidence

No.12

Hamidon bin HYunus

Cross-examination

23rd April 1974

(continued)

Clerk in charge of Shed: He is responsible for seeing cargo in Shed is properly stacked and cargo to be delivered is properly delivered and to check the correctness of documents etc. He is also responsible for stocktaking.

Tally clerk: He is responsible for visual tally and delivery either to wagon, etc.

Wharf clerk: He is responsible for seeing that the cargo received in the wharf is directed to a destined point - sheds, open yard, lorries or wagons - for direct delivery. He is also responsible for seeing that the vehicles, e.g. trailers, lorries, etc. are available to ensure quick discharge of vessels.

10

Forwarding Clerk - If he has cargo to take delivery of he can enter the Shed. After showing the documents, he is accompanied by the Clerk in Charge, the Assistant Clerk or the Tally Clerk. If he leaves the Shed, unless there is something suspicious, he is not checked. Goods left through them would be checked.

20

Stocktaking: On average it is done a fortnight after a vessel has sailed. But we do not send our cargo from the Transit Shed to the import Warehouses after the three free day period has expired. When we send the cargo to the warehouses we also tally the cargo. This could be described as stocktaking.

After each stocktaking, we produce the outturn which will show the cargo received by the Port Authority and the cargo not received.

30

System: The system is to take stocktaking by way of marking. There is an outturn in respect of this consignment.

(Page 33 AB referred). This is a Port Authority document. The outturn indicates that 66 cases were shortlanded. Before the document is prepared, the Port Authority would have checked the inward cargo charges - (page 29 to 32 AB). Only 29 cases were delivered. There is a discrepancy - a clerical error happens from time to time.

40

(Pages 34 - 36 AB referred). This is a

stock report. A stock report is relied upon in the preparation of outturns.

(Page 37 AB referred). This is where the error comes in. The total here is wrong. (See items 310 and 311). This document was signed by two persons - the clerk in charge of the Shed and the clerk in charge of the Centralised Invoicing Section. A stock report is a physical count. Then at the Central Invoicing Section the stock report, the manifest and the I.C.C. will be considered together to get the outturn.

10

I cannot say whether a letter was received from the consignee concerning the shortlanding.

In respect of I.C.C. (page 29 AB) on April 10, at least 9 cartons could not be located. In respect of I.C.C. (page 30 AB) at least 57 cartons could not be located.

In respect of I.C.C. (page 31 AB) one carton was delivered.

20

In respect of I.C.C. (page 32 AB) two cartons were delivered.

Stocktaking: Taking of stock of all cargo that comes in one particular vessel - not individual consignments. At the same time we are not too worried if the cargo is complete or not because from our experience we know that when the shortage on a particular consignment is big, it is quite normal that the cargo has not landed.

30

Stock was not specifically taken of Messrs. T.W. Wu's consignment.

The clerk in charge does not have to report a shortage.

We do check the ship's tally sheet in the preparation of the outturn. I cannot say whether it was in fact done in this particular case.

(Page 11 AB referred). The agent's tally sheet shows a discharge of 93 packages. It was certified by the Port Authority that the tally sheet was prepared during the second shift.

40

⌈ A letter dated April 29 (P2) shown to the

In the High Court

Defendants Evidence

No.12

Hamidon bin Yunus

23rd April 1974

(continued)

In the High Court

Defendants Evidence

No.12

Hamidon bin Yunus

Cross-examination

23rd April 1974

(continued)

witness/. This letter was addressed to Messrs. T.W. Wu by the Port Authority. It refers to the outturn on page 33 AB. Probably by April 29 the error was discovered.

[Police report - (page 21 AB) referred]. I do not personally know whether the Port Authority was aware of this report.

A complaint was made by Messrs. T.W. Wu of the shortage of 64 cases of their goods in a letter dated April 15. A reply was sent on April 29 informing them that the cargo was short-landed. This is still the Port Authority's contention.

10

The fact, if at all, that part of the consignment was found with the Kuala Lumpur Pharmacy is no evidence that the cargo had not shortlanded. The possibility is that the cargo could have been discharged at high sea or overside the vessel while it was in Port.

Customs Declaration: Plaintiffs' goods - The Customs pay more attention. It is not unusual for the Customs to count the packages.

20

Security: I have some knowledge of security but the security people know better.

Cross-examination by Mr. Marjoriebanks:

The person who certifies does not make a visual check. His duty is to direct the destination of the goods.

Re-examination

Re-examination:

The Assistant Commercial Traffic Officer may know the details relating to a particular consignment.

30

As for this particular consignment, I cannot say who knows the details.

Court: Assuming that 93 cases were landed the loss must have occurred within the Port Area.

No. 13

Evidence of Yap Sen Fook

DW2: Yap Sen Fook, affirmed, speaks in English.
Kuala Kubu Bahru Police - O.C.P.D.

In April 1970 I was in charge of port security.

10 Security measures taken: The police cover the North and South Port. In each port there is a beat area as well as the checking of gates. We also had detectives. The security is maintained round the clock. They work on four-hour shifts. Plainclothes police move around in the Sheds, Wharves and Gates.

Both the port areas are fenced in with the exception of the Wharf where ships berth.

Sheds: The sheds have zinc sheets. I was in charge from May 1965 until January 1971. Policing was quite adequate. There were some petty pilferages.

Cross-examination by Mr. Abraham:

20 Sheds: I am not sure what sort of locks were used at these sheds. The keys were deposited at the Police Enquiry Office. By road the Police Enquiry Office is not even a quarter of a mile from Shed No.8. The keys were handed to the clerk in charge of the godown or to one of the staff. Police personnel did not lock up the godowns. No alarms were fitted to the godowns.

30 Patrols: Patrols were in four-hour shifts. In 1970 in the north port we had 43 men. For godowns Nos. 6, 7, 8 and 9, we had 4 men. Beat Books were positioned at different points. I checked the books whenever I made my rounds. There were occasions when I had to reprimand police personnel for not signing the beat books.

The police are no longer responsible for security in the Port Area now.

40 It would be useful to have an alarm at the door of the shed. There were no dog patrols in 1970. Such patrols were probably useful in the early hours of the morning when there were no workers.

In the High Court

Defendants
Evidence

No.13

Yap Sen Fook
Examination

23rd April
1974

Cross-
examination

In the High Court

Defendants Evidence

No.13

Yap Sen Fook

Cross-examination

23rd April 1974

(continued)

The wharf side was patrolled by the police. In addition patrols were also undertaken by the Marine Police. I had no control over the regularity of Marine Police control.

Sort of offences committed by the Port Authority Staff: Petty thefts and pilferages - not very often.

(Page 21 AB referred). I am aware of this report. I did not investigate into this matter. It was within the Port Area.

10

For anyone to come into the Port Area he must have a port pass, the number of his vehicle is written in the port pass. When he leaves - if the pass is valid for that day only - he has to surrender it. A monthly pass is renewable monthly.

In regard to vehicles going in and coming out, the police will check the port pass of the driver. If he is in possession of a valid pass he is allowed in. The vehicle is not normally examined when it is going in.

20

When a vehicle is coming out there is no 100% check. One hundred per cent checks of vehicles of staff is not done. Checks were at random. There had been members of my staff charged with pilferage.

Chain link fence: There were reports that the fence had been tampered with. The notice of the Port Authority was drawn to this matter and the matter was left to the Engineering Department of the Port Authority.

30

I do not know the total Port Area. In April 1970 I had a total of 14 plainclothes men.

Cross-examination by Mr. Marjoriebanks:

The goods are examined by the port checker at the gate. He is called the gate checker. The checking was not done by the police.

Re-examination

Re-examination:

Petty thievery - There was thievery by stevedores and forwarding agents. In my time

40

there was a theft on ginseng involving about 100 boxes. We recovered them outside the Port Area. The consignment could have been taken out by the forging of certain documents. The theft could have been done with the connivance of the port staff.

(Second defendants' case is closed).

In the High Court

Defendants Evidence

No.13

Yap Sen Fook

Re-examination

23rd April 1974

(continued)

No. 14

Proceedings

No.14

Proceedings

23rd April 1974

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Court: No case against the first defendant. Case against first defendant is dismissed with costs.

Second defendant to submit written submission within one week with copy to counsel for the plaintiffs. Thereafter counsel for the Plaintiffs to submit written submission within one week.

Reserve judgment.

Sgd. ABDUL HAMID,
JUDGE,
HIGH COURT,
MALAYA.

20

No. 15

Judgment of Abdul Hamid J.

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Civil Suit No. 5 of 1971

Between

T.W. Wu & Company (M) Sendirian
Berhad

Plaintiffs

And

1. The Sanko Asia Line, Limited)
2. The Port Swettenham Authority)

Defendants

No.15

Judgment of
Abdul Hamid
J.

27th June
1974

In the High
Court

JUDGMENT OF ABDUL HAMID J.

—
No.15
Judgment of
Abdul Hamid J.
27th June 1974
(continued)

The plaintiffs T.W. Wu & Company (M) Sendirian Berhad brought an action against the carriers Sanko Asia Line Limited and the Port Swettenham Authority (hereinafter referred to as "the Port Authority") for breach of contract and/or for conversion.

In March 1970 93 cases of pharmaceutical goods were shipped aboard the vessel "Sansei Maru" at Hongkong for carriage and delivery at Port Kelang to the plaintiffs. The vessel arrived at Port Kelang on or about April 5, 1970 and the ship's tally showed that all 93 cases were unloaded at the wharf on the same day between 3.40 and 4.35 p.m. The plaintiffs through Din Trading Sendirian Berhad their forwarding agents subsequently collected 29 cases. 10

On April 15th the plaintiffs wrote to the Traffic Manager stating that they only received 29 cases and 64 cases could not be found or traced. They asked the Port Authorities to investigate. The Port Authorities sent a reply in April saying that according to the outturn 64 cases shortlanded. Din Trading also wrote to the Traffic Manager of the Port Authorities (P6 A and B) informing him that these 64 cases could not be found in spite of the search made. 20

On April 16th the ship's agents wrote to Din Trading maintaining that 93 cases were discharged complete vide tally sheet No.1 (Pl) a copy of which was sent to the Traffic Manager of the Port Authorities. 30

Din Trading obtained the delivery order from the ship's agents on receipt of the Bills of Lading. Ng Boon Bee the Chief forwarding clerk of Din Trading made a Customs Declaration. According to him the Customs examined the goods at Shed No.8. The paper was passed and duty was paid. All the 93 cases were there when he and a Customs Officer inspected them.

Sallehuddin bin Hamzah (PW4) the forwarding agents' transport supervisor confirmed that Customs examination was done on April 8th. It took six hours and duty was paid on April 9th. 40

Before I proceed to deal with the facts it may be necessary to determine the relationship between the plaintiffs and the Port Authorities. In the light of the long line of decided authorities it seems clear that the relationship was that of bailor and bailee. And on the evidence before the Court it is quite apparent that the Port Authorities were bailees for reward [See Lee Heng Sendirian Berhad v. Port Swettenham Authority (1971) 2 M.L.J. p.27 (Federal Court)].

In the High Court

—
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Judgment of
Abdul Hamid J.
27th June 1974
(continued)

Our law as to duties and responsibilities of a bailee in all cases of bailment are set out under sections 104 and 105 of the Contracts (Malay States) Ordinance, 1950 which read as follows -

"104. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed."

"105. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 104 of this Ordinance."

At common law it would seem that -

"A custodian for reward is bound to use due care and diligence in keeping and preserving the article entrusted to him on behalf of the bailor. The standard of care and diligence imposed on him is higher than that required of a gratuitous depository, and must be that care and diligence which a careful and vigilant man would exercise in the custody of his own chattel of a similar description and character in similar circumstances."
[Halsbury's Laws of England 3rd ed. vol. 2 page 214 paragraph 225]

As to onus of proof it seems clear that -

"When a chattel entrusted to a custodian is lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequences of his

In the High Court

No.15

Judgment of Abdul Hamid J.

27th June 1974 (continued)

neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property. If he succeeds in showing this, he is not bound to show how or when the loss or damage occurred. If a custodian declines either to produce the chattel entrusted to him, when required to do so by the owner, or to explain how it has disappeared, the refusal amounts prima facie to evidence of breach of duty on his part, and throws on him the onus of showing that he exercised due care in the custody of the chattel and in the selection of the servants employed by him in the warehousing." /Halsbury's Laws of England 3rd ed. vol. 2 page 117 paragraph 227.

10

In B.R.S. Ltd. v. Arthur Crutchely (1968) Lloyds Rep. vol. 1 p.271 Lord Justice Sachs at page 286 in a case of bailment said -

20

"..... the onus of proof, of course, lay on the defendants to prove that at the time of the theft they were taking proper care of the load having regard to all the circumstances, or if they failed so to prove, then to show that their lack of care was not the cause of the theft. In the present case the first and most important issue to be determined is whether the defendants proved that their system of looking after the goods was one which was proper in all the circumstances.

30

The common law has always been vigilant in the interests of bailors whose goods are not returned to them by the bailee for a number of reasons: in so far as that vigilance relates to the onus of proof, one of the reasons stems from the fact that normally it is only the bailee who knows what care was being taken of the goods

40

As far as I can gather the law as to onus of proof in regard to a bailee for reward in this country is similar to that at common law. Ong, C.J. dealing with by-law 91(1) of the Kelang Port Authority By-Laws 1965 in Lee Heng's case (supra) considered whether in its true construction the

operation of common law principles is by that rule excluded so as to shift the burden of proving how the goods came to be lost from the bailee to the bailor. At page 29 His Lordship had this to say -

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Abdul Hamid J.

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(continued)

10 "Having thus averred negligence against the respondent, they succeeded in proving the loss of one case while it was in the respondent's custody. In the case of non-delivery all that the bailor need plead is the contract and a failure to deliver on demand. That puts on the bailee the burden of proving either loss without his fault (which would be a complete answer at common law) or, if the loss was due to his fault, that it was a fault from which he is excluded by the exemption clause: see Denning L.J. in Spurling v. Bradshaw (1956) 2 All. E.R.121 at 125. Mere non-delivery, therefore, is prima facie evidence of negligence - this being a case of *res ipsa loquitur*. And 'once negligence on the part of the defendants had been established and this negligence could have caused the loss, it was eminently reasonable to ask them to prove that in fact it did not': see Hunt & Winterbotham Ltd. v. B.R.S. (Parcels) Ltd. (1962) 1 Q.B. 617, 634. per Donovan L.J. who went on to say -

20

30 'Similarly, in Brooke Wharf and Bull Wharf Ltd. v. Goodman Bros. (1937) 1 K.B. p.534 (another case of a claim in negligence) it was held that the circumstance of the loss of goods by a bailee may justify the inference of negligence as the cause of the loss, which inference it would be for the bailee to displace.'

40 It is perhaps appropriate at this juncture to refer to the case of Dwarka Nath v. R.S. Co. Ltd. (1917) A.I.R. (P.C.) p.173, where Sir Walter Phillimore at page 175 after referring to sections 151 and 152 of the Indian Contract Act which are identical with sections 104 and 105 of our Contracts (Malay States) Ordinance, 1950 said -

"The weight to be attached to judgment of the learned Judge of first instance, who saw the witnesses, is a good deal lessened by reason of his having apparently thrown the burden of proof on the wrong party. He states that it

In the High Court

No.15

Judgment of Abdul Hamid J.

27th June 1974 (continued)

was, in his opinion, incumbent upon the defendant Company to satisfy him that they had taken such care of these goods as a man of ordinary prudence would take of his own goods. This, in their Lordships' view, is not a correct statement of the law.

It is true that under the Evidence Act of 1872 s.106 'when any fact is especially within the knowledge of any person, the burden of proving that fact is on him': and it was therefore right that the defendant Company should call the material witnesses who were on the spot, as it seems to have done. But this provision of the law of evidence does not discharge the Plaintiffs from proving the want of due diligence, or (expressing it otherwise) the negligence, of the servants of the defendant company.

10

It may be for the Company to lay the materials before the Court; but it remains for the plaintiffs to satisfy the Court that the true inference from the materials is that the servants of the defendant Company have not shown due care, skill and nerve."

