23, 1980

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

PORT JACKSON STEVEDORING PTY. LIMITED	Appellant (Second Named Defendant)
- and -	
SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED	Respondent (Plaintiff)

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CASE FOR THE APPELLANT

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1. This appeal, which is brought pursuant to special leave in that behalf, is from a majority judgment of the High Court of Australia (Stephen, Mason, Jacobs and Murphy, JJ., Barwick, C.J. dissenting) dismissing an appeal from the Court of Appeal of the Supreme Court of New South Wales (Hutley, Glass and Mahoney, JJ.A.). The Court of Appeal had allowed an appeal from Sheppard, J. sitting in Commercial Causes. Sheppard, J. had dismissed an action brought by Salmond and Spraggon (Australia) Pty. Limited (hereinafter called "the consignee") against Port Jackson Stevedoring Pty. Limited (hereinafter called "the stevedore").

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2. A consignment of razor blades had been shipped from Canada to Australia on board a vessel of the Blue Star Line "the New York Star". The consignor was the

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Bill of Lading, p.257

Schick Safety Razor Company, said to be "a division of Eversharp of Canada Ltd.". The relevant bill of lading was issued in Montreal, Quebec, the port of loading being St. John, New Brunswick, and the port of discharge being the port of Sydney. Salmond and Spraggon (Australia) Pty. Limited was named in the bill of lading as consignee. The bill of lading was issued to and accepted by the consignor and transmitted to and accepted by the consignee. Port Jackson Stevedoring Pty. Limited carried on business as a stevedore in the Port of Sydney. Of its issued share capital 49% was owned by Blue Star Line Australia Limited, the balance being owned by Cunard International Australia Pty. Limited, and it commonly acted as stevedore in Sydney for the Blue Star Line. The "New York Star" arrived at the Port of Sydney on 10th May, 1970. Upon her arrival the goods were, in accordance with the usual practice in the port, discharged from the ship and placed by the stevedore in part of a shed under its control on the wharf. The goods were stolen from the wharf, being delivered by the stevedore to a person who had no right to them. When the consignee tendered the bill of lading the goods were therefore unavailable for delivery. The consignee sued the stevedore and the ship's agent, Joint Cargo Services Pty. Limited, for damages for loss of the goods, alleging negligence in failing to take proper care of the goods, delivery of the goods to an unauthorised person and non-delivery to the consignee.

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Dean p. 67, l. 25

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Sheppard J., pp. 130-132

Amended Declaration, pp. 2-5

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Sheppard J., pp. 133, l. 10

Sheppard J., p.133, l. 47

3. The learned trial judge dismissed the consignee's action against the ship's agent on the grounds that the ship's agent never had the care and custody of the goods and in any event had not been negligent. No appeal was brought against that decision. His Honour found that the stevedore was negligent in its care of the goods, and that there had been a mis-delivery of the goods. However the bill of lading contained a provision that any action for loss of or damage to the

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goods had to be commenced within one year after the date when the goods should have been delivered (clause 17) and a "Himalaya clause" (clause 2) which extended the benefit of all defences and immunities conferred by the bill of lading on the carrier to independent contractors employed by the carrier. Those clauses, which are in standard form, were substantially the same as the clauses considered by the Judicial Committee in Satterthwaite & Co. Limited v. New Zealand Shipping Co. Limited (The Eurymedon) (1975) A.C. 154. The present action had not been commenced within the period specified. The learned judge considered that the decision in The Eurymedon was directly in point and applied it. The stevedore submits that the learned judge was correct in doing so.

p. 265 1. 54.
p. 259 1. 3.
Sheppard J., p. 150, 1. 35.

4. The course taken by the proceedings thereafter was somewhat unusual. Before Sheppard J. the consignee had advanced three arguments as to why the provisions of the bill of lading did not operate to defeat its claim: first, that there had been a "fundamental breach" by the stevedore of its obligations to the consignee as bailee of the goods; second, that there had been a failure by the stevedore to satisfy the third of the four conditions stated by Lord Reid in Scruttons Limited v. Midland Silicones Limited (1962) A.C. 446 at 474, that is to say proof of the carrier's authority to act on the stevedore's behalf in including the "Himalaya clause" in the bill of lading; and third, that the bill of lading was exhausted and ceased to have relevant operation after the goods passed over the ship's rail. Sheppard, J. rejected all three arguments. In the Court of Appeal the consignee raised the same three arguments and these were again rejected. However the consignee was given leave to raise a fresh argument to the effect that the fourth of the conditions stated by Lord Reid in Scruttons Limited v. Midland Silicones Limited, that is to say, proof of consideration moving from the stevedore so as to entitle it to the benefit of exclusion or limitation clauses in the bill of lading, was not satisfied. That argument succeeded in the Court of Appeal. In the High Court the fresh argument that had found favour with the Court of Appeal

