23,1980

IN THE PRIVY COUNCIL No. 5 of 1979

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

PORT JACKSON STEVEDORING PTY. LIMITED

Appellant
(Defendant)

- and -

SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED

Respondent
(Plaintiff)

CASE FOR THE RESPONDENTS

Record

1. This is an appeal from a decision of the High Court of Australia dated 3rd April 1978 which, by a majority (Stephen, Mason, Jacobs and Murphy JJ., Sir Garfield Barwick C.J. dissenting), dismissed an appeal from a decision of the Supreme Court of New South Wales Court of Appeal dated 8th October 1976. The Supreme Court (Hutley, Glass and Mahoney JJ.A.) had allowed an appeal from a decision of Sheppard J. in the Supreme Court of New South Wales, Common Law Division, Commercial List given on 14th July 1975. Page 254 Page 184 Page 161

2. The Respondents were the Plaintiffs in the action which was brought to recover A$14,684.98 damages, being the value of 33 cartons of razor blades the property of the Respondents which on 14th May 1970 had been negligently lost and/or misdelivered by the Appellants, a stevedoring company in Sydney. The Respondents had also claimed against Joint Cargo Services Pty.Ltd., a firm of Ship's Agents in Sydney, but Sheppard J. held that it was not they but was the Appellants who were responsible for the loss and no appeal was brought against that part of his decision. Page 132 line 20- page 133 line 42

3. The circumstances which gave rise to the liability of the Appellants to the Respondents in

respect of the said 33 cartons of razor blades were as follows :-

(a) The razor blades (part of a consignment of 37 cartons) had been sold to the Respondents on CIF terms by the Shick Safety Razor Company of Canada who on about 27th March 1970 had shipped them at St. John N.B. on board the "New York Star" a vessel owned by Blue Star Line Ltd. for carriage to Sydney.

Pages 271-2

(b) The shipment was covered by a bill of lading which was issued on behalf of the master and owners of the vessel and which named the Respondents as consignees of the relevant goods.

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(c) The property in the razor blades passed to the Respondents upon or by reason of such consignment and the Respondents were at the materal time the holders of the said bill of lading and the persons entitled to the possession of the razor blades.

(d) The vessel arrived in Sydney and berthed at a wharf belonging to the Maritime Services Board of New South Wales. She commenced to discharge on 10th May 1970, the razor blades being discharged on or about 12th May. The Shipowners through their agents Joint Cargo Services Pty. Ltd employed the Appellants to discharge the vessel.

Page 125 lines 29-30

Pages 285-296

(e) After discharge the razor blades were, whilst waiting collection by the Respondents, placed in a shed (called the "dead house") owned by the Maritime Services Board. Whilst in this shed the razor blades were in the possession of the Appellants and under the care and control of the Appellants' employees.

(f) On the morning of 14th May 1970 the Appellants' employees without requiring the production of any evidence of title gave the possession of the said razor blades to a dishonest person who had no right or title to them as a result of which the said razor blades were lost to

the Respondents and the Appellants were not in a position to deliver them up to the Respondents when subsequently demanded.

(g) As was held by Sheppard J., and affirmed on appeal, the misdelivery and loss were caused by the negligence of the Appellants and their servants: Page 133 lines 43-47 Page 165 line 33- Page 166 line 7 page 172 lines 52-55

(i) The Appellants' system did not permit the person having the custody of the goods at the dead house to demand the production of documents authorising removal and this was so even though the dead house was where goods were put which were thoughtto be more attractive to thieves and therefore more likely to be stolen. Page 134 lines 16-25

(ii) The Appellants' tally clerk chose to neglect his duty and "continued to sit in the sun and did not come over to the dead house" to check the goods onto the truck. Page 134 lines 2-3

(h) The loss of the goods took place after the Respondents had obtained the release of the goods from the Shipowners' agents but before the Respondents had gone to collect the goods from the Wharf or had been in contact with the Appellants.

4. Under these circumstances the Appellants were liable to the Respondents in the torts of negligence, detinue and conversion unless the Appellants could establish some defence. The Appellants alleged that they had a contractual defence arising from the terms of the bill of lading. Clause 2 of the bill of lading provided:

"2. 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 Page 259

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.

The Appellants said that under clause 2 they should not in any circumstances whatsoever be under any liability whatsoever to the Respondents, alternatively under clauses 2 and 5 they should not be under any liability for any theft, non-delivery or misdelivery, or alternatively under clauses 2 and 17 they were discharged from all liability because (as was the case) suit had not been brought within the one year allowed by clause 17.

Page 12 line 51 - Page 17 line 14
Pages 26-28

5. The contractual defences gave rise to three main questions.

(1) Whether there was a contract on the bill of lading terms between the Appellants and the Respondents. (The "Eurymedon" Question).