20

Speaking of Lee Heng's case (supra) Mr. Puthucheary submitted that the attention of the Federal Court was not drawn to the decision of the Privy Council in Dwarka Nath's case (supra). He further submitted that even in England the onus to show that goods have been lost without default or negligence on the part of the bailee is limited to actions of detinue and not to actions for breach of contract and that in Malaysia more particularly so the onus is not on the bailee to show that there is no negligence on his part. It is the defendants' contention that the onus of proof of negligence is governed by the decision in Dwarka Nath's case to the effect that the bailee tells the Court what he had done to take care of the goods and then it is for the plaintiffs to show in the bailee's action there was some omission or commission which constitutes negligence.

30

40

With all due respect I am of the view that Dwarka Nath's case has not introduced any new principle of law on the burden of proof in bailment cases. The law in regard to the onus

of proof in such cases is clearly stated by the learned author in Indian Contract and Specific Relief by Pollock and Nulla 9th ed. p. 665 -

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(continued)

"In cases governed by the provisions of ss. 151 and 152, the loss or damage of goods entrusted to a bailee is prima facie evidence of negligence, and the burden of proof, therefore, to disprove negligence lies on the bailee."

10 Reference was made to Dwarka Nath's case and in so doing the learned author at p. 666 had this to say -

"There is a special class of cases where goods are destroyed by fire arising from some unknown cause, while they are in the possession of a common carrier or a railway company."

20 That burden of proof lies on the bailee to prove absence of negligence is further stated by the learned author at page 667 -

"..... where goods delivered for sale custody for reward are lost while in the possession of the bailee, the burden lies on the bailee to prove absence of negligence on his part. /See Trustees of Harbour Madras v. Best & Co. (1899) 22 Mad. 524/."

30 As for the decision in Lee Heng's case the Federal Court's attention was in fact drawn to Dwarka Nath's case although no reference was made by Ong, C.J. in his judgment.

40 Mr. Abraham counsel for the plaintiffs contended that in the present case the Port Authorities were unable to offer explanation how the goods were lost and therefore failed to discharge the burden of proof. He further contended that the security and administration and other arrangements were exclusively within the knowledge of the Port Authorities and it is incumbent upon them to lay before the Court the necessary evidence in rebuttal. Reference is made to Barker on Evidence 12th ed. where the learned author at p. 882 dealt with the burden of proof in cases of bailment. After referring to section 106 of the Evidence Ordinance counsel drew Court's attention to a passage at

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Abdul Hamid J.
27th June 1974
(continued)

p.922 where it is stated -

"The general rule is that the person who alleges negligence must prove it. In an action against a bailee for loss of property bailed to him if loss of property is prima facie evidence of negligence then the burden of proving that loss was not due to negligence lies upon the bailee under s.106. But where no prima facie inference of negligence can be drawn, s.106 however casts a duty on the bailee to give a reasonable explanation how the accident occurred Ponnappa v. Theasdhi, A 1937 M 411/. In a suit against a bailee for not taking care and saving goods from loss, e.g. fire, the bailee should under s.106 call all the material witnesses who were present at the time of the loss but that section does not discharge the plaintiff from proving want of diligence or negligence on the part of the bailee. The company is to lay all materials before the court, but the plaintiff is to satisfy that the true inference from those materials is one of due care, skill and nerve Dwarka Nath v. River S.W. Co. A 1917 PC 173: 27 CLJ 615: see National S. Stores v. G-G in Council, A 1948 S 26/. The burden of proving that the bailee has exercised ordinary care must generally be upon the bailee, the reason being that he has special knowledge of the facts. Secy. of S. v. Afzal, 56 IC 714: 20 OC 96/."

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20

30

I shall now refer to the case of Mansfield Importers & Distributors Ltd. v. Casco Terminals Ltd. (1971) 2 Lloyds Law Reports p.73. In this case the plaintiffs were the owners of 17 cartons of automobil stereo sets which were discharged from a vessel at Vancouver and placed in the defendant warehouseman's storage shed. The defendants operated the shed under an arrangement with the National Harbours Board. The practice was that when a vessel docked, the charge for ocean freight was payable by the defendant to the carrier, and that for wharfage to the Board. The charge for handling was retained by the defendant. The Board supplied a patrol of the perimeter of the shed during non-working hours

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and their services were paid for by the defendants. During working hours supervisors inside the shed supervised the handling of cargo, and every stevedore was within visual range of a supervisor. When the plaintiffs sent a representative to collect the sets, it was discovered that all of them were missing. The plaintiffs claimed damages from the defendants on the ground that they were liable as bailees for reward. The defendants, however, denied liability and contended that the bailment was a gratuitous one, for the "handling" charge which was paid to them was just that, and not one for storage. It was held by Rao, J. in the Supreme Court of British Columbia that -

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- (1) the defendants were bailees for reward;
- (2) the burden of proving that they had not been negligent in the storage of the goods lay on them;
- (3) the defendants should have provided more internal security than they did;
- (4) the only reasonable inference was that the goods had been stolen or wrongly converted;
- (5) such theft or conversion could not have occurred except for neglect of duty or complicity in the theft on the part of the defendants' employees in the course of their employment; and
- (6) accordingly the defendants were liable for breach of their duties as bailees for reward or were vicariously liable for their employees being involved in the theft of the goods.

At p.77 His Lordship said -

"Indeed, on the balance of probabilities on the evidence before me, including the evidence of the officers on perimeter patrol, and the evidence that there was no indication of any break-in at any relevant time, the only reasonable conclusion is, first, that the stereos in question went missing during working hours. Second, on all the evidence before here, including the evidence

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as to the method of handling goods by the defendant, the arrangements for checking in and out and for checking on delivery of goods, the nature of the goods here and their weight and bulk, the only reasonable inference is that they were stolen or wrongfully converted.

"Finally, one must in reason infer that such theft or wrongful conversion could not have occurred except for neglect of duty or complicity in the theft on the part of some one or more of the defendant's employees in the course of employment."

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In his submission Mr. Abraham referred to the case of Malayan Thread Co. Sdn. Bhd. v. Oyama Shipping Line Ltd. and Anor. (1973) 1 M.L.J. p.121 A decision of Azlan Shah, J. (as he then was) another case of bailment. His Lordship in dealing with the onus of proof of a bailee in the light of Rule 91 (1) of the Kelang Port Authority By-Laws 1965 applied Lee Heng's case. His Lordship said that in the light of the rule the onus on the part of the Port Authorities is to show some circumstance which negatives the idea of misconduct or negligence on their part. Mr. Abraham, however, drew Court's attention in particular to that part of the judgment where His Lordship at p.123 said -

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"They are not supposed to do the impossible. If the goods are stolen by their servants in the absence of negligence on their part, they cannot be held liable. In the absence of personal negligence on the part of the employer e.g. negligence in selecting the servant whose act had occasioned the loss, (see Willings v. Curzon Syndicate Ltd. (1919) 35 TLR p.478) the latter is not responsible for the fraudulent act of the servant, as the loss of the goods is not referable to the employer's negligence, and as the loss is caused by an act which is not within the scope of the servants' employment (see Cheshire v. Bailey (1905) 1 K.B. p.237)."

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Although the facts of this case may be distinguished from the facts in the Malayan Thread case (supra) I quite agree that in that

case His Lordship had not considered Morris v. Martin (1966) 1 Q.B. p.716 where Cheshire v. Bailey (supra) was disapproved. The facts in Morris v. Martin (supra) are as follows -

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"The plaintiff sent a mink stole to a furrier to be cleaned. With the plaintiff's consent, the furrier, who did no cleaning himself, delivered the fur to the defendants, who were well-known cleaners, to be cleaned by them for reward. The contract between the furrier and the defendants which was made by the furrier as principal and not as agent for the plaintiff contained printed conditions of trading with exemption from liability clauses. Whilst the fur was with the defendants, it was stolen by one of their servants whose duty it was to clean the fur. The fur was never recovered.

20

The plaintiff claimed damages against the defendants for breach of their duty to return the fur to her and to exercise reasonable care in its custody and, alternatively for wrongfully depriving her of the fur. The county court judge found that the defendants had taken proper steps to safeguard the fur and were not negligent in employing the servant; and he held that the defendants were not liable because the act of the servant in stealing the fur was not done 'in the scope of his employment.'

30

On appeal by the plaintiff it was held allowing the appeal that the defendants being sub-bailees for reward to the plaintiff the owner of the fur the duties of a bailee for reward to take reasonable care of the fur.

Lord Denning, MR at page 728A-B said -

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"When a principal has in his charge the goods or belonging of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then, if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable.

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So also, if the servant or agent himself steals them or makes away with them."

On page 728 Lord Denning MR said -

"It follows that I do not think that Cheshire v. Bailey (1905) 1 K.B. 237 can be supported."

Lord Diplock speaking of Cheshire v. Bailey at page 736 said -

"As recently as 1955 the Privy Council in United Africa Co. Ltd. v. Saka Owoade, although they reach a decision in conflict with Cheshire v. Bailey, declined to express a view as to whether it had been overruled by Lloyd v. Grace, Smith & Co. or could be distinguished from it. In the present case, we, I think, are compelled to make up our minds about this. For my part I find it impossible to reconcile the decision in Cheshire v. Bailey with the principles laid down in Lloyd v. Grace, Smith & Co. I think that decision is no longer good law and is not binding upon us."

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20

In this regard may I refer to paragraph 226 of Halsbury's Laws of England volume 2 page 117 which reads -

"The custodian is further responsible to the owner of the chattel entrusted to him both for the negligence of his agents or servants, and for their acts of fraud or other wrongful acts, provided that such acts were committed by them within the apparent scope of their authority, either in the supposed interest of their principal or master or in the course of their employment."

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In the final analysis it is apparent that a bailee for reward is under a liability, in the performance of his duties and responsibilities, to exercise due care and diligence of the goods entrusted into his custody as a prudent man would of his own goods according to all circumstances of the case.

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Where a claim is made for the return of the goods in his possession and on proof for failure to deliver on demand the burden shifts and the onus thereby lies upon him to establish that the loss or disappearance was not due to his fault or misconduct or lack of care or the fault or misconduct or lack of care of his officers or servants.

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10 In the light of Lee Heng's case it would seem that Rule 91 (1) of the Kelang Port Authority By-Laws 1965 does not relieve the Port Authority of the burden of proof that ordinarily lies upon a bailce in such circumstances.

20 I shall now examine the facts. The Court shall in the first place determine whether all the 93 cases were unloaded at the wharf and if they were, whether they passed to the custody of the Port Authorities. On the facts before me I am of the view that the plaintiffs have adduced sufficient evidence to satisfy me that all the consignment had landed and passed into the custody of the Port Authorities. Apart from the tally sheet that showed that 93 cases were unloaded on the wharf on or about April 5, 1970 there was the evidence of Ng Boon Bee who stated that he and a Customs Officer on inspection of the cargo counted the 93 cases at Shed No. 8. Inward Cargo Charges and Customs Duty were paid on all 93 cases. Ng Boon Bee's testimony revealed
30 that the Customs would, if any part of the consignment was missing, endorse in the Declaration Form and the forwarding agents would in that event prepare Customs Declaration Form No. 3 the number of packages found and duty would then be paid on them.

40 In disputing liability on the ground that the consignment shortlanded by 64 cases the Port Authorities were relying mainly on the outturn which they prepared. On the evidence adduced by the plaintiffs I am unable to accept the outturn as sufficient proof of shortlanding. The outturn merely provided evidence of stocks in their possession on the date of the stocktaking. In practice the stocktaking was only done a fortnight after the vessel had sailed. It would therefore be reasonable to assume that a number of things could have happened particularly when the consignment had to be moved from the transit shed

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to the import warehouse three days after landing. Encik Hamidon testified that a tally is done when the cargo is sent to the warehouse and apparently upon such tally the outturn is produced. Encik Hamidon referred mainly to the system of stock-taking generally applied by the Port Authorities. Although he stated that the tally is done when the cargo is sent to the warehouse it is not known whether this is done before the cargo leaves the shed or on arrival at the warehouse. In regard to this particular consignment no one from either Shed No. 8 or the warehouse was called to testify concerning the stocktaking. Encik Hamidon evidently was not in a position to throw any light whatever upon the subject-matter of this case. He confessed that he could not even remember what happened when the ship came into port. He also conceded that he had no personal knowledge whatever of the consignment. Although he maintained that his assistant, the Commercial Traffic Officer, had more knowledge of it no effort was made to call this officer to testify. The chief clerk at Shed No. 8 who apparently was in a position to give some evidence in regard to the consignment was also not called to testify. Explaining the finding of part of the consignment at the Kuala Lumpur Pharmacy Encik Hamidon said that this was no evidence that there was no shortlanding. In his view the cargo could have been discharged at high seas or overside the vessel while it was in port. I am inclined to regard this suggestion as a mere conjecture devoid of any merit. In the circumstances it would seem that 64 cases were missing or lost while in the custody of the Port Authorities. There remains for consideration whether the Port Authorities have succeeded in showing that the loss has not been caused by their misconduct or negligence or the misconduct of its officers or servants.

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It is relevant at this point to refer to by-law 91 (1) of the Kelang Port Authority By-Laws 1965 which states that -

"The Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or misdelivery of goods or from any other cause, unless such loss or destruction has

been caused solely by the misconduct or negligence of the Authority or its officers or servants."

H.T. Ong, C.J. in the Federal Court case of Lee Heng (supra) dealing with by-law 91 (1) at page 30 said -

10 "Much of the argument of this appeal, however, has been devoted to the question whether rule 91 (1) has the effect of shifting the onus from the bailee to the bailor of proving how the loss came about In the absence of clear and unequivocal language to the contrary, I am of opinion that the onus still lies on the authority to show that it has taken all reasonable care of the goods and that the loss thereof occurred in circumstances which showed no lack of care on its part."

20 Now, in the present case a great deal turns on whether, having regard to all the material evidence and the surrounding circumstances, the true inference is that the Port Authorities had taken all reasonable care of the goods and that the loss thereof occurred in circumstances which showed no lack of care on their part. In consideration of the facts before me, on those they sought to rely, the Port Authorities evidently failed to offer an explanation of how the goods were lost.

30 In the light of the circumstances surrounding the disappearance, the nature of the goods, the bulk and the arrangement relating to administration and security, I am compelled to conclude that by this failure the Port Authorities had failed to show that they had exercised due care and diligence. It may be material to add that the arrangement pertaining to the administration and security was exclusively within the knowledge of the Port Authorities and it is incumbent upon them
40 to lay before the Court the necessary evidence sufficient on the balance of probabilities for this Court to hold that it had taken all reasonable care of the goods and that the loss had not occasioned in circumstances which showed lack of care on their part.

On the facts before me the irresistible

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(continued)

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27th June 1974
(continued)

inference that arises was that the goods might have been stolen as a consequence of the negligence of the servants of the Port Authorities in the course of their employment. I am even inclined to think that the theft might indeed have taken place through active participation or complicity of one or more of their employees. [See Mansfield Importers & Distributors Ltd. (supra)]

Although goods leaving the port area are supported by proper documents delivery of the goods at the shed and the checking at the gate is all done by port employees. It may be pertinent to observe that in view of the nature of the goods, their weight and bulk, it is reasonable to conclude that they could only be taken out of the port area in a vehicle. As the goods had to be loaded at some point within the port area it would seem to me that this could not easily have been done without active assistance of the port employees.

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In regard to the security arrangement Mr. Yap Sen Fook a police officer (DW2) expressed the view that policing at the port area was adequate. Nevertheless it seems clear that further measures could be taken to tighten up the security in particular the checking of goods leaving the port area, supervision of personnel having the charge of checking and delivery arrangement.

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Mr. Puthucheary, in his submission touching upon the evidence adduced by the plaintiffs to the effect that 93 cases were discharged by the ship and that Mr. Ng Boon Bee and a revenue officer counted 93 cases in Shed No. 8, said that the Port Authorities have not sought to contradict this evidence because they had no means of knowing and therefore do not know whether the cases alleged to be missing were in fact under the custody of the Port Authorities.

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In the present case I am satisfied that in the light of all the surrounding circumstances, the Port Authorities are liable for breach of their duty as bailees for reward. The plaintiffs' claim must therefore succeed.

I allow the plaintiffs' claim in the sum of

RM21,236.34 being value of the 64 cases undelivered and interest at 3% per annum with effect from 3.4.1970 and costs. Costs of the first defendant shall be paid by the second defendant.