Sheppard J., p. 158, 1. 1.
Sheppard J., p. 137, 1. 48.
Sheppard J., p. 135, 1. 54.
Glass J.A., p. 175, 1. 8
Barwick C.J. p. 204, 1. 30
Stephen J., p. 215, 1. 10

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Mason & Jacobs J.J. P. 237 1. 45
Murphy J., pp. 249-253.
Barwick C.J., p. 197, 1. 32

was considered and rejected. Senior Counsel for the consignee, as well as supporting the reasoning of the Court of Appeal also addressed argument to the High Court on the fundamental breach point. However he expressly disclaimed reliance on the third point which had been argued before, and rejected by, Sheppard, J. and the Court of Appeal. There was therefore no argument on that point in the High Court. It was on that point that the majority in the High Court decided the case in favour of the consignee. In none of the Courts below was there any argument as to the correctness of the decision of the Judicial Committee in The Eurymedon. However, two members of the majority in the High Court (Stephen and Murphy, J.J.) expressed disagreement with that decision.

Stephen J., p. 218, 1. 50.
Murphy J., p. 251, 1. 20.

5. The facts of the case were not in dispute in the High Court and the stevedore does not seek to challenge before your Lordships' Board any of the findings of fact made by the learned trial judge. However, three of the members of the High Court (Stephen, Mason and Jacobs, J.J.) were under a misapprehension as to one matter of fact which they regarded as being of significance. That misapprehension related to the remuneration of the stevedore. Mason and Jacobs, J.J. said that the stevedore "stacked and stored the goods on the wharf on behalf of and at a charge to the holder of the bill of lading" and Stephen, J. said that the stevedore was "remunerated by the consignee". The significance of this related to their Honours' view that the conduct of the stevedore in question was not relevantly connected with, or affected by, the contract evidenced by the bill of lading. In fact the evidence was that the goods were stored by the stevedore at the expense of the carrier. The account for stevedoring services was paid to the stevedore by the ship's agent which was put in funds by the carrier. This account, which was Exhibit 1, included as specific items in the total amount to be paid by the carrier the wages of the watchmen and tally clerks who were charged with the safe keeping of the goods

p. 245, 1. 17.
p. 228, 1. 9.
Dean, p. 68, 1. 47.
p. 298.

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	after discharge and with their due delivery. Tonnage and wharfage rates were paid to the Maritime Services Board by the ship's agent. Their Honours may have been confused by some references in the evidence to an additional charge, called a "sorting" (not storing) "and stacking charge" which was, for convenience, collected by the ship's agent from the consignee for the stevedore. As to the stevedoring and tonnage and wharfage charges paid by the carrier, these were presumably taken into account in the rate of freight.	Dean, p. 77, 1. 21. Clayton, p. 106, 1. 2. Ex. 6, p. 317. Clayton, p. 104, 1. 40.
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	6. The stevedore submits that reasoning of the Court of Appeal on the point on which that Court decided in favour of the consignee, which did not commend itself to any of the members of the High Court, was incorrect. In particular the stevedore relies upon the reasons for that conclusion expressed by Barwick, C.J. and by Mason and Jacobs, J.J.. It is submitted that the members of the Court of Appeal based their decision upon a wrong view of the decision of the High Court in <u>Australian Woollen Mills Pty. Limited v. The Commonwealth</u> (1954) 92 C.L.R. 424 and that they failed to recognise that the point on which they decided the case was directly covered by the decision of the Judicial Committee in <u>The Eurymedon.</u>	pp. 200-204. pp. 235-238.
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	7. The stevedore further respectfully submits, should it be necessary to do so, that the decision in <u>The Eurymedon</u> was correct and should not be departed from. In this regard it is of significance that the decision was one of great public and commercial importance, relating to the legal effect of a clause which is in common use in contracts relating to the international carriage of goods by sea, it has been followed and applied in subsequent cases and, presumably, in the settlement of many disputes that have never come to Court, and it is to be expected that people in many countries have ordered their affairs on the faith of that decision. In view of some of the comments made by Stephen and Murphy, J.J. about matters of policy it should also be mentioned that the two dissentients in <u>The Eurymedon</u> indicated that in their view it would have been possible, by an appropriately worded	Stephen J., pp. 219-220. Murphy J., pp. 252-253.
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clause, to include in the bill of lading a contractual exclusion or limitation of liability that would have been available to the stevedore, and their Lordships' conclusion was based upon what they regarded as the unsuitability of the particular clause under consideration in that case.