In the High Court

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Judgment of Abdul Hamid J. 27th June 1974 (continued)

Sgd. (ABDUL HAMID) JUDGE, HIGH COURT, MALAYA.

10 Kuala Lumpur, Dated this 27th day of June, 1974.

Mr. C.W.M. Abraham of Shearn, Delamore & Co., Kuala Lumpur for the plaintiffs.

Mr. N.A. Marjoribanks with Mr. Lall Singh Mukher of Lovelace & Hastings, Kuala Lumpur for the first defendant.

Mr. James Puthucheary with Mr. Wong Chong Wah of Skrine & Co., Kuala Lumpur for the second defendant.

No. 16

No.16

20 Formal Judgment

Formal Judgment

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

27th June 1974

Civil Suit No. 5 of 1971

Between

T.W. Lu & Company (M) Sdn. Bhd. Plaintiff

And

- 1. The Sanko Asia Line Ltd.
2. The Port Swettenham Authority Defendants

BEFORE THE HONOURABLE MR. JUSTICE ABDUL HAMID

THIS 27TH DAY OF JUNE, 1974 IN OPEN COURT

30 ORDER

THIS SUIT coming up for hearing on the

In the High Court

No.16

Formal Judgment

27th June 1974 (continued)

22nd and 23rd days of April, 1974 in the presence of Mr. Cecil W.M. Abraham of Counsel for the Plaintiff, Mr. N.A. Marjoribanks and Mr. Lall Singh Muker of Counsel for the First Defendants and Mr. James Puthuchearry and Mr. Wong Chong Wah of Counsel for the Second Defendants AND UPON READING the Pleadings herein AND UPON HEARING the evidence adduced by the parties and arguments of Counsel aforesaid IT WAS ORDERED that the Plaintiff's claims as against the First Defendants be dismissed IT WAS ORDERED that the aforesaid Counsel for the Plaintiff and the Second Defendants do file their written submissions AND IT WAS ORDERED that this Suit do stand adjourned for Judgment and the said Suit coming on for Judgment this day in the presence of Mr. Cecil W.M. Abraham of Counsel for the Plaintiff, Mr. N.A. Marjoribanks of Counsel for the First Defendants and Mr. James Puthuchearry of Counsel for the Second Defendants IT IS ORDERED that the Second Defendants do pay to the Plaintiff the sum of Dollars Twenty-one thousand two hundred and thirty six and cents eighty four (\$21,236.84) together with interest thereon at the rate of 3% per annum with effect from the 5th day of April, 1970 to the date hereof and thereafter interest at the rate of 6% per annum from the date hereof to the date of realisation AND LASTLY IT IS ORDERED that the costs of this Suit be taxed by the proper Officer of this Court and be paid by the Second Defendants to the Plaintiff and to First Defendants.

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GIVEN under my hand and the Seal of the Court this 27th day of June, 1974.

Sd: Illegible.

Senior Assistant Registrar,
High Court,
Kuala Lumpur.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT
(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 111 OF 1974

Between

The Port Swettenham Authority

Appellants

And

T.W. Wu & Company (M) Sdn. Bhd.

Respondent

(In the matter of Civil Suit No. 8 of 1972
In the High Court in Malaya at Kuala Lumpur

In the
Federal Court

No.17

Notice of
Appeal

23rd July
1974

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Between

T.W. Wu & Company Sdn. Bhd.

Plaintiff

And

1. The Sanko Asia Line Ltd.
2. The Port Swettenham
Authority

Defendants

NOTICE OF APPEAL

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TAKE NOTICE that The Port Swettenham Authority, the Appellant abovenamed, being dissatisfied with the decision of the Honourable Mr. Justice Abdul Hamid given at the High Court, Kuala Lumpur on the 27th day of June, 1974 appeals to the Federal Court against the whole of the said decision.

Dated this 23rd day of July, 1974.

Sd: Skrine & Co.
Solicitors for the Appellant
abovenamed.

To:

The Registrar,
The Federal Court,
Kuala Lumpur.

30

and to

The Senior Assistant Registrar,
High Court, Kuala Lumpur.

the following grounds:-

1. The Learned Judge erred in law in holding that Byelaw 91(1) of the Kelang Port Authority Byelaws 1965 does not relieve the Appellants of the burden of proof that ordinarily lies upon a bailee in such circumstances.

10 2. The Learned Judge erred in law in holding that the Appellants were liable on the grounds that the theft took place as a consequence of either the negligence or the active participation or complicity of one or more of the Port employees.

3. The Learned Judge erred in holding that the care taken by the Appellants of the Respondents' goods was insufficient to satisfy the duty of care placed on the Appellants by Section 104 of the Contracts (Malay States) Ordinance 1950.

4. The Learned Judge erred in awarding the First Defendant costs against the Appellants.

Dated this 3rd day of September, 1974.

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Sd: Skrine & Co.
Solicitors for the Appellants
abovenamed.

To:-

1. The Registrar,
Federal Court,
Kuala Lumpur.
2. The Senior Assistant Registrar,
High Court,
Kuala Lumpur.
- 30 3. The Respondent abovenamed
or its Solicitors,
Messrs. Shearn Delamore & Co.,
2, Benteng,
Kuala Lumpur.

In the
Federal Court

No.18

Memorandum
of Appeal

3rd September
1974

(continued)

In the
Federal Court

No. 19

No.19

Judgment

Judgment of
Lee Hun Hoe
C.J.

JUDGMENT OF
LEE HUN HOE, C.J. BORNEO

8th March
1975

Cor. Suffian, L.P. Malaysia
Lee Hun Hoe, C.J. Borneo
Ali, F.J.

This is an appeal by appellants from a judgment of Hamid, J. ordering them to pay a sum of $\$21,236.84$ damages to respondents for the loss of 64 cases of pharmaceutical goods while in the custody of appellants. There are four grounds of appeal, namely, that the learned Judge erred:- 10

- (i) in law in holding that by-law 91(1) of the Kelang Port Authority Bylaws 1965 does not relieve the appellants of the burden of proof that ordinarily lies upon a bailee in such circumstances;
- (ii) in law in holding that the appellants were liable on the grounds that the theft took place as a consequence of either the negligence or the active participation or complicity of one or more of the port employees; 20
- (iii) in holding that the care taken by the appellants of the respondents' goods was insufficient to satisfy the duty of care placed on the appellants by section 104 of the Contracts (Malay States) Ordinance, 1950; 30
- (iv) in awarding the first defendant costs against the appellants.

The first and third grounds may be taken together as both are concerned with the question of burden of proof. The second ground seems to question inferences made by the learned Judge from facts. The last ground refers to costs awarded to first defendants who are not parties to this appeal.

Respondents were consignees of 93 cases of 40

pharmaceutical goods from Hongkong which were carried by S.S. "Sansei Maru" pursuant to two Bills of Lading. The vessel arrived at Port Kelang on 5th April, 1970. The goods were unloaded, tallied and taken away by appellants' fork-lift and kept in Shed No. 8. The goods were examined by customs and duty was duly paid. Through their forwarding agents respondents managed to collect only 29 cases. Appellants were informed in writing on 15th April, 1970 of the short delivery of 64 cases. In reply, appellants stated that according to their outturn the 64 cases were shortlanded. On 20th July, 1970, acting on information received, respondents lodged a report with the police concerning the missing goods. As a result police raided the premises of Kuala Lumpur Pharmacy Sdn. Bhd. where part of the missing goods were recovered. The proprietor of the said firm was charged in court but subsequently discharged.

Before going into the grounds of appeal, we would deal with one matter raised by appellants. Encik Puthuchearry referred to the pleading and said that detinue was not pleaded. He said that was important in determining onus of proof. The reason is that the onus on a bailee arises when a bailor demands the goods and is refused. He argued that the bailor should frame his action in detinue. He raised this point because the learned Judge had placed the onus on appellants as bailees. As far as we can see from the statement of claim respondents based his claim on contract (para.5), detinue (para.6), negligence (para.9) and conversion (para.12). In any case Encik Abraham said that since the goods were already missing there would be no point in their proceeding in detinue because it would mean asking for the return of the goods. They could rely on other parts of their pleading. It is sufficient to say that the case of General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd. (1963) W.L.R. 644 at 648 was cited, particularly the judgment of Lord Diplock, merely to show the distinction between detinue and conversion. In the common law the onus of proof is on the bailee to show that the loss of, or damage to, the goods entrusted to him occurred without negligence or default on his part. This is so notwithstanding the nature and contract of bailment required of him. See Joseph Travers & Sons Ltd. v. Cooper (1915) 1 K.B. 73, CA; Phipps v. The New

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Claridge's Hotel Ltd. (1905) 22 T.L.R. 49. We do not think there is much in what Encik Puthuchearry said. As Denning, L.J., as he then was, in J. Spurling Ltd. v. Bradshaw (1956) 2 A.E.R. 121 at 125 said:-

" A bailor, by pleading and presenting his case properly, can always put the burden of proof on the bailee. In the case of non-delivery, for instance, all he need plead is the contract and a failure to deliver on demand. That puts on the bailee the burden of proving either loss without his fault (which would be a complete answer at common law) or, if the loss was due to his fault, that it was a fault from which he is excluded by the exempting clause." 10

He continues in another passage:-

" Where, however, the only charge made in the pleadings - or the reasonable inference on the facts - is that the damage was due to negligence and nothing more, then the bailee can rely on the exempting clause without more ado." 20

The main question in this appeal is concerned with the burden of proof. Was the learned Judge right to place the burden on appellants in the circumstances to prove that the loss of the goods was not caused by negligence on their part?

There can be no doubt that on the evidence the goods were delivered to appellants. This was also the finding of the learned Judge. The loss of the cases of pharmaceutical goods was established. Part of the missing goods was found in the premises of the Kuala Lumpur Pharmacy Sdn. Bhd. As the goods were entrusted to appellants they were dutybound to take all reasonable precautions to protect them from theft, loss or damage. Because of their special knowledge the burden is on them. Section 106 of the Evidence Act provides that:- 30

" When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." 40

One important aspect of the burden of proof

was strenuously argued by the parties. Encik Puthuchery contended that section 106 did not in any way shift the onus of proving negligence to appellants. All that section 106 required of appellants was for them to show what had been done to protect the goods. They had given evidence regarding system and security. It was for respondents to show where appellants as bailees had failed in the care of a man of ordinary prudence. Dwarka Nath Pai Mohan Chaudhuri v. Rivers Steam Navigation Co. Ltd. (1918) 46 I.C. 319 at 321; (1917) A.I.R. (P.C.) 173, was cited and certain passages were quoted.

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The argument on onus centres round the provisions of sections 104 and 105 of the Contracts (Malay States) Ordinance, 1950 and by-law 91(1) of the Port Swettenham Authority By-laws 1965. Sections 104 and 105 read as follows:-

"104. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed."

"105. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 104 of this Ordinance."

By-law 91(1) provides that:-

"The Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or mis-delivery of goods or from other cause unless such loss or destruction has been caused solely by the misconduct or negligence of the Authority or its officers or servants."

It is the contention of the appellants that by-law 91(1) has the effect of decreasing the liability of the Authority and that the onus is on respondents to show that the loss was caused solely by the misconduct or negligence of the Authority or its officers or its servants. Further, the duty which rests upon a bailee under section 104 is no

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different from the duty cast by the common law on a gratuitous bailee. That the duties of a bailee for reward are the same as those of a gratuitous bailee under the Indian Contract Act has been long recognised in India. In Secretary of State v. Ramdhan Das Dwarka Das (1934) 150 I.C. 189 the Privy Council considered the duty of care to be taken by a bailee under section 151 of the Indian Contracts Act (which is pari materia with our section 104). After commenting on the English cases on bailments their Lordships went on to say:-

10

"The Indian legislature in S.151 Contract Act, makes no reference to the distinction between a gratuitous bailee and a bailee for hire, and, omitting all reference to skill, lays down for both one standard, namely, as much care as a man of ordinary prudence would take of his own goods in similar circumstances. The standard, therefore, must, while it is one and the same as far as it is a question of principle, cannot be formulated by an inflexible practical rule applicable to all cases."

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They very wisely gave this warning when dealing with English authorities:-

" To show what the standard ought to be, a number of English authorities have been cited before us on behalf of the appellant. These authorities it must be admitted are not always consistent, and moreover they have to be, if at all, relied on with great caution, in view of the difference that exists between the two systems of law."

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Reference was made to Pollock & Mulla on Indian Contract and Specific Relief Acts, 6th Edition, page 516, particularly the commentary on section 151 which reads:-

"This section abolishes the distinctions in the amount of care required of various kinds of bailees which were established, or supposed to be established, by the judgment of Holt, C.J. in Coggs v. Bernard (1703) 2 Ld. Raym. 909; 1 Sml.C.175. By modern English law a gratuitous bailee is bound

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to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description; and it does not seem that in practice an ordinary bailee for reward is bound to anything more."

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(continued)

10 It was submitted that in Malaysia as in India the duty imposed by law on a bailee for reward is the same as that imposed by common law on a gratuitous bailee.

20 On the other hand, Encik Abraham says that although our law does not expressly distinguish between a gratuitous bailee and a bailee for reward, in so far as onus of proof of a bailee for reward is concerned, the burden of proof in our law is the same as the burden of proof of a bailee for reward in the common law. In support of this two Malayan cases were cited. The first is Abdul Rahman v. Ariffin (1956) 22 M.L.J. 89. It concerned a claim for the value of a buffalo which plaintiff had entrusted to defendant in accordance with a profit sharing agreement. The learned magistrate considered that there was a contract of bailment of the buffalo but held that as plaintiff had not established that the loss of the buffalo was through the neglect or default of the defendant, the bailee, he had no cause of action. On appeal, Thompson, J. as he then was, held that the onus was on the defendant as bailee to show that the loss was not attributable to lack of care on his part and, therefore, the learned magistrate was wrong in giving judgment for the defendant at the close of the case for the plaintiff. Part of his short judgment reads:-

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40 "I do not find it necessary to discuss the point at great length because in my opinion the law is clearly stated in the following passage from Chitty on Contracts, 20th Edition, p.846:-

"In the case of loss or damage to goods bailed the onus is on the bailee to show that the loss or damage was not attributable to any lack of care which by law is required of him."

After mentioning the case of Phipps v. The

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New Claridges Hotel (Ltd.) (1905) 22 T.L.R. 49
where the facts were similar to the case he was
considering he continued:-

"There is nothing inconsistent between the law as thus stated in Chitty and sections 104 and 106 of the Contracts Ordinance. The point is more one of onus than one of substantive law. It is true that the bailee is only responsible for the consequences of failure to observe the standard of care laid down by section 104 and there is no doubt that up to a point there is an onus upon any plaintiff which must be discharged. It seems to me, however, that once loss has been proved that onus has been discharged and the onus then shifts to the defendant to shew that the loss occurred in circumstances which showed no lack of care on his part."

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The second case is Gee Mup & Co. v. Yeo Swee Hern trading as Chop Yong Pee Huat ()

There plaintiffs regularly sent quantities of uncured rubber to defendant owners of a smokehouse, for smoking at an agreed price. As a result of a fire the smokehouse and adjoining buildings, the contents therein including plaintiffs' uncured rubber were destroyed. Thorne, J. expressed the view that as plaintiffs had alleged negligence against defendant they had to adduce evidence to establish a prima facie case of negligence in order to shift the onus to defendants. After hearing all the evidence he found for plaintiffs holding that plaintiffs had established that defendants were negligent. Although the appeal was dismissed, Huggard, C.J. criticised the view expressed by Thorne, J. He made clear that he agreed with the principle established by those cases arising out of tort on the question of onus in that plaintiff was to prove that defendant was negligent and that the negligence was the proximate cause of the loss or injury complained of. Having said that he made these observations:-

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"But in my view the principle established by this line of cases has no application to the facts in the present case. It is,

I think, quite clear that the defendants here were bailees for reward of the Plaintiff's rubber, and therefore what we have to consider is the legal position applicable to the relationship of bailor and bailee for reward."

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10 He then referred to sections 151 and 152 of the Contract Enactment of the Federal Malay States which were substantially the same as the provisions of the Indian Contract Act and cited Pollock & Mulla, 5th Edition, particularly a passage which is the same as in the 9th Edition and quoted in a later part of this judgment. Continuing on he said:-

20 "Now the common law of England as to bailments is substantially the same as the statute law on that subject in force in this State. It is therefore of assistance to turn to English authorities dealing with the subject."

The following general proposition appears in Halsbury Laws of England, 2nd Edition, Vol. 1 at page 751:-

30 "When a chattel intrusted to a custodian is lost, injured or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his property."

This proposition is supported by ample authority amongst the cases cited being:-

Mackenzie v. Cox 173 E.R.987,

Phipps v. New Claridges Hotel (Ltd.) (1905)
22 T.L.R. 49.

Coldman v. Hill (1919) 1 K.B. 443.

40 Section 104 clearly lays down the duty and responsibility of a bailee. Section 105 merely deals with special contract. Encik Puthuchery submitted that by-law 91(1) could be regarded as analogous to a special contract. We do not think that is possible in this case. The Port Swettenham

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Authority By-laws, 1965 was made pursuant to section 29 of the Port Authorities Act, 1963. Paragraph (g) of section 29(1) reads:-

"29(1) The authority may with the approval of the Minister make by-laws for

(g) limiting the liability of the authority in respect of any loss, damage or injury to any person, occurring without the actual fault or privity of the authority (whether in any vessel operated or maintained by them or on any wharf, quay or other part of the port);"

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Section 29 merely empowers the appellants to limit liability so that the authority would be only liable if they are at fault. It in no way gives appellants power to exempt themselves totally from liability. The By-laws would be ultra vires if they purported to deal with matters outside the ambit of section 29.

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Part IV of the Port Swettenham Authority By-Laws, 1965 covers By-laws 90 to 117 and deals specifically with limitation of liability. By-law 91(1) has nothing whatsoever to do with onus of proof or shifting of onus of proof. Once it is established from the evidence that appellants were at fault, then, as H.T. Ong, C.J. said in Sharikat Lee Heng Sdn. Bhd. v. Port Swettenham Authority (1971) 2 M.L.J. 27. "The onus as a determining factor, therefore, did not arise." Lee Heng's Case (1971) 2 M.L.J. 27 being a decision of this court is binding on this court unless it can be shown to be per incuriam. Thus, the Federal Court in Yong Tong Hong v. Siew Soon Wah & Ors. (1971) 2 M.L.J. 105 did not follow Hajarah Singh v. Muthukaruppan (1967) 1 M.L.J. 167 and Lee Ah Low v. Cheong Lip Kien (1970) 1 M.L.J. 7 and similarly in T.O. Thomas v. K.C.I. Reddy (1974) 2 M.L.J. 87 the Federal Court did not follow Nagappa Rengasamy Pillai v. Lim Lee Chong (1968) 2 M.L.J. 91 as it was considered that the earlier decisions were given per incuriam. It could be on the ground that a point was not fully argued either because (a) certain

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law, rule or regulation, or (b) certain authority or authorities had not been brought to the attention of the Court. However, the same cannot be said of Lee Heng's Case (1971) 2 M.L.J. 27. By-law 91(1) was thoroughly canvassed in that case. The learned Judge rightly pointed out that Lee Heng's Case (1971) 2 M.L.J. 27 made clear that By-law 91(I) did not relieve the Port Authority of the burden of proof that ordinarily rested upon a bailee. In this case respondents averred that appellants as bailees were negligent and on the evidence the learned Judge was satisfied that the 64 cases of pharmaceutical goods were stolen while in the custody of the appellants. After referring to what Denning, L.J. said in Spurling v. Bradshaw (1956) 2 A.E.R. 121 at 125 in Lee Heng's Case (1971) 2 M.L.J. 27, H.T.Ong, C.J. continued:-

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" Mere non-delivery, therefore, is prima facie evidence of negligence - this being a case of res ipsa loquitur. And 'once negligence on the part of the defendants has been established and this negligence could have caused the loss, it was eminently reasonable to ask them to prove that in fact it did not see Hunt & Winterbotham Ltd. v. B.R.S. (Parcels) Ltd. (1962) 1 Q.B. 617 at 634 per Donovan, L.J. who went on to say -

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'Similarly, in Brooks Wharf and Bull Wharf Ltd. v. Goodman Bros. (1937) 1 K.B. 534 (another case of a claim in negligence) it was held that the circumstances of the loss of goods by a bailee may justify the inference of negligence as the cause of the loss, which inference it would be for the bailee to displace.'"

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Dwarka Nath's Case (1918) 46 I.C. 319 at 321; (1917) A.I.R. (RC) 173 was not mentioned by H.T.Ong, C.J. in Lee Heng's Case (1971) 2 M.L.J. 27 although his attention was drawn to the case. This is understandable because Dwarka Nath's Case (1918) 46 I.C. 319 at 321; (1917) A.I.R. (R.C.) 173 dealt with an entirely different kind of case. It was concerned with a suit against common carriers for loss of goods occasioned by fire which originated from some unknown cause. This is stated very clearly in Pollock & Mulla on the Indian Contract and Specific Relief Acts, 9th Edition, page 666 when referring to Dwarka Nath's Case, that:-

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"There is a special class of cases where goods are destroyed by fire arising from some unknown cause, while they are in the possession of a common carrier or a railway company."

In so far as burden of proof on a bailee is concerned the position in India is stated in the same edition of Pollock & Mulla at page 665 as follows:-

"In cases governed by the provisions of sections 151 and 152, the loss or damage of goods entrusted to a bailee is prima facie evidence of negligence, and the burden of proof, therefore, to disprove negligence lies on the bailee." 10

At page 659 under the heading of Common Carriers it is stated:-

"The provisions of sections 151 and 152 of the Contract Act embody in effect the Common Law rule as to the liability of bailees other than common carriers and innkeepers. The measure of care required of these bailees in respect of goods entrusted to them was the same as a man of ordinary prudence would take of his own goods; in other words, the liability was one for negligence only, in the absence of special contract. Common carriers and innkeepers, on the other hand, were liable as insurers of goods; that is, they were responsible for every injury to the goods occasioned by any means whatever, except only the act of God and the King's enemies." 20 30

To recapitulate the weight of authorities indicates that our law regarding onus on bailee for reward is not inconsistent with the common law. In the ordinary cases of tort the onus would be on the plaintiff to prove that defendant was negligent and that the act or omission was the proximate cause of the loss or injury. But, in cases where the bailor and bailee relationship has been established then all that the plaintiff has to do is to prove that he entrusted the goods to defendant who could not deliver them on demand. It would then be up to the defendant as bailee to show that the loss was not due to his negligence. 40

The fact that the appellants had devised a good system did not render them any the less liable if it was not shown that the loss of the goods arose otherwise than through their negligence. Appellants did not tell the court anything at all as to what happened to the 64 cases of goods which were delivered to them in Shed No. 8. It would not help to say that the goods were shortlanded or to give speculative evidence when it was established on preponderance of probabilities that the goods were conveyed by their employees and kept in their custody. They could not explain how the bulky and heavy goods could be taken out of the shed under the watchful eyes of their employees.

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We should like to refer to British Traders & Shippers Ltd. v. Ubique Transport & Motor Engineering Co. (London) Ltd. and Port of London Authority (1952) Vol. 2 Lloyds Law Report 236 at 256 where Lord Justice Morris said:-

"In the case of Brooks Wharf & Bull Wharf Ltd. v. Goodman Bros. (1936) 55 Ll.L. Rep.147; (C.A.) 56 Ll.L.Rep.71; (1937) 1 K.B. 534, a case decided by Mr. Justice Branson which went to the Court of Appeal, Lord Wright, M.R. in his judgment in the Court of Appeal (at pp.73 and 538 of the respective reports) made certain citations, and he quoted a passage from the judgment of Lord Loreburn in Morrison, Pollexfen & Blair v. Walton (unreported), Lord Wright said:-

'The law as to the position of warehousemen in such circumstances and the extent of the duty of care which rests upon them has been discussed in various cases, but I proceed on the basis of the statement of the law on the liability of warehousemen contained in two passages from the judgments of the House of Lords in the unreported case of Morrison Pollexfen & Blair v. Walton quoted by Lord Justice Kennedy in Joseph Travers & Sons Ltd. v. Cooper (1915) 1 K.B. 73 at 90. The first passage so quoted from the judgment of Lord Loreburn in the following words'.

I do not read all the passages, but the concluding sentences are these:-

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'It is for him (warehouseman) to explain the loss himself, and if he cannot satisfy the court that it occurred from some cause independent of his own wrong-doing he must make that loss good.'

And Lord Halsbury had said in Morrison, Pollexfen & Blair v. Walton (unreported):-

'It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him'".

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The learned Judge was at pain to show that by-law 91(1) did not shift the onus in any way or exempt appellants from the burden of proving that they were not negligent. Appellants took the line that they did take reasonable precautions to protect the goods in their custody by showing system of protection and adequacy of security. In Malayan Thread v. Oyama Shipping Line Ltd. & Anor. (1973) 1 M.L.J. 121, 123 the learned Judge there was presented with more materials and also, if we remember correctly, security was then in the Port's charge. For instance, the shed clerks, delivery clerks and other port personnel besides evidence similar to those given by D.W.1 and D.W.2 were adduced. The decision in that case was, therefore, based on the particular facts of the case.

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More is required than merely adducing evidence to show that their system was impeccable and their security adequate. If their system and security were so good then such bulky and heavy goods from the shed could not have escaped the vigilance of their employees bearing in mind that they were supposed to be working in shifts round the clock. In this case the learned Judge was entitled to hold that on the evidence appellants had not discharged the onus which rested on them.

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In many respects the case of British Traders & Shippers Ltd. v. Ubique Transport & Motor Engineering Co. (London) Ltd. and Port of London

Authority (1952) Vol. 2 Lloyds Law Report 236 at 256 is similar to our case except that the missing goods were never located or found. There plaintiffs claimed damages against defendants for negligence and conversion or detinue in respect of the loss of 5 tons of corrugated metal sheets. Defendants denied liability. But, second defendants also pleaded alternatively that if the sheets were delivered to them they were exempted from liability (1) by the Owner's Risk clause in that goods were "unprotected" or "unpacked", and (2) by their conditions relating to liability or to goods warehoused, which provided:-

"The Port Authority take all reasonable measures to protect goods received by or landed, warehoused or deposited with them against loss or damage, but they do not accept liability for any loss or damage arising otherwise than through their negligence."

It was held that the first defendants as carriers had discharged the onus of showing that they had delivered the steel sheets to second defendants and that the onus was on second defendants to show that the loss occurred without their negligence. It was also held that they were not exempted from liability either by (1) the Owner's Risk clause as the steel sheets were neither "unprotected" nor "unpacked", or (2) their conditions relating to liability as to goods warehoused. Accordingly, as second defendants failed to show that the loss occurred otherwise than through their negligence, plaintiff's claim against them succeeded. As to costs a bullock order was made.

Encik Puthuchearry submitted there was no evidence of theft by any named servants and if someone was in complicity with the thieves, these facts would not be enough to make the master liable vicariously. All that was required of appellants under section 104 was the degree of care that a man of ordinary prudence would take of his own goods in similar circumstances. Further, By-law 91(1) appellants had contracted into a lower duty of care. If an analogy to common law duty was to be drawn then it was submitted that duty would be that of a gratuitous bailee which the Contracts (Malay States) Ordinance 1950 had imposed.

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The Port Swettenham Authority could not function except through individuals who are their servants or employees. Appellants did not try to contradict the evidence adduced by respondents because Encik Puthuchearly frankly admitted they did not know whether the missing goods were ever in their possession. Something must be wrong with their system of which they spoke so highly of, if they could say they did not know anything of goods proved to have been delivered to their custody. In this case it was established that 93 cases were taken by appellants' forklift to Shed No. 8 and 29 cases were delivered, but 64 cases apparently disappeared from that shed under the noses of those employees working round the clock in the shed and at the gate. Part of the goods were found in a local pharmacy. All these showed that their system was not as impeccable as they wanted the court to believe. Neither was their security adequate.

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Encik Puthuchearly argued that Malayan Thread's Case (1973) 1 M.L.J. 121, 123 relied on Cheshire v. Bailey (1905) 1 K.B. 237 for the proposition that a master was not responsible for the fraudulent act of his servant or the loss of goods was not referable to the employees' negligence since the loss was caused by an act outside the scope of the servant's employment. The learned Judge distinguished the facts in Malayan Thread's Case (1973) 1 M.L.J. 121, 123 from the facts he was considering and also in that case Morris v. Martin (1966) 1 Q.B. 716 at 728 which disapproved Cheshire v. Bailey (1905) 1 K.B. 237 was not considered.

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In Morris v. Martin (1966) 1 Q.B. 716 at 728 the theft was committed by the very servant who was entrusted by the bailee to clean the fur. The County Court held that the bailee was not liable for the theft of the servant whose act was not "in the scope of his employment". In allowing the appeal the Court of Appeal held that the bailees owed the owner of the fur the duties of a bailee for reward to take reasonable care of the fur and not to convert it. Lord Denning, M.R. observed:-

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"..... when a principal has in his charge the goods or belongings of another in such circumstances that he is under a

duty to take all reasonable precautions to protect them from theft or depredation, then if he entrusts that duty to a servant or agent he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also if the servant or agent himself steals them or makes away with them. It follows that I do not think that Cheshire v. Bailey (1905) 1 K.B. 237 can be supported".

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Encik Puthuchearry referred the court to section 3(1)(a) of the Civil Law Ordinance, 1956 which reads:-

"3. (1) Save so far as other provision has been made or may hereinafter be made by any written law in force in Malaysia the Court shall -

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(a) In West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956."

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He argued that Morris v. Martin (1966) 1 Q.B. 716 at 728 was decided on 17th May, 1965 and till then Cheshire v. Bailey (1905) 1 K.B. 237 was the common law of England. Morris v. Martin (1966) 1 Q.B. 716 at 728 might be the correct common law rule regarding master's liability for servant's tort but it was not the common law administered in England on 7th April, 1956. Therefore, section 3(1)(a) prohibits its reception.

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Cheshire v. Bailey (1905) 1 K.B. 237 clearly conflicts with Lloyd v. Grace, Smith & Co. (1912) A.C.716 which rejected the view that a dishonest act committed by a servant for his own benefit was outside the scope of his employment. Although the House of Lords did not say it had overruled Cheshire v. Bailey (1905) 1 K.B. 237 clearly it must be taken to have impliedly overruled it. Even the Privy Council did not follow Cheshire v. Bailey (1905) 1 K.B. 237. As Lord Diplock remarked at page 736:-

"As recently as 1955 the Privy Council in United Africa Co. Ltd. v. Saka Owoade (1955) A.C. 130 although they reached a decision in conflict with Cheshire v. Bailey, declined to

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express a view as to whether it had been overruled by Lloyd v. Grace, Smith & Co. (1912) A.C. 716 or could be distinguished from it. In the present case, we, I think, are compelled to make up our minds about this. For my part I find it impossible to reconcile the decision in Cheshire v. Bailey (1905) 1 K.B. 237 with the principles laid down in Lloyd v. Grace, Smith & Co. (1912) A.C. 716. I think that decision is no longer good law and is not binding upon us. In so holding I am reassured by the reflection that this branch of the common law in England will be the same as it has been held to be in Ontario by the Supreme Court of Canada (see Reg. v. Levy Bros. & Co. Ltd. (1961) E.C.R. 189; 26 D.L.R. (2d) 760 and as it has been held to be in Nigeria by the Privy Council (United Africa Co. Ltd. v. Saka Owoade (1955) A.C. 130). It is better that the common law in different common law countries should converge rather than grow apart."

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Morris v. Martin (1966) 1 Q.B. 716 at 728 merely brings to light what should have been the common law. Cheshire v. Bailey (1905) 1 K.B. 237 and Lloyd v. Grace Smith & Co. (1912) A.C. 716 cannot both be right. We must substitute common sense for technicality. There is nothing to prevent this court from saying that the common law of England regarding a master's liability for a servant's tort is correctly laid down by the House of Lords in Lloyd v. Grace Smith & Co. (1912) A.C. 716 which impliedly overruled Cheshire v. Bailey (1905) 1 K.B. 237. The Privy Council in United Africa Co. Ltd. v. Saka Owoade (1955) A.C. 130 also did not follow Cheshire v. Bailey (1905) 1 K.B. 237. So that the common law of England was as stated by Lloyd v. Grace, Smith & Co. (1912) A.C. 716 and not Cheshire v. Bailey (1905) 1 K.B. 237.