Barwick C.J. p. 209, l. 45. Mason & Jacobs J.J., p. 238, l. 6. Stephen J., p. 221. Murphy J., p. 253, l. 5.

8. Barwick, C.J., Mason and Jacobs, J.J. accepted the decision in The Eurymedon without reservation and held the four conditions stated by Lord Reid in Scruttons Limited v. Midland Silicones Limited had been satisfied on the facts of the present case. Stephen and Murphy, J.J. were prepared to make those assumptions for the purpose of considering the point which was ultimately decisive in the case in the High Court. On that basis the issue was whether the limitation of action provision, clause 17, which by hypothesis had contractual force as between the consignee and the stevedore and applied to some possible claims by the consignee against the stevedore, applied to the present claim. 10 20

9. The bill of lading on its face contemplated that delivery would be effected "by the Carrier or his Agents" in exchange for the Bill of lading.

It contained the following relevant provisions:

The preamble provided that the goods were -

p. 258, ll. 5-15.

"to be transported subject to all the terms of this bill of lading ... to the port of discharge... and there to be delivered or transhipped on payment of the charges thereon...".

The preamble also provided as follows: 30

p. 258, ll. 20-27.

"It is agreed that the custody and carriage of the goods are subject to the following terms on the face and back hereof which shall govern the relations, whatsoever they may be, between the shipper, the consignee and the

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carrier Master and ship in every contingency, wheresoever and whatsoever occurring..."

Clause 2 of the bill of lading was as follows:-

"It is expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and without prejudice to the generality of the foregoing provisions in this Clause, every exemption limitation condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading".

p. 259, ll. 3-31.

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Clause 5 of the bill of lading was as follows:-

"The Carrier's responsibility in respect of the goods as a carrier shall not attach until the goods are actually loaded for transportation upon the ship and shall terminate without notice as soon as the goods leave the ship's tackle at the Port of Discharge from Ship or other place where the Carrier is authorised

p. 260, ll. 10-40.

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to make delivery or end its responsibility. Any responsibility of the Carrier in respect of the goods attaching prior to such loading or continuing after leaving the ship's tackle as aforesaid, shall not exceed that of an ordinary bailee, and, in particular, the Carrier shall not be liable for loss or damage to the goods due to - flood: fire, as provided elsewhere in this bill of lading: falling or collapse of wharf, pier or warehouse: robbery, theft or pilferage: strikes, lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: any of the risks or causes mentioned in paragraphs (a), (e) to (l) inclusive, of subdivision 2 of Section 1 of the Carriage of Goods by Sea Act of the United States: or any risks or causes whatsoever, not included in the foregoing, and whether like or unlike those hereinabove mentioned, where the loss or damage is not due to the fault or neglect of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any non-delivery or mis-delivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier".

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Clause 8 of the bill of lading was as follows:-

p. 261, l. 53- p. 262, l. 32.

"Delivery of the goods shall be taken by the consignee or holder of the Bill of Lading from the Vessel's rail immediately the vessel is ready to discharge, berthed or not berthed, and continuously as fast as vessel can deliver notwithstanding any custom of the port to the contrary. The Carrier shall be at liberty to discharge continuously day and night, Sundays and holidays included, all extra expenses to be for account of the Consignee or Receiver of the goods notwithstanding any custom of the port to the contrary. If the Consignee or holder of the Bill of Lading does not for any reason take delivery as provided herein, they shall be jointly

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and severally liable to pay the vessel on demand demurrage at the rate of one shilling and sixpence sterling per gross register ton per day or portion of a day during the delay so caused: such demurrage shall be paid in cash day by day to the Carrier, the Master or Agents. If the Consignee or holder of the Bill of Lading requires delivery before or after usual hours he shall pay any extra expenses incurred in consequence. Delivery ex ship's rail shall constitute due delivery of the goods described herein and the carrier's liability shall cease at that point notwithstanding consignee receiving delivery at some point removed from the ship's side and custome of the port being to the contrary. The Carrier and his Agents shall have the right of nominating the Berth or Berths for loading and discharging at all ports and places whatsoever any custom to the contrary notwithstanding. The Carrier shall not be required to give any notification of disposition or arrival of the goods."

Clause 14 of the bill of lading was as follows:-

p. 264, ll. 36-44.

"Neither the carrier nor any corporation owned by, subsidiary to or associated or affiliated with the Carrier shall be liable to answer for or make good any loss or damage to the goods occurring at any time and even though before loading on or after discharge from the ship, by reason or by means of any fire whatsoever, unless such fire shall be caused by its design or neglect".

Clause 16 of the bill of lading was as follows:-

p. 265, ll. 37-52.

"Unless notice of loss or damage and the general nature of such loss or damage is given in writing to the Carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage such removal shall be prima facie evidence of the delivery by the Carrier

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of the goods as described in the bill of lading. If the loss or damage is not apparent the notice must be given within three days of the delivery. The Carrier shall not be liable upon any claim for loss or damage unless written particulars of such claim shall be received by the Carrier within thirty days after receipt of the notice herein provided for".

Clause 17 of the bill of lading was as follows:-

p. 265, 1. 53- p. 266, 1. 8.

"In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear" 10

p. 210, 1. 35- p. 211, 1. 35.

10. The Chief Justice pointed out that part of the commercial background to the operation of the above provisions is that in fact consignees rarely take delivery at the ship's rail but usually collect their goods after some period of storage on or near the wharf. As His Honour observed, it must have been within the contemplation of the parties that the carrier would employ agents to store the goods on the wharf or in a shed and hold them pending the arrival of the consignee who would take delivery in exchange for a copy of the bill of lading. 20

p. 212, 11. 2-12.

p. 221, 1. 49- p. 228, 1. 25.

11. Stephen, J. held that the benefits of clause 2 of the bill of lading, even if otherwise available to the stevedore, were not available in respect of a loss that occurred after completion of discharge. His Honour held that the loss of the goods occurred at a time when the stevedore was no longer acting in performance of any of the carrier's obligations under the bill of lading (because the carrier was not obliged to store the goods pending collection by the consignee) and for that reason the benefits of clause 2 (and therefore of clause 17) had ceased to apply. 30

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12. This approach substitutes the concept of performance of the carrier's obligations in relation to the carriage of the goods for the concept which the contract identifies as relevant, that is to say, acting in the course of or in connection with employment as the servant or agent of the carrier. The carrier's immunities were not co-extensive with its obligations as to carriage and delivery. The bill of lading expressly refers in various places to the possibility that the carrier might have the goods in its custody either before loading or after discharge, and that the carrier might incur liability to the consignee for loss of or damage to the goods during those periods. The second sentence of clause 5, and the concluding words of clause 14, both give rise to potential liability of the carrier before loading or after discharge, even though the carrier might not at the relevant time have been obliged to have the goods in its custody. In such cases the carrier might well have wanted to rely on clause 17. When the practical position of the servants and agents of the carrier is considered the possibility of some claim being made against them in relation to loss of the goods before loading or after discharge is even stronger.

p. 259, 1. 12.

p. 260, 11. 16-36.

p. 264, 11. 40-44.

13. It is further submitted that the view which His Honour took as to the determination of the carrier's obligations in relation to the goods, involving, as he acknowledged, an interpretation "which reduces to the bare minimum the carrier's obligations as to delivery" was inaccurate and cannot be reconciled with such authorities as Meyerstein v. Barber L.R. 2 C.P. 38 Chartered Bank of India, Australia and China v. British India Navigation Co. Limited (1909) A.C. 369. Clause 8 entitled the carrier to insist that the consignee should take delivery at the ship's rail and to charge demurrage if that is not done, but the carrier did not so insist. If it had done so serious practical difficulties would have arisen for all parties. Stephen, J. appears to have treated the words "discharge" and "delivery" as co-extensive. In fact in the present case as is usual in the Port of Sydney, the carrier decided to effect delivery through the agency of a stevedore. On Stephen, J.'s view delivery to the stevedore was due delivery of the goods even though it

p. 227, 1. 50

p. 261, 1. 53ff.

pp. 222-224.

was not in exchange for the bill of lading.