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Sections 104 and 105 read with By-law 91(1) in no way reverse the onus of proof which rested squarely on appellants as bailees for reward. They have nothing to do with the burden of proof. To decide on whom the burden rests one must look to our law of evidence and decided cases. Even in Secretary of State v. Randham Das (1934) 150 I.C. 189 their Lordships in the Privy Council

realised the impracticability of having one standard of care for a gratuitous bailee and a bailee for reward. Hence, they said that although the standard was one and the same so far as the question of principle was concerned the standard could not be formulated by an inflexible practical rule applicable to all cases. It is, therefore, the practical aspect that one must look into. In this type of cases a bailee would only be able to adduce evidence of delivery, demand and refusal. He would be in no position to obtain evidence to show what actually happened to the goods which were in the custody of the Port Authority. Since the goods were in the care and control of the Port Authority, it was, therefore, reasonable that the Port Authority should explain the loss as the matter was something within their own knowledge. Abdul Rahman's Case (1956) 22 M.L.J. 89, Gee Hup's Case (1935) M.L.J. Vol.4 p.66, 67 and 69 and Lee Heng's Case (1971) 2 M.L.J. 27 are clear authorities for the proposition that the onus of proof on a bailee for reward in this country is the same as that of the common law.

Much more detailed evidence on system was given in British Traders' Case (1952) Vol. 2 Lloyds Law Report 236 at 256 but Lord Justice Morris accepted the evidence of the driver that he did in fact deliver the steel sheets to the Port of London Authority. In our case only two witnesses gave evidence on system and security when the missing goods were proved to be in their custody. Not a single word was uttered about the particular missing goods and what happened to them in their evidence.

It was submitted on behalf of appellants that they had discharged the burden which rested upon them merely by showing system and security. The learned Judge did not think so and he was right too. The Port of London Authority in British Traders' Case (1952) Vol. 2 Lloyds Law Report 236 at 256 also could not explain at all what happened to the goods deposited with them. All they did was to show that they had devised and evolved a good system for the protection of the goods kept by them. In holding that this was not good enough, Lord Justice Morris said:-

" But, furthermore, the Port of London Authority cannot say whether these goods were

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stolen or not, and if they were stolen they cannot say whether they were stolen by some intruder or by some of their servants. The matter is a complete mystery and it would be wrong and idle to speculate as to what did happen. Anyone may suggest in his own mind a series of possibilities, but it would be idle and wrong to formulate them, for there is no reason to think that anyone is more likely than any other; but I am satisfied that it is not shown in this case that the loss of the goods arose otherwise than through the negligence of the Port of London Authority."

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In our case the goods were clearly stolen as some found their way to a local pharmacy. Appellants took no active steps to investigate into the matter but chose the easy way out by holding stubbornly to the view that the goods were shortlanded because in their experience it usually happened to consignment which was big. The learned judge could not find the appellants negligent considering the circumstances under which the goods disappeared, the nature, bulk and weight of the goods, and the system of security. We are not at all surprised that he should make the following comments:-

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but

"Although goods leaving the port area are supported by proper documents delivery of the goods at the shed and the checking at the gate is all done by port employees. It may be pertinent to observe that in view of the nature of the goods, their weight and bulk, it is reasonable to conclude that they could only be taken out of the port area in a vehicle. As the goods had to be loaded at some point within the port area it would seem to me that this could not easily have been done without active assistance of the port employees."

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We have already said that By-law 91(1) has nothing to do with onus. It cannot shift onus which is on a bailee for reward to show that he is not negligent. What was said about applying the contra proferentum rule to By-law 91(1) in Lee Heng's Case (1971) 2 M.L.J. 27 should be regarded as obiter as it was not necessary for

the decision of that case. By-law 91(1) derives its power from the Port Authority Act which can in no way be construed to give any power to decide on burden. Thus, By-Law 91(1) cannot assume to do what the Act itself is unable to do.

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In this case the learned Judge has dealt with the law in some details and gone through the evidence carefully. Appellants merely called two witnesses D.W.1 and D.W.2 to show system and security. Both knew nothing about the missing goods, so they said nothing about them. Those who knew or were at the shed were not called. D.W.1 admitted that their outturn was not accurate. Those working at Shed No. 8 had been proved. They could not have been taken out without proper documents. A check would be made when the goods were being loaded onto a lorry. A second check would be made at the gate. Shed No. 8 was in the charge of a chief clerk with four clerks under him. They worked on shifts round the clock. All these people were appellants' employees. D.W.2 had stated that some of his police officers were guilty of pilferage and of not signing beat book at times. He said he had no control over the regularity of marine police patrols. He said there was no alarm in the shed and agreed that dog patrol would be useful. It seems that the security aspect left much to be desired. There should be more effective control and co-ordination.

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The learned Judge was in a better position to assess the credibility of the witnesses. The facts are such that we could not say that the learned Judge was wrong to say at page 116 of the Appeal Record that:-

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"On the facts before me the irresistible inference that arises was that the goods might have been stolen as a consequence of the negligence of the servants of the Port Authorities in the course of their employment. I am even inclined to think that the theft might indeed have taken place through active participation or complicity of one or more of their employees."

Pilfering is inescapable in a port. Small packages can easily be spirited out of a shed without anyone the wiser. Cases can be broken and goods extracted from them. The best system cannot

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ensure that no goods will be pilfered. But, when bulky and heavy goods kept on disappearing, something must be wrong somewhere. The 64 cases were bulky and weighed over 5 tons and required a forklift to convey them to the shed. Such a large quantity could not walk out of the port by themselves. When some of the missing goods were known to have been found in a local firm the port authority should follow up with an investigation. They did nothing. In view of the frequent loss of bulky and heavy goods from the port the system and security must be assessed by the authority in the manner suggested by Sach, L.J. in British Road Services Ltd. v. Arthur v. Crutchley & Co. Ltd. (1968) Vol. 1 LL.L.R. 271 at 288 where he said:-

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"..... in relation not merely to the risks of a particular "outside job" such as the one under consideration, but also as regards other risks including those of an "inside job", e.g. where a day employee facilitates the entry of others through some small door - a matter to which no evidence was directed."

20

Both Encik Puthuchearry and Encik Abraham have done considerable researches judging by the way they presented their submissions. We want to express our thanks to them as we have obtained much assistance from their researches. Encik Puthuchearry has presented various submissions carefully but we find that we are unable to accept them. We do not think in this case the learned Judge has stated the law incorrectly and on the facts there is no reason to interfere with his finding against appellants.

30

We will now deal with the last ground on costs. Respondents (as plaintiffs) sued the Sanko Asia Line Ltd. (as first defendants) and appellants (as second defendants). The learned Judge gave judgment in favour of respondents against appellants with costs. He also ordered appellants to pay costs to first defendants. Order of costs made in this manner is commonly known as a Sanderson Order. We think the learned Judge did not make an order as in Bullock v. The London General Omnibus Co. & Ors. (1907) 1 K.B. 264 commonly known as Bullock Order because it would involve double taxation

40

resulting in added costs.

Appellants argued that respondents were entitled to first defendants' costs from appellants if first defendants were properly joined. Firstly defendants were joined from the start but respondents adduced no evidence against them resulting thereby in the dismissal of the claim against first defendants. It was submitted that first defendants were not entitled to costs. On the other hand, respondents pointed out that they had to consider the question of limitation. They had to bring in first defendants because appellants gave them to understand that the 64 cases were shortlanded. Also, in their defence appellants denied ever receiving the missing goods. At first they refused even to accept the accuracy of the tally sheets but changed their minds later. In such a situation it was not only reasonable and advisable for respondents to join both as defendants but they would have been extremely unwise if they had not done so.

Costs are at the discretion of the court. So long as the court is shown to have exercised the discretion judicially the appellate court should not interfere lightly with such exercise. There is no ground for interference as the learned Judge has acted properly in the exercise of his discretion.

For reasons given we would dismiss the appeal with costs here and in the court below.

In the
Federal Court

No.19

Judgment of
Lee Hun Hoe
C.J.

8th March
1975
(continued)

No. 20

Order of the Federal Court

CORAM: SUFFIAN, LORD PRESIDENT, FEDERAL COURT,
MALAYSIA.

LEE HUN HOE, CHIEF JUSTICE, HIGH COURT IN
BORNEO

ALI, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 8TH DAY OF MARCH, 1975

No.20

Order of the
Federal Court

8th March
1975

O R D E R

In the
Federal Court

No.20

Order of the
Federal Court

8th March
1975
(continued)

THIS APPEAL coming on for hearing on the 8th and 9th days of January, 1975 in the presence of Mr. J.J. Puthuchery of Counsel for the Appellants and Mr. Cecil Abraham of Counsel for the Respondent AND UPON READING the Record of Appeal filed herein AND UPON HEARING the submissions of Counsel aforesaid IT WAS ORDERED that this Appeal do stand adjourned and the same coming on for Judgment this day in the presence of Mr. J.J. Puthuchery of Counsel for the Appellants and Mr. Cecil Abraham of Counsel for the Respondent IT IS ORDERED that this Appeal herein be and is hereby dismissed AND IT IS ORDERED that the Appellants do pay to the Respondent the costs of this Appeal to be taxed by the Proper Officer of the Court AND IT IS LASTLY ORDERED that the sum of Ringgit Five hundred (RM500.00) paid into Court by the Appellants as security for costs of this Appeal be paid out to the Respondent towards their taxed costs.

10

20

GIVEN under my hand and the seal of the Court this 8th day of March, 1975.

Sd: E.E. Sim
CHIEF REGISTRAR.

No.21

No. 21

Notice of
Motion

Notice of Motion

19th April
1975

NOTICE OF MOTION

TAKE NOTICE that on Monday, the 12th day of May, 1975 at 9.30 o'clock in the forenoon, or as soon thereafter as Counsel can be heard by Counsel on behalf of the Appellants abovenamed will move the Court for an Order:-

30

- 1) That conditional leave be granted to the Appellants to appeal to His Majesty the Yang Dipertuan Agung against the judgment of the Federal Court given on the 8th day of March, 1975;
- 2) That execution of the said judgment be suspended pending the appeal;

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3) That the costs of and incidental to this application be costs in the cause.

In the Federal Court

Dated this 17th day of April, 1975.

Notice of Motion

Sd: Skrine & Co.
Appellants' Solicitors.

19th April
1975
(continued)

Dated this 19th day of April, 1975.

Sd: E.E. Sim
Chief Registrar,
FEDERAL COURT, MALAYSIA,
KUALA LUMPUR.

10

This Notice of Motion was taken out by Messrs. Skrine & Co., Straits Trading Building, No. 4, Leboh Pasar Besar, Kuala Lumpur, Solicitors for the Appellants abovenamed.

The Affidavit of Mohamed bin Abdul Hamid affirmed on the 17th day of April 1975 and filed herein will be read in support of this application.

Filed this 17th day of April, 1975.

20

Sd: E.E. Sim
Chief Registrar,
Federal Court, Malaysia,
Kuala Lumpur.

No. 22

No.22

Affidavit

Affidavit of
Mohamed bin
Abdul Hamid

A F F I D A V I T

17th April
1975

I, Mohamed bin Abdul Hamid, of full age, of c/o The Port Swettenham Authority, Port Klang, Selangor, affirm and say as follows:-

30

1. I am the Secretary of the Port Swettenham Authority, the Appellants abovenamed and am duly authorised to affirm this affidavit on their behalf.

2. On the 27th June 1974 the High Court at Kuala Lumpur gave judgment in favour of the Respondent and ordered that the Appellants do pay to the

In the
Federal Court

No.22

Affidavit of
Mohamed bin
Abdul Hamid
17th April
1975
(continued)

Respondent the sum of \$21,236.84 damages for
loss of 64 cases of pharmaceutical goods together
with interest and costs.

3. The Appellants appealed against the said
judgment, and the Appeal was heard in the Federal
Court of Malaysia at Kuala Lumpur on the 8th and
9th January, 1975 when at the conclusion of the
hearing, Judgment was reserved.

4. On the 8th day of March, 1975 the Federal
Court gave judgment whereby it was ordered that
the Appellants' appeal be dismissed with costs.

10

5. The Appellants are dissatisfied with the
said Judgment of the Federal Court and are
desirous of appealing to His Majesty the Yang
Dipertuan Agung against the said Judgment. The
Appellants are advised that this is a fit and
proper case for appeal.

6. The said judgment is a final judgment or
order in a civil matter where the matter in
dispute amounts to more than \$20,000/-.

20

7. The Appellants abovenamed are willing to
undertake as a condition for leave to appeal to
enter into good and sufficient security to the
satisfaction of this Honourable Court in such
sum as this Honourable Court may duly prescribe
and to conform to any other conditions that may
be imposed.

8. I pray that this Honourable Court will be
pleased to grant to the Appellants to appeal to
His Majesty the Yang Dipertuan Agung and that
execution of the said judgment may be suspended
pending the hearing of the appeal.

30

AFFIRMED at Kuala Lumpur)
this 17th day of April,) Sd: Mohamed bin
1975 at 11.00 a.m.) Abdul Hamid

Sd: W.P. Sarathy
Commissioner for Oaths.

This Affidavit is filed by Messrs. Skrine
& Co., Straits Trading Building, No.4 Leboh Pasar
Besar, Kuala Lumpur, Solicitors for the
Appellants abovenamed.

40

No.23

Order of Federal Court

In the
Federal Court

No.23

CORAM: GILL, CHIEF JUSTICE, HIGH COURT, MALAYA;
ONG HOCK SIM, JUDGE, FEDERAL COURT, MALAYSIA;
RAHA AZLAN SHAH, JUDGE, FEDERAL COURT, MALAYSIA.

Order of
Full Court
12th May 1975

IN OPEN COURT

10

THIS 12TH DAY OF MAY, 1975O R D E R

UPON MOTION made unto Court this day by Encik Abdullah bin Mohamed Yusof of Counsel for the Appellants in the presence of Encik Anwar Isamil of Counsel for the Respondent abovenamed AND UPON READING the Notice of Motion dated the 19th day of April, 1975 and the Affidavit of Mohamed bin Abdul Hamid affirmed on the 17th day of April, 1975, both filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that leave be and is hereby granted to the Appellants to appeal to His Majesty the Yang di-Pertuan Agung against the Order of the Federal Court dated the 8th day of March, 1975 upon the following conditions:-

20

30

40

- (a) that the Appellants abovenamed do within three months from the date hereof enter into good and sufficient security to the satisfaction of the Chief Registrar, Federal Court, Malaysia, in the sum of \$5,000/- (Ringgit Five thousand only) for the due prosecution of the appeal, and the payment of all such costs as may become payable to the Respondent abovenamed in the event of the Appellants abovenamed not obtaining an order granting them final leave to Appeal or of the Appeal being dismissed for non-prosecution or of His Majesty the Yang di-Pertuan Agung ordering the Appellants abovenamed to pay the Respondent's costs of the Appeal as the case may be;
- (b) that the Appellants abovenamed do within the said period of three months take the necessary

In the
Federal Court

No.23

Order of
Federal Court

12th May 1975
(continued)

steps for the purpose of procuring the preparation of the Record and for the despatch thereof to England.

AND IT IS ORDERED that the costs of and incidental to this application be costs in the cause.

GIVEN under my hand and the seal of the Court this 12th day of May, 1975.

SD: E.E. SIM
CHIEF REGISTRAR.

No.24

Order of
Federal Court
granting
final leave
to appeal

22nd September
1975

No. 24

Order of Federal Court
granting final leave to appeal

10

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR (APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 111 OF 1974

Between

The Port Swettenham Authority Appellants

And

T.W. Wu & Company (M) Sdn. Bhd. Respondent

(In the matter of Civil Suit No. 5 of
1971 in the High Court in Malaya at
Kuala Lumpur

20

Between

T.W. Wu & Company Sdn.Bhd. Plaintiff

And

1. The Sanko Asia Line Ltd.
2. The Port Swettenham
Authority Defendants)

CORAM: LEE HUN HOE, CHIEF JUSTICE, HIGH COURT IN BORNEO

ONG HOCK SIM, JUDGE, FEDERAL COURT, MALAYSIA;
WAN SULEIMAN, JUDGE, FEDERAL COURT, MALAYSIA.

30

IN OPEN COURTTHIS 22ND DAY OF SEPTEMBER, 1975O R D E R

10 UPON NOTICE made unto this Court this day by Mr. Anantham Kasinather of Counsel for the Appellants abovenamed in the presence of Mr. M. Shankar of Counsel for the Respondent abovenamed AND UPON READING the Notice of Motion dated the 2nd day of September, 1975 and the Affidavit of Mohamed bin Abdul Hamid affirmed on the 28th day of August, 1975 both filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that the Appellants abovenamed be and are hereby granted final leave to appeal to His Majesty the Yang di-Pertuan Agung from the decision and Order of the Federal Court dated the 8th day of March, 1975 AND IT IS ORDERED that the costs of and incidental to this Application be costs in the cause.

20 GIVEN under my hand and the seal of the Court this 22nd day of September, 1975.

(L.S.) Sd: Illegible
CHIEF REGISTRAR

In the
Federal Court

No.24

Order of
Federal Court
granting
final leave
to appeal
22nd September
1975
(continued)

EXHIBITS

EXHIBIT A.B.2

Bills of Lading

EXHIBITS

Exhibit A.B.3

Bills of Lading

28th March 1970



THE SANKO ASIA LINE, LTD.

BILL OF LADING

Shipped on board the goods or packages said to contain goods marked and numbered as hereunder (marks, numbers, quantity, weight, gauge, measurement, contents, nature, quality or value as declared by the shipper but unknown to the Carrier), in apparent good order and condition unless otherwise indicated herein, to be transported subject to all the terms and conditions of this Bill of Lading, to the port of discharge named herein and/or such other port or place as authorized or permitted hereby or so near thereto as the vessel can always safely get and leave always afloat at all stages and conditions of water and weather, and there to be delivered or transhipped on payment of all charges thereon. In accepting this Bill of Lading, the shipper, owner and consignee of the goods, and the holder of this Bill of Lading agree to be bound by all its stipulations, exceptions and conditions appearing on the face and back hereof, whether written, stamped, printed or otherwise incorporated, as fully as if they were all signed by such shipper, owner, consignee or holder notwithstanding any local customs or privileges to the contrary. The terms hereof shall not be deemed waived by the Carrier except by written waiver, signed by duly authorized agent of the Carrier. One signed Bill of Lading, duly endorsed, must be surrendered to the Carrier in exchange for the goods or delivery order.

DEED: 6/4/70

VESSEL: Sansei Maru VOY NO. FLAG: JAPAN

SHIPPER: T. M. Yu & Co., (HK) Ltd.

PORT OF LOADING: Hong Kong DESTINATION: Port Swettenham

PORT OF DISCHARGE:

CONSIGNEE: M/s. T. M. Yu & Co., (M) Sdn. Bhd., Kuala Lumpur

NOTIFY PARTY:

PARTICULARS FURNISHED BY SHIPPER OF GOODS			
Marks & Numbers	Packages	Description Of Goods	Weight & Measurement
<LUCO> TW KUALUMPUR NO. 1/80	80 Cases	Pharmaceuticals	<p>PERAGAMA PELABOYAN SWETTENHAM</p> <p>Setelah menerima segala bayaran samu, tolong serahkan kepada kami secepat mungkin secepatnya didalam salinan bill of lading ini kepada:</p> <p>Messrs. <i>E. F. SHARP & CO. (M) Sdn. Bhd.</i></p> <p>7 APR 1970 Kuala Lumpur</p> <p>Port Swettenham</p> <p><i>Fluk</i></p>

LEPASKAN DOKUMEN KAWAN
8/8
9/9
Kawan Kawan
Port Swettenham
123727

COPY
NON-NEGOTIABLE

AMENDED 042500

VALUE:	FREIGHT CHARGED ON	RATE	PER	FREIGHT
		per		
		lbs.		

TOTAL PAYABLE AT Hong Kong
IN WITNESS WHEREOF, Two Bills of Lading have been signed, all of the same tenor and date, one of which being accomplished, the others to stand void.

Dated at Hong Kong on 28/3/1970

FREIGHT PREPAID

THE SANKO ASIA LINE, LTD.

303
OF GOODS

B.L. No.

EXHIBITS

Exhibit A.B.3
Bills of Lading
28th March 1970
(continued)



THE SANKO ASIA LINE, LTD.

BILL OF LADING

Shipped on board the goods or packages said to contain goods marked and numbered as hereunder (marks, numbers, quantity, weight, gauge, measurement, contents, nature, quality or value as declared by the shipper but unknown to the Carrier), in apparent good order and condition unless otherwise indicated herein, to be transported subject to all the terms and conditions of this Bill of Lading, to the port of discharge named herein and/or such other port or place as authorized or permitted hereby, or so near thereto as the vessel can always safely get and have always aboat at all stages and conditions of water and weather, and there to be delivered or transhipped on payment of all charges thereon. In accepting this Bill of Lading, the shipper, owner and consignee of the goods, and the holder of this Bill of Lading agree to be bound by all its stipulations, exceptions and conditions appearing on the face and back hereof, whether written, stamped, printed or otherwise incorporated, as fully as if they were all signed by such shipper, owner, consignee or holder notwithstanding any local customs or privileges to the contrary. The terms hereof shall not be deemed waived by the Carrier except by written waiver, signed by duly authorized agent of the Carrier. One signed Bill of Lading, duly endorsed, must be surrendered to the Carrier in exchange for the goods or delivery order.

AERD: 0/4/70

VESSEL: Samboi Maru VOY NO. _____ FLAG: JAPAN
SHIPPER: T. S. W. & Co., (M.) Ltd.
PORT OF LOADING: Hong Kong DESTINATION: Port Swettenham
PORT OF DISCHARGE: _____
CONSIGNEE: M/S. T. S. W. & Co., (M) Ltd., Kuala Lumpur
NOTIFY PARTY: _____

PARTICULARS FURNISHED BY SHIPPER OF GOODS			
Marks & Numbers	Packages	Description Of Goods	Weight & Measurement
<p>← W 00 →</p> <p>Tan KUALA LUMPUR NO. 011-013</p> <p>13 Cases</p> <p>PERAKA M. ASOMAN SWETTCHAM</p> <p>Setoran memungut segala bayaran kemas, selang seran dan barang yang tersebut didalam salinan Bill of Lading ini kepada <u>Dina Tarulian Sdn Bhd</u> Melayu.</p> <p>7 APR 1970 C. F. SHARF & CO (M) Sdn. Bhd. Maribulan. <u>Port Swettenham</u></p> <p><u>Tan</u> Sampul Plastik</p>		<p>Pharmaceuticals</p> <p>13</p> <p>43725</p>	
<p>NON-NEGOTIABLE</p> <p>AMENDED</p> <p>042502</p>			

FREIGHT CHARGED ON	RATE	FREIGHT
VALUE:		
	fee	% ad valorem
		per 10 c. ft.
	lbs	per
		per

TOTAL PAYABLE AT _____
IN WITNESS WHEREOF, two Bills of Lading have been signed, all of the same tenor and date,
one of which being accomplished, the others to stand void.
Dated at Hong Kong on 28/3/1970

FREIGHT PREPAID

THE SANKO ASIA LINE, LTD.

SUBJECT TO _____
OF GOODS BY _____
For the Master

EXHIBIT A.B.6

EXHIBITS

Suppliers Invoice

Exhibit A.B.6

Suppliers Invoice

31st March 1970

(13-A-70.) 31.419.417.13.14.64 = 15.064.77.

Sold to/s. T. W. WU & CO., (d) SDK. LTD.

34, Jalan Kalam,
3rd Mile, Ipoh Road,
Kuala Lumpur.

Date 31st Mar. 1970.

司公限有廠藥衛志港香
T. W. WU & CO., (H.K.) LTD.

Terms 120 Days D/A.

Invoice No. E 3504.

Order No. 100

734, KING'S ROAD,
HONG KONG
KUALA LUMPUR
10. 1/30. SALES OFFICE TEL: H-616225-7

per s.s. "Sindesi Maru" Salesman
Bill No. 22/3/70.

NO GOODS TO BE RETURNED WITHOUT OUR AUTHORIZATION
此項不獲寄回則本公司不負責任

Country of Origin Made in Hongkong.			
50/x 1000's ✓	Chenimycin tab. (yellow)	19.00 (15)	950.00
95/x 1000's ✓	Chenimycin tab. (green)	19.00	1,805.00
50/x 1000's ✓	Chenimycin tab. (white)	19.00 (50)	950.00 ✓
20/x 1000's ✓	Chenimycin tab. (white)	22.00 (20)	440.00 ✓
50/x 500's ✓	Coldhast tab.	8.00	400.00 ✓
42/x 1000's ✓	Alubarb tab.	6.48 (42)	272.16 ✓
36/x 1000's ✓	Cryserpine t. b. 0.25 mg.	3.10 (36)	111.60 ✓
25/x 500's ✓	Cryopen V tab. 200,000 iu.	9.50 (25)	237.50 ✓
50/x 500's ✓	Cryopen V tab. 400,000 iu.	18.00 (50)	900.00 ✓
50/x 1000's ✓	Derosone tab. 0.5 mg.	20.00	1,000.00
250/x 1000's ✓	Medicorvolone tab. 5 mg. (G/V)	14.50	3,625.00
100/x 500's ✓	Novapyrin tab. 0.5 mg.	7.70	770.00
50/x 500's ✓	Iparin tab.	8.00 (60)	400.00 ✓
50/x 500's ✓	Iparin plain tab.	8.00 (60)	400.00 ✓
45/x 1000's ✓	Medicorvolone tab. (R/W)	14.50	652.50
45/x 1000's ✓	Bendrin Capsules 25 mg.	12.00	576.00
25/x 1000's ✓	Chenimycin capsules (pink)	24.50 (25)	612.50 ✓
50/x 1000's ✓	Chenimycin capsules (clear)	24.50 (50)	1,225.00 ✓
25/x 500's ✓	Amicap capsules.	9.18	229.50

THE SAID ITEMS ARE OF HIGH DANGEROUS
OR HARMFUL NATURE.

GTI value 556.76

Exchange rate Mal. 1.00 = 2.00
E. S. O. E. 5,548.76

ALL CLAIMS MUST BE MADE WITHIN SEVEN DAYS

13. 4. 70.

EXHIBITS

Exhibit A.B.6

Suppliers Invoice

31st March 1970
(continued)

Sold to
 4/No. T. W. WU & CO., (H.K.) LTD.,
 34, Jalan Sultan,
 3rd Mile Ipoh Road,
 Kuala Lumpur.

Date: 31st. Mar. 1970

Terms 120 Days D/A

Order No.

734, KING'S ROAD
 HONG KONG

SALES OFFICE TEL: H-618225-7

Invoice No. E 3005.

Salesman

20.1/70.

Country of origin is

100 x 100's ✓	Chlorpheniramine maleate (w/s)	2,450.00
25 x 40 ✓	Amobarbital Suspension	150.00
27 x 40 ✓	Amobarbital Suspension	50.00
9 x 40 ✓	Amobarbital Suspension	150.00
45 x 40 ✓	Amobarbital Suspension	697.50
12 x 40 ✓	Amobarbital Suspension (P)	1,000.00
45 x 40 ✓	Amobarbital Suspension (pink)	500.00
270 x 40 ✓	Amobarbital Suspension	3,000.00
90 x 40 ✓	Amobarbital Suspension	600.00
1000 x 10 ✓	Chlorpheniramine maleate (w/s)	1,450.00
25 x 10 ✓	Amobarbital Suspension	120.00
10 x 10 ✓	Amobarbital Suspension	137.50
25 x 10 ✓	Amobarbital Suspension	100.50
15 x 10 ✓	Amobarbital Suspension	100.00
100 x 1000's	Amobarbital Suspension	1,000.00

THE SAID INVOICE IS SUBJECT TO THE FOLLOWING CONDITIONS:

Exchange rate

2 x 1000's Chemipharm Cap. (17-10)

10 x 1000's Calornapharmical Cap. (17-10)

ALL CLAIMS MUST BE MADE WITHIN SEVEN DAYS

EXHIBITS

Exhibit A.B.6

Suppliers
Invoice

31st March 1970
(continued)

Sold to M/s. T. W. WU & CO., (M) S.M. S.A.S.,
34, Jalan Lalang,
3rd Mile Ipoh Road,
Kuala Lumpur.

Date 31st. Mar. 1970

Terms 120 Days D/A.

司公限有廠藥衛志港香
T. W. WU & CO., (H.K.) LTD

Invoice No. 3006.

Order No.

734, KING'S ROAD,
HONG KONG

per s.o. "Samsel Laru" Salesman
Billing on/abt. 28/3/70.

SALES OFFICE TEL: H-618225-7
NO. 01-013.

NO GOODS TO BE RETURNED WITHOUT OUR AUTHORIZATION
此項不取貨物者須有本公司之印信

Country of Origins made in Hong Kong

100/x 1000's. ✓	beamin tab. (ord.)	102.80 (100)	200.00
54/x 1000's. ✓	Cetax tab. 100 mg. (ord. 50)	5.00 (54)	102.00
25/x 500's. ✓	Colixam tab.	9.25 (25)	231.25
2/x 500's. ✓	terrous sulphate w/vit. tab.	1.00 (2)	19.00
99/x 500's. ✓	Lexia Syrup (Strawberry)	7.00 (98)	653.00
300/x 500's. ✓	treduycin Cream	0.32 (300)	36.00
200/x 500's. ✓	Ortiaycin Cream	0.35 (200)	280.00

Exchange rate HK1.00 = HK2.00

THE SAID TO BE THE ...
OR ...



E. & O. E.

ALL CLAIMS MUST BE MADE WITHIN SEVEN DAYS

此項明係內口七亦請請請...

EXHIBIT A.B.5

Packers Record

EXHIBITS

Exhibit A.B.5

Packers Record

T. W. WU & CO., (H.K.) LTD.

734, KING'S ROAD,
HONG KONG

Cable Address: "WUCO"

PACKERS' RECORD

Invoice To: M/s. T. W. WU & CO., (M) SD.B. BHD., 34 Jalan Balam, (1st. floor) 3rd Ipoh Road, Ipoh Road, Kuala Lumpur.	Invoice Date 31st. Mar. 1970.	Invoice No. E3004 & 3005
	Marks & Numbers TWN WUCO KUALA LUMPUR NO.1/80.	
Shipped Via per a.s. "Sansei Maru"	Sailing Date on/abt. 28/3/70.	

CASE NO.	DESCRIPTION	WEIGHT	
		NET	GROSS
Country of Origin: Made in Hong Kong. THE FOLLOWING ITEMS ARE OF NON-DANGEROUS OR HARMLESS NATURE.			
1 - 30.	Ephesedyl Syrup.	270 x Gal.	
31 - 35.	Hiethenyl Syrup.	45 x Gal.	
36 - 41.	Triple Sulfas Suspension(W)	126 x Gal.	
50 - 52.	Theodral Suspension.	27 x Gal.	
53 - 57.	Triple Sulfas Susp. (Pink)	45 x Gal.	
58 - 67.	Allerton Syrup.	90 x Gal.	
68.	Kaopecta Suspension.	49 x 40 oz.	
69.	Theodral Suspension.	25 x 40 oz.	
0.	Medisorclone tab. 5 ug (O/W).	200 x 1000's.	
71.	Iparin tab. Chemimycin Capsules (pink) Chemimycin Capsules (clear)	50 x 500's. 25 x 1000's. 50 x 1000's.	
72.	Metazin Powder. Succidin Powder. Sulfaguanidine Powder. Trifoneth Powder.	25 x lb. 10 x lb. 25 x lb. 15 x lb.	
Bonus - free of charge: Chemimycin cap. (pink). 2 x 1000's. Chloramphenicol Cap. (G/W) 10 x 1000's.			
73.	Chemimycin tab. (yellow) Chemimycin tab. (green).	50 x 1000's. 95 x 1000's.	
74.	Chemimycin tab. (white) Alubarb tab.	70 x 1000's. 42 x 1000's.	