14. It is not clear from the judgment of Stephen, J. what view His Honour would have taken of the operation of clause 17 if the facts of the case had been the same in all respects as the present case except that the carrier, instead of employing a stevedore, had acted directly (through its own employees) in relation to the storage and delivery of the goods. It is submitted that as a matter of the construction of the bill of lading it is clear that in such a case clause 17 would operate to protect the carrier and there is no reason why it should not also have been intended to protect the carrier's agent where the carrier chose to employ one.

p. 236, 1. 20

15. Mason and Jacobs, J.J. also regarded as a critical point of distinction between The Eurymedon and the present case the fact that there the goods were damaged whilst they were being unloaded whereas in the present case the goods had been unloaded. In that respect the submissions made above in relation to Stephen, J.'s reasoning also apply to that of Mason and Jacobs, J.J. .Their Honours, however, were not prepared to go as far as Stephen, J. in minimizing the carrier's obligations as to delivery. They recognised the problem involved in saying that the carrier could satisfy its obligations as to delivery by dumping the goods over the ship's side and onto the wharf. This resulted in their drawing a distinction between misdelivery of the goods and negligence in the safekeeping of the goods. Their Honours said:

p. 247, 11. 8-11

> "If the case were one of misdelivery and not of negligence in the safekeeping of the goods on the wharf, the appellant might be able to claim the benefit of clause 17".

The following observations are made concerning that distinction:

(a) It produces an extraordinary result in practice

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if the outcome of cases such as the present will depend upon such a distinction. The facts of the present case illustrate how difficult it can be to draw such a fine distinction.

(b) In fact the learned trial judge accepted the argument, which was advanced by the consignee, that the present was a case of misdelivery and not merely one of negligence in the safe-keeping of the goods.

10 (c) Such a distinction does not appear to have been contemplated by the parties.

16. If the distinction drawn by Mason and Jacobs, J.J. be valid and, in a case such as the present, critical, then the stevedore submits that a proper application of the distinction to the facts of the present case should result in a decision in favour of the stevedore.

17. Furthermore, for reasons referred to above it is incorrect to say, as is implicit in the reasoning of Mason and Jacobs, J.J., that there could never have been any
20 question of the carrier being liable to the consignee by reason of carelessness in the custody of the goods after they left the ship's rail.

18. It is respectfully submitted that on the point at issue the reasoning of Murphy, J., does not add to that of the other members of the majority. — pp. 249-253

19. The stevedore submits that the reasons for judgment of Barwick, C.J. are correct. — pp. 190-214

20. If it were necessary to do so the stevedore would submit that in addition to or alternatively to
30 relying on clause 17 it was also in the circumstances of the case entitled to rely on the general exclusion provisions in clause 2. On this question Barwick, C.J. said that he expressed no opinion. The other members of the High Court did not deal with it, and — p. 213, ll. 42-53.

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p. 157, l. 14.

presumably they agreed with what Sheppard, J. said about the matter. If it be relevant, the stevedore submits that the "judicial estimation" which formed the basis of Sheppard, J.'s decision on the point was incorrect. Alternatively, it is submitted that the question is simply one of the construction of the bill of lading, and that as a matter of construction of the bill of lading the case falls within the words of exclusion.

21. The stevedore submits that the appeal should be allowed for the following amongst other 10

REASONS

(1) THAT it should have been held that it was not necessary in order that the stevedore have the benefit of clause 17 of the bill of lading that the stevedore should have been performing some obligation of the carrier under the bill of lading relating to the carriage so long as the stevedore was acting in the course of or in connection with its employment by the carrier. 20

(2) IF it were necessary that the stevedore be shown to have been doing acts in performance of an obligation of the carrier under the bill of lading, the stevedore ought to have been held to have been doing acts in performance of such an obligation, namely the obligation to retain the goods until their delivery to the consignee or holder of the bill of lading upon production thereof or alternatively the obligation to deliver the goods to the consignee or holder of the bill of lading upon production thereof. 30

(3) THAT it ought to have been held that the provisions of the bill of lading including clause 17 thereof were available to the stevedore.

(4) THAT it ought to have been held that the

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provisions of clause 17 operated in the circumstances and on their true construction to defeat the consignee's claim.

(5) THAT it ought to have been held that the exclusion provisions of clause 2 operated in the circumstances and on their true construction to defeat the consignee's claim.

A. M. GLEESON

B. W. RAYMENT

IN THE PRIVY COUNCIL No. 5 of 1979

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N:

PORT JACKSON STEVEDORING PTY. LIMITED

Appellant (Second Named Defendant)

- and -

SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED

Respondent (Plaintiff)

CASE FOR THE APPELLANT

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