To be continued.....

Packed by:

Weighed by:

Checked by:

- 1 - *[Signature]*

EXHIBITS

Exhibit A.B.5

T. W. WU & CO., (H.K.) LTD.

734, KING'S ROAD,
HONG KONGPackers Record
(continued)

Cable Address: "WUCO"

PACKERS' RECORD

Invoice To: M/s. T. W. WU & CO., (M) SDN. BHD., 34, Jalan Balam, (1st. Floor), 3rd Mile, Ipoh Road, Kuala Lumpur.	Invoice Date	Invoice No.
	31st. Mar. 1970.	E3004 & 3005.
Marks & Numbers		
WUCO		T.W. KUALA LUMPUR. NO.1/80.
Shipped Via	Sailing Date	
per s.s. "Santai Maru"	on/abt. 28/3/70.	

CASE NO.	DESCRIPTION	WEIGHT	
		NET	GROSS
	Continued.....		
	Countr. of Origin: Made in Hong Kong.		
	<u>THE FOLLOWING ITEMS ARE OF NON-DANGEROUS OR HARMLESS NATURE.</u>		
75.	Coldhist tab. 50 x 500's. Novapyrin tab. 0.5 gm. 100 x 500's.		
76.	Medicorsolone tab. 5 mg. (O/W) 50 x 1000's. Medicorsolone tab. 5 mg. (R/W). 45 x 1000's. Derosone tab. 0.5 mg. 50 x 1000's. Amicap Capsules. 25 x 500's. Hendrin capsules 25 mg. 45 x 1000's.		
77.	Chloramphenicol cap. (O/W) 100 x 1000's.		
8.	Allerton Inj. 10 mg. 1500 x 10 cc vial. Cryserpine tab. 0.25 mg. 36 x 1000's. Cryspen V tab. 200,000 iu. 25 x 500's. Chemamycin w/calcium cap. 36 x 1000's.		
79.	Chemamycin w/calcium cap. 64 x 1000's. Allerton Inj. 10 mg. 100 x 10 cc vial.		
80.	Cryspen V tab. 400,000 iu. 50 x 500's. Iparin plain tab. 50 x 500's. Allerton Inj. 10 mg. 400 x 10 cc vial.		



T. W. WU & CO. (H.K.) LTD.
C. P. T. C.

Packed by:

- 2 -

Weighed by:

Checked by:

EXHIBITS

Exhibit A.B.5

T. W. WU & CO., (S. K.) LTD.

734, KING'S ROAD,
HONG KONGPackers Record
(continued)

Cable Address: "WUCO"

PACKERS' RECORD

Invoice To: M/s. T. W. WU & CO., (S. K.) LTD., 34, Jalan Balak, (1st. Floor), 3rd Mile, Ipoh Road, Kuala Lumpur.	Invoice Date 31st. Oct. 1970.	Invoice No. E3006.
Shipped Via per s.s. "Samuel Bana"		Marks & Numbers WUCO KUALA LUMPUR NO. D1-D13.
		Sailing Date on Oct 31, 1970

CASE NO	DESCRIPTION	WEIGHT	
		NET	GROSS

Country of Origin: Made in Hong Kong.

THE FOLLOWING ITEMS ARE OF NON-BANGKOK ORIGIN

D1-D11.	Bexmin Syrup (Strawberry)	99 x Gal.
D12.	Cetex tab. (Orange) 100 mg.	54 x 1000's.
	Lexmin tab. (Oran.)	103 x 1000's.
	Colizyme tab.	25 x 5000's.
D13.	Coltimycin Cream	600 x 5 gm.
	Fredmycin Cream	300 x 5 gm.
	Ferrous Sulphate w/vit. tab.	2 x 5000's.
	Cetex tab. (orange) 100 mg.	4 x 1000's.

C. I. 1970

700540

BANGKOK LAMP
No. 130811
KUALA LUMPUR

Packed by:

Weighed by:

Checked by:

VOYAGE SAILING FROM PORT KAITUMA

M.S. "SANGRETTA" R.

B/L NO.	SHIPPERS	CONSIGNEES	MARKS AND NUMBERS	QUAN. TITY	DESCRIPTION	CROSS WEIGHT LBS. OR KILOS	CUBIC FEET	BASIS	RATE	PREPAID	FREIGHT		REMARKS
											COLLECT	CURRENCY	
308.	Kay D. Vaswani & Co., (HK) Ltd.	Order: Mty: K.D. Vaswani & Co., Jalan Tuanku Abdul Rahman, Kuala Lumpur.	KAYDEVAS G. 2519 KUALA LUMPUR VIA PORT SWEETENHUSA 934-937	4 cases	Ready to assemble (Muller Goods)	(0.371)	1.850 - 20%	40%	4163.00	HK\$ 301.55 60.31 211.24 36.17 205.05 22.91 182.14 12.14 166.04 (Nett)			
309.	Kay D. Vaswani & Co., (HK) Ltd.	Order: Mty: K.D. Vaswani & Co., 131 Jalan Tuanku Abdul Rahman, Kuala Lumpur.	- 6 APR 1970 KAYDEVAS C 2557 KUALA LUMPUR PER PORT SWEETENHUSA 937 C 2593 319-328 CT 1970 319-328 - 6 APR 1970	1 case	Ready to assemble (PVC Coils)	(0.267)	0.750 - 20%			122.25 24.45 97.80 85.15 8.21 77.94 (Nett)			
310.	T.W. Hu & Co., (HK) Ltd.	Order: Mty: T.W. Hu & Co., (S) Kuala Lumpur	MUCO 1174 KUALA LUMPUR 1-80	80 cases	Pharmaceuticals	(4.462)	8.825 - 20%		4132.00	HK\$ 1,035.48 257.70 156.70 172.62 978.16 97.85 130.24 88.02 722.31 (Nett)			
311.	T.W. Hu & Co., (HK) Ltd.	Order: Mty: T.W. Hu & Co., (S) Kuala Lumpur	MUCO 1174 KUALA LUMPUR 11-113	13 cases	Pharmaceuticals	(0.703)	1.300 - 20%		2163.00	HK\$ 211.90 42.38 169.52 25.63 14.77 189.68 12.27 116.71 (Nett)			
				108 pages		(5.903)	12.225			HK\$ 1,122.45			

Utah Kewangan Labuan
 For Official Use
 Salinan Pejabat
 Office copy
 Salinan Asli
 Original copy
 Salinan Datar Mueatan
 Manifest copy
 Salinan Perangkaan
 Statistical copy
 Salinan Pendaftaran
 Importer's copy
 Salinan Kawalan Pergerakan
 Wang Aisling
 Foreign Exchange Control copy

NEGERI TANAH MELAYU
 STATES OF MALAYA
PENGAKUAN BARANG BERCHUKAI YANG DI-IMPOT
 DECLARATION OF DUTIABLE GOODS IMPORTED
 7th April 1970
 (continued)

EXHIBITS
 Exhibit P.3
 Customs Declaration

Peringatan—Perakuan ini mestilah diserahkan, empat salinan, oleh pengimport (atau empunya barang) sebelum ia berangkat atau waktu ia yang bertolak.
 This declaration must be submitted, in quadruplicate, by the importer (or the owner of the dutiable goods), or his Authorized Agent.
 Salinan ketiga mestilah diserahkan bagi impot daripada negeri yang lain dari negeri yang di-impotkan.
 A third copy must be submitted in respect of imports from countries other than the State of Terengganu.
 Salinan yang di-impotkan di bawah ini mestilah mengikut yang di-syaratkan di dalam Undang-undang Kastam.
 The values entered below must be as declared in the Customs Ordinance.
 Impot yang berkenaan hendaklah diserahkan.
 The relevant invoices should be attached.
 Sembarang potongan harga atau aliansi mestilah di-tunjukkan bersama dengan pengimport.
 Any discounts or allowances must be shown together with explanation thereof.

Nama pembuat dan alamat pengimport dan wakil bertolak
 (Full name and address of Importer and Authorized Agent)
 (where applicable)
 Nama pembuat dan wakil bertolak
 (Full name and address of Importer and Authorized Agent)
 (where applicable)

Tempat di-impot
 Place of Import
 Part percutian
 Part percutian
 Nama Kapal atau nombor Kereta atau Fesyen atau Nama of Vessel or No. of Vehicle or Flight
 Surat Muatan atau nombor Surat Kiriman Bill of Lading or Consignment Note No.
 200
 200
 200

No.	R/Ts	Maksud	Bilangan atau No. of Packages	Tanda Pengaliran atau Shipping Mark	Unik Keselamatan atau Safety Mark	Negeri Asal atau Country of Origin	Maksud atau Description	Ukuran atau Weight	Nilai atau Value	Ulasan atau Remarks	No. Tarif atau Tariff Item	Kadar Chukai atau Rate of Duty	Chukai Kena Bayar atau Duty Payable
72	15	1 Pkg	1				25 x 1b Kabanin Powder	20.08.699	HK				
73	16	1 Pkg	1				10 x 1b Saccalin Powder						
74	17	1 Pkg	1				25 x 1b Sulfaguanidine Powder						
75	18	1 Pkg	1				16 x 1b Tylosin Powder						
76	19	1 Pkg	1				50 x 1000's Chondrycin Tab(X)						
77	20	1 Pkg	1				50 x 1000's Chondrycin Tab(O)						
78	21	1 Pkg	1				70 x 1000's Chondrycin Tab(O)						
79	22	1 Pkg	1				60 x 1000's Alubarb tabs						
80	23	1 Pkg	1				50 x 500's Calchint Tabs						
81	24	1 Pkg	1				100 x 500's Noverrylin Tab O. 633						
82	25	1 Pkg	1				100 x 1000's Chloramphenicol caps						
83	26	1 Pkg	1				100 x 1000's Chondrycin w/Calcium						
84	27	1 Pkg	1				1000 x 1000's Allerton Inj 10mg/50.08.650						

Diakui bahawa saya telah mengetahui dan dengan ini mengaku bahawa:
 Certified that I have the means of knowing and do hereby declare that:
 (a) Keterangan yang di atas adalah benar dan lengkap.
 The above particulars are true and complete.
 (b) Impot ini adalah untuk kegunaan peribadi dan tidak akan diperjualbelikan atau digunakan untuk tujuan komersial.
 This importation is for personal use and will not be sold, transferred or used for commercial purposes.
 (c) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (d) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (e) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (f) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (g) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (h) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (i) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (j) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (k) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (l) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (m) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (n) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (o) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (p) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (q) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (r) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (s) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (t) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (u) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (v) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (w) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (x) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (y) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.
 (z) Nilai yang diimpotkan adalah betul dan tidak akan ditukar-tukarkan.
 The values declared are correct and will not be altered.

DIN'S TRADING SDN. BHD.
 Tindakan
 Action
 9/4/70
 Melayu

EXHIBIT P.5 A & B

Delivery Orders

EXHIBITS

Exhibit P.5
A & B

Delivery Orders
10th April 1970

DELIVERY NOTE

ORIGINAL

N: 0150

DIN'S TRADING SENDIRIAN BERHAD

No. 6, RAILWAY BUILDING,
PORT SWETTENHAM.
TELEPHONE No. 6357

M/s. W.W. & Co (M) Sdn. Bhd. Date 10/4 1970
No. 54 Jln. Balin, Ipoh Rd K. Lumpur.

Please receive per Lorry No. BA 7222
the undermentioned goods in good order and condition.

Sansei 12000

Description of Goods

lots of 25 c/s

W.W.C
T.W.W
Kuala Lumpur

No. 10-32-3-6-37
2-9-30-18-55-25
16-19-23-1-50-71
8-73-70-74-2-1510

} 25 c/s.

2 D8 - D12 - D13 — 3

26 case.

(25 only size cases only)

A.

Order No.

PS

Description of Goods

Date

10/4/70

Signature

EXHIBITS

Exhibit P.5
A & B

Delivery Orders
10th April 1970
(continued)

NOTE

ORIGINAL

No: 0221

DIN'S TRADING SENDIRIAN BERHAD

No. 6, RAILWAY BUILDING,
PORT SWETTENHAM.
TELEPHONE No. 6357

M/s. Tui Wye & Co. S.A. Date 15/4 1970
No. 34 of Jalan ... K. Lumpur

Please receive per Lorry No. BC 7604
the undermentioned goods in good order and condition.

... ..

Description of Goods

Lot of 200 S.B. 1/3

wucc
2 w/w
K. Lumpur
D.S.V
68,71

Case Medicine

(... ..)

[Signature]

EXHIBIT P.1

Letter from C.F. Sharp & Co. (Malaya)

EXHIBITS

Exhibit P.1

Letter from
C.F. Sharp &
Co. (Malaya)

16th April
1970



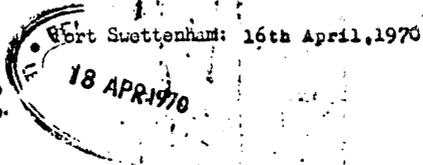
5175 (70)

C. F. SHARP & COMPANY (MALAYA) SDN. BERHAD,

Time Derby Building

P. O. Box No. 50

529 Our Ref: Pq.1116/APR/70



Messrs. Bin's Trading Sdn.Berhad,
No.6, Old Railway Shipping Office,
Port Swettenham.

Dear Sirs,

WUCO
T.W.W.
KUALA LUMPUR

93 Cases Medicines
ex "Santai Baru" Arrds 5.4.70
B/L No. 310 & 311 Hongkong/Port Swettenham

We are in receipt of your letter (ref: 1170) dated 15th April, 1970 and would advise that the above consignment was discharged complete at Port Swettenham as undernoted:

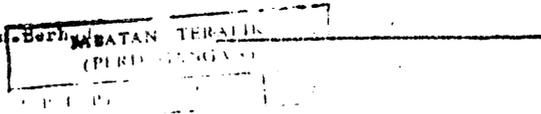
TALLY SHEET NO. 1 = 93 CASES. (PHOTOSTAT COPY OF TALLY SHEET NO.1 IS ATTACHED)

(Under the above circumstances, we are unable to accept liability for shortage/loss to the said cargo.

J.L.
c.c. Pongurus Torafik,
Lembaga Pelabuhan Swettenham,
Port Swettenham.

Yours faithfully,
C.F. SHARP & CO. (M) S.N. BERHAD,
As Agents:

Messrs. T.W.Wu & Co. Sdn. Berhad
40, Jalan Isipang,
Kuala Lumpur.



A 22. (A)
30/4

EXHIBITS

Exhibit P.1

C. F. SHARP & CO., (MALAYA) SDN. BHD.
SIME DARBY BUILDING,
PORT SWETTENHAM,
MALAYSIA.

Letter from
C.F. Sharp &
Co. (Malaya)

16th April
1970

(continued)

Port Swettenham, 5/4 1970
Time Commenced 2:40 pm Completed 4:35 pm

RECEIVED in apparent good order and condition.

Ex: For 1/s "SANSI MARU" at Wharf/Stream 2 NICE
Hatch No. 4 Lighter/Waggon/Scammel No.
the undermentioned goods:-

MARKS	TALLY	TOTAL
KAYDREVAS (C/S) 2. 2 C 3359 S.C. Compton	—	4
MALAYSIA SHIP. MARU C/S 1 Port Swettenham	—	1
MALINGO (C/S) 2. 2 T.W.E Port Swettenham	—	4
T.T.C. (C/S) 30 30 30 30 4 Port Swettenham	—	114
WINE (C/S) 19. 7. 15. 18. 19 9. 6 T.W.E S.C. Compton	—	92
S.O.L. (C/S) 3 S.C. Compton	—	3
M.B.L. (C/S) 3. 2. 7. S.C. Compton	—	17
KAYDREVAS (C/S) 1. C 3359 S.C. Compton	—	1

GENERIC TALLY SHEET PREPARED
DURING THE SHIP
On 19/4/70 At Port Swettenham
Signature of Staff No.
Name:
P.S. A copy of this sheet is to be kept by the Tally Clerk.

237 Two hundred & thirty seven

Shippers/Consignees
Representative/Tally Clerk

C. F. Sharp & Co. (M) Sdn. Bhd.
Tally Clerk

Signature of Tally Clerk

EXHIBITS P.6 A & B

Letters

EXHIBITS

Exhibit P.6 A & B

Letters

16th April 1970

DIN'S TRADING SENDIRIAN BERHAD
WATCHMAN CONTRACTOR, TALLY CLERK SUPPLIER & COMMISSION AGENT.

TELEPHONE:
PORT SWETTENHAM 6357
KLANG 32619

NO. 8, OLD RAILWAY SHIPPING OFFICE,
PORT SWETTENHAM.

16th April, 1970

The Traffic Manager,
Port Authority,
Port Swettenham.

Exhibit No. P673
Description of
Particulars

Tuan,

Particulars

RECEIVED
15.0.70 15 Cases The Date of
Keroh 117
D1-375
Ex: 15 Cases of 4 Cases

Against the above shipment we confirm having taken delivery of 4 Cases from your B & F Shed and leaving 9 Cases which cannot be found in spite of the search made by us.

We now, therefore, but accepting any storage charges accrued from the date of this letter. This also serves as a pro forma claim in the event of loss of the goods if in your Custody.

Yang benar,
for Din's Trading Sdn. Bhd.
[Signature]
As Forwarding Agent.

c.c. The Clerk-in-Charge
N.K.S. B, F Shed.
c.c. Agents: T.M.U.

*N/T = F Shed @ 8:00 pm
on 16/4/70*
[Signature]
11.55.88

EXHIBITS

Exhibit P.6 A
& B

Letters

16th April
1970

(continued)

DIN'S TRADING SENDIRIAN BERHAD

WATCHMAN CONTRACTOR, TALLY CLERK SUPPLIER & COMMISSION AGENT.

TELEPHONE:
PORT SWETTENHAM 6387
KLANG 32618

NO. 6, OLD RAILWAY SHIPPING OFFICE,
PORT SWETTENHAM.

HIGH COURT No. 377
16th April 1970

Exhibit No: P6 X2

Description
of Goods:

Put in by:

The Traffic Manager
Port Authority,
PORT SWETTENHAM.

Tuan,

WUCO
T.W.W. 95 Cases Pharmaceuticals
K.LUMPUR Date 16/4/70
1-00
EX: 'Gungoi Naru' Arrds 5/4/70

Against the above shipment we confirm having taken
delivery of 25 Cases from your B & F Shed and leaving 55 Cases,
which cannot be found inspite of the search made by us.

We are, therefore not accepting any storage charges
accrued from the date of this letter. This also serves as a
pro forma claim in the event of loss of the goods if in your
custody.

Yang benar,
for Din's trading Sdn. Bhd.

[Signature]
As Forwarding Agent.

c.c. The Clerk-in-Charge
N.K.S B, F Shed,
c.c. Messrs T.W.W. K.Lumpur

N/T in F Shed @ 30/4
on 16/4/70

[Signature]
KEPADA RENJANG GUDANG F
M. ARSHAN UJARA
1970

EXHIBIT A.B.9

Report

EXHIBITS

Exhibit A.B.9

Report

16th April
1970

LEMBAGA PELABOHAN SWETTENHAM

/11

Bil: (3) dlm TPU.51.32/ 273-2(70)

16th April 1970.

Pejabat Pg. Pengurus Terafik,
Pelabuhan Utara,
Port Swettenham.

Sherikat C.P. SURUP (M) S/MS BHD.

DA EUGEN SIMS DATBY,

PORT SWETTENHAM.

Tuan2,

Kapal: ... 34.511. N.W. - 5.1.70

The Port Swettenham Authority acknowledges receipt of consignments appearing in the Manifests which have since been lodged with the authority together with those items appearing as overlanded but not those which have been declared shortlanded. Given below are particulars of overlanded and shortlanded cargo ex the above vessel.

Lebih di-turunkan

-

Kurang di-turunkan

8/L.310 W D C U
TV W KL 1-10

37 cases Pharmaceuticals

8/L.311 WUCO
T/b
KL 01-0 13

9 ca. - do -

REMARKS

8/L.573 8 T11-10736
IF Mid MM PS
1-1200

Paper bags high pressure polyethylene

c.c. Pg. Pengawal Kastam,
Port Swettenham.

c.c. Pengurus Terafik,
Lembaga Pelabuhan Swettenham.

c.c. Ketua Kerani Chang....
Pelabuhan Utara.

Yang benar,

[Signature]
Pg. Pengurus Terafik,
Pelabuhan Utara.

EXHIBITS

SHIP		STOCK REPORT		14/4		EXHIBITS	
C.I.				8		Exhibit A.B.9	
R/L NO:		MARKS		DESCRIPTION		Report	
						16th April 1970	
						(continued)	
318	✓	Kaydeva C/2359 4 PS. 934-937	40/s ready made garment.			4	4 Bad
319	✓	Kaydeva C/2357 4 PS 132 C/2393 319-323	1 cf - no 10 ctors. rubber			1 10	1 Bad 10 OK
415	✓	6 VIC VC/246 GSS 4 PS VC/2354 VC/2249	2 cts gents polo 1 cf T Shirts 1 cf. habies. sleep 4	11981	3	1	1 Bad
415	✓	5 WEC 4 PS	4 ctors lamp bulbs			4	4

Note: Please include any other items held by you under this vessel
Certified Correct

Work-in-Charge: *[Signature]* 2332
Date: 13/4 - 1970

Chief Officer
Commanding Officer
Port Officer

Refered to 2nd Section
sw. 16/4 at 1 pm.

EXHIBITS

Exhibit A.B.9

Report

16th April

1970

(continued)

SHI:	STOCK REPORT		14/4		
C.L.	<i>Sanser Maru</i>		<i>C</i>		
E/L	<i>574</i>				
NO:	KAPYS	DESCRIPTION	P. No.	Qty	Total
3	<i>UBMSB 14 PS 42/1/70</i>	<i>600 bags clay</i>	<i>11340</i>	<i>600</i>	<i>landed delivery</i>

Note: Please include any other items held by you under the vessel. Certified Correct.

sp *Mark-in-Charge* *Shed* *1574*

Mark-in-Charge
 Generalist & Surveyor
 Port of Call

EXHIBITS

Exhibit A.B.9

Report

16th April 1970

(continued)

SHIP	SARVEE MEEN (STOKA) REPORT		10/4 D	
C.L.				
B/L NO:	-HMOYS	DESCRIPTION	Qty	Total
			/li	/ty
5019	Kajdeenas C 2597 14 ps. 822 C 2593 319-328	1 cf. ready made paracetamol 10 ctus radior		
Carson S/K Refrigerator				

Note: This does not include any other items held by you under this vessel's certificate of cargo.

Officer-in-Charge: *[Signature]*
Shed: *[Signature]*
Date: 10/4/70

Chief Officer: *[Signature]*
General Superintendent: *[Signature]*
Pilot: *[Signature]*

EXHIBITS

Exhibit A.B.9

Report

16th April

1970

(continued)

SHIP: <i>Suzuki Maru</i>		STOCK	REPORT	Date: <i>14/4</i>	Qty	Total
No: <i>574</i>			(1)			
No:	MARKS	DESCRIPTION	DATE	QTY	OLD	NEW
301	JMBL W	170c cheye frame	<i>15/4</i>	<i>17</i>	-	-
303	SBL W	3 boxes metal key circuits	<i>To Check According to list sheet No. 197548 from 3 lines</i>			
305	Malayco shoe mfg. PS 375-NC	1 cf shoe making machine	-	-	1	1
306	Malinco FWC PS	4 c/s peak caps	-	-	4	4
310	WICO TWW W	80 c/s phams	<i>10/4</i>	<i>22</i>	-	<i>57</i>
311	WICO TWW W	130 c/s "	<i>11/4</i>	<i>2</i>	-	<i>9</i>
312	Cancelled		<i>12/4</i>	<i>1</i>	-	<i>9</i>
313	PTC 1 Arm 114	92 fresh potatoes	<i>11/4</i>	<i>114</i>	-	-
K/S	Masda BAI with LC 032	2 c/s parts	<i>17/4</i>	<i>2</i>	-	-
2	Malinco Super-market W PS	36 c/s drops biscuit etc.	<i>36 c/s in 8 food tins by Malinco Tawau on 14/4</i>			
5	HBK. PS	5 bags polyethylene	-	-	5	5

Note: Please include any other items held by you under this vessel's Certificate of Registry.

Malinco 628
 Clerk-in-Charge Shed/Store/Port

Date: *15/4/70* 1970

Malinco
 Clerk-in-Charge
 Generalised Section
 Relational Unit

16/4
8305

EXHIBITS

Exhibit A.B.9

Report
16th April
1970

(continued)

SHIP:	STOCK	REPORT	DATE	QTY	TOTAL
C.L.					
B/L NO:	DESCRIPTION	QTY	UNIT	QTY	UNIT
1	Wania 0529 14 PS.	28 coils thread waste		25	25
8	THI 10736 FF MBK NM PS.	1200 bags polyethylene			to provide after delivery
1	LDS 14 PS.	37% antenna in CKD		37	37
2	6558 Pusey 1361/70 14 PS	13 aatis copying machine		13	13
3	UMW 3003 PS	2 c/s Hand equip.			
4	WEC 14	4 otu stamp bulbs			Refer to list 1/R
9	AHC Sankyo/ Maly/Samp PS	2 c/s med & adv materials			
12	TMT 1712-2 PS	1 c/s Toso shop hardware & access.			

Note: Please include any other items held by you under this vessel's certified account.

Signature: [Handwritten Signature]
Date: 15/4/70

Signature: [Handwritten Signature]
Central Stores Section,
Port of Call.

EXHIBIT P.2Letter 29th April 1970

EXHIBITS

Exhibit P.2

Letter

29th April
1970

(4)d/m.7.51.32/2736-1(70)

29th April, 70

Sharikat T.W.Wu & Co.(S) Sdn.Bhd.,
40, Jalan Ampang,
KUALA LUMPUR.

Tuan,

WCCG
T.W.W.
Kuala Lumpur

50 cases Medicines
ex.m.s.s. "SANSEI MARU"
arrived on 5.4.70
Short received 64 cases

Surat tuan KL-COL/70 bertarikh 15.4.1970 menuntut kekurangan 84 peti dari kapal "Sansei Maru" tiba pada 5.4.1970 di-rojok.

Mengikut Laporan Naragha pejabat ini bahawa 84 peti tersebut telah kurang pendaratan dan perkara ini telah di-laporkan kepada Sharikat Perkapalan melalui bil.(3)d/m.TP.51.32/2736-1(70) bertarikh 16.4.1970.

Naragha kami ada-lah surat penerimaan kami dan oleh kerana barang2 itu tiada di-dalam penerimaan tersebut, kami berpendakwahan bahawa tuntutan tuan itu ada-lah tertalok di-bawah Undang-Undang Pelatohan Jetties No. 94. (1) Tahun 1965. Kandungan-nya di-ghatiskan di-bawah:-

"Receipt of
Goods."

94.(1) The liability of the Authority in respect of goods shall in no case exceed that set out in any receipt given by the Authority for the goods."

Yang benar,

l/p Pengurus Trafik,
Lebuhraya Pelabuhan S'han.

TRANSLATION OF EXHIBIT P.2EXHIBITS

(4) dlm.T.51.35/1308-1 (70)

Translation of
Exhibit P.2

29hb April,

70

Letter
29th April
1970

Shariket T.W.Wu & Co:(M) Sdn.Bhd.,
40, Jalan Ampang,
KUALA LUMPUR

Tuan,

WUCO
T.W.W.
Kuala Lumpur

93 cases Medicines
ex.m.s. "SANSEI MARU"
arrived on 5.4.70
Short received 64 cases:

Your letter KL.COI/70 dated 15.4.70 claiming for the missing 64 boxes from m.s. SANSEI MARU which embarked on 5.4.70 is referred to.

According to the registration report received at this Office the 64 boxes were missing on arrival and this matter was reported to the shipping company through our reference: (3) dlam. TPU.51.32/2736-1(70) dated 16.4.70.

As our registration is our official statement and as the 64 boxes were not recorded therein I am afraid your claim falls under the Port Swettenham Council Regulation No. 94 (1) 1965, the contents of which is stated below:-

"Receipt of
Goods.

94 (1) The liability of the Authority in respect of goods shall in no case exceed that set out in any receipt given by the Authority for the goods."

Yang Banar

b/p Pengurus Terafik,
Lembaga Pelabuhan S'ham.

EXHIBIT A.B.7

Claim Bill

EXHIBITS

Exhibit A.B.7

Claim Bill

GRF/70/0267

Policy No. CEA.70/1226
 Cms: L-4, vs Pharmaceuticals
 Rxs: ss "SASRI MARU" arrd: 5.4.70
Hongkong/Port Swettenham B/L No.311

Non Delivery on 9 cases nos. D1, D2,
 D3, D4, D6, D7, D9, D10 & D11.
 Each case contg. 9 x 1 gal. Benzoin Syrup
 = 81 gals @ M\$7.00 = M\$567.00

Insured Value: M\$877.00 x HK\$1180.00
 HK\$5,533.70

M\$ 670.7

Policy No. CEA.70/1225
 Cms: 80 cases pharmaceuticals
Hongkong/Port Swettenham B/L No.310
Rxs: ss "SASRI MARU" arrd: 5.4.70

Non delivery of 55 cases:

16 cases Nos. 4, 5, 7/9, 11/14, 17, 20/24, 26/17	- 114 x 1 gal Ephesedyke syrup @ M\$11.58 = M\$2,099.52
4 cases nos. 31, 33/35	- 36 x 1 gal. Histhenyl Syrup @ M\$15.50 = 558.00
3 cases nos. 50, 51/52	- 27 x 1 gal Theodral Suspension @ M\$29.00 = 540.00
13 cases Nos. 56, 58/49	- 117 x 1 gal Triple sulfan(W) Suspension @ M\$13.20 = 1,544.40
4 cases nos. 54/57	- 36 x 1 gal Triple sulfas Suspension (Pink) @ M\$13.20 = 475.20
9 cases nos. 58/60, 62/67	- 81 x 1 gal Allerton Syrup @ M\$7.65 = 619.65
1 case No. 60	- 49 x 40 oz. Kaopecta Suspension @ \$4.00 = 196.00
1 case No. 70	- 200 x 1000's Medicorsolone (Q/W) Tab. 5 mg. @ M\$14.50 = 2,900.00
1 case No. 75	- Chemimycin Tab. (Yellow) 50 x 1000's @ M\$19.00 = 950.00 Chemimycin Tab. (Green) 95 x 1000's @ M\$19.00 = 1,805.00
1 case No. 75	- Coldhist Tab. 50 x 500's @ M\$8.00 = 400.00 Novaprin Tab. 0.5 gm. 100 x 500's @ M\$7.00 = 770.00
1 case No. 76	- Medicorsolone Tab. 5 mg. (Q/W) 50 x 1000's @ 14.50 = 725.00 Medicorsolone Tab. 5 mg. (A/W) @ 45 x 1000's @ M\$14.50 = 652.50 Deromone Tab. 5 mg. 50 x 1000's @ M\$20.00 = 1,000.00 Amicaps Capsules 25 x 500's @ M\$9.18 = 229.50 Bandrin Capsules 25 mg. 45 x 1000's @ M\$12.80 = 576.00
1 case No. 79	- Chemimycin W/Calcium Cap 64 x 1000's @ M\$22.00 = 1,408.00 Allerton inj. 10 mg. 100 x 100.c.c. vial @ M\$0.50 = 50.00 17,438.77

Insured Value: M\$17,438.77 x HK\$68,300.00
 HK\$59,445.12

ADD. Investigation Fee

M\$20,075.3
 M\$20,746.8
 80.6
M\$20,826.6

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No. 6 of 1976

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR

B E T W E E N :

THE PORT SWETTENHAM AUTHORITY

Appellants
(2nd Defendants)

- and -

T.W. WU AND COMPANY (M) SDN. BHD.

Respondents
(Plaintiffs)

RECORD OF PROCEEDINGS

Stephenson Harwood & ~~Tatham~~,
Saddlers' Hall,
Gutter Lane,
~~Cheapside~~,
London EC2V 6BS.

Appellants Solicitors

Waltons & Morse,
Plantation House,
31/35 Fenchurch Street,
London E.C.3.

Respondents Solicitors