(2) If so, whether the Appellants were at the material time acting as independent contractors employed by the Carrier within the meaning of clause 2. (The Capacity Question).

(3) If so, whether the Appellants were, having regard to the facts of this case, precluded from relying upon the relevant or any contractual defence by reason of their fundamental breach. (The "Fundamental Breach" Question)

The first of these questions raises matters which were considered in the Privy Council in New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite /1975/ AC 154

(The "Eurymedon") The second and third questions raise matters which were not considered in that decision.

THE "EURYMEDON" QUESTION

6. All courts below were in relation to this case bound by the decision in The Eurymedon (Morris v. English Scottish & Australian Bank (1957) 97 C.L.R. 624). However, in the High Court Stephen and Murphy JJ. (cf. Viro v. The Queen (1978) 52 A.L.J.R.418) were prepared to decide the case by refusing to follow The Eurymedon. Stephen, Mason, Jacobs and Murphy JJ. in the High Court adopted comments on The Eurymedon made by Sheppard J. Barwick C.J. followed and adopted the decision in The Eurymedon although he preferred to give his own explanation of it.

Page 215 lines 22-34
Page 251 lines 20-24
Page 219 lines 11-43
page 246 line 54
page 247 line 7
page 251 lines 17-19

7. In each court the Appellants formulated their argument by reference to the quotation from Lord Reid in Midland Silicones Ltd. v. Scruttons, [1962] A.C. 446 at 474, adopted under 4 heads in The Eurymedon, and it will be convenient initially to follow the same approach. However it must be commented that what Lord Reid said in this passage was no more than a statement of an agency route by which a contractual nexus might be established. It is respectfully submitted that the analyses adopted in The Eurymedon do not in truth follow the scheme visualised by Lord Reid or the known concepts of agency and consideration he referred to, with the result that a contract was held to exist which in practical terms was a fiction.

page 160 line 22
Page 161 line 10
page 210 lines 1-4

8. Lord Reid's heads (1) and (2): This is a matter of the wording of clause 2 of the bill of lading. The wording is identical to that in The Eurymedon bill of lading. Although drafted before the Midland Silicones case, the wording does purport to confer protection on independent contractors and to make the carrier the agent of independent contractors, so that apparently Lord Reid's heads (1) and (2) are satisfied. However, the clause by a repeated reference to "be deemed to be" fails to make it clear whether it is referring to an actual or fictional situation. Further the clause purports to apply to independent contractors from time to time employed by the carrier. This is not legally effective. A contract cannot be made on behalf of a principal not capable of being ascertained at the time of the making of the contract. (Watson v. Swann (1862) 11 CBNS 756.) The class referred to in clause 2 is one of which

the content, whatever the likelihood might be, can only be ascertained by reference to the future events and at the time of the contract is unknown to either party. It should also be noted that -

(a) the clause purports to contain a present agreement;

(b) the clause in no way purports to contain an offer made by the consignor;

(c) the clause as a purported contract with others than the carrier is wholly lacking in mutuality since it purports to negative unequivocally all legal liability whatsoever (c.f. Firestone v. Vokins [1951] 1 Lloyd's Rep. 32 at 39 per Devlin J.) and the independent contractor is, or is deemed, to be a party to the contract only to the extent of his immunity.

It is submitted that none of this accords with the analysis and decision in The Eurymedon.

page 138 lines 12-18
page 138 lines 18-50
page 175 lines 13-44 page 198 line 48 p.199 line 3 page 234 line 267

9. Lord Reid's head (3): This is a matter of the reality of the agency and the authority of the Shipowners. Sheppard J. found that there was on the evidence no original authority but, believing that he was following The Eurymedon, he held that there had been ratification by reliance on the clause in the litigation. The Court of Appeal found that there was original authority and the High Court adopted this conclusion.

page 138 l. 12-18
page 73 lines 9-41
page 81 line 1-41
pages 291-6
page 175 lines 26-29

10. Original Authority: The Respondents submit that Sheppard J. was right. On the evidence, all that was proved was that at Sydney at the relevant time the Shipowners habitually employed the Appellants to stevedore their ships although neither was under any antecedent obligation to the other (see per Barwick C.J. at p.203 lines 22-32); the Appellants knew that the Shipowners' standard form of bill of lading incorporated clause 2. The evidence specifically failed to establish that the Appellants had ever approved the bill of lading provisions. Further the express contract between the Shipowners and the Appellants did not contain any authorisation or reference to the alleged agency. The Court of Appeal reversed the finding of Sheppard J. on the ground that the evidence had shown that "prior to the loss of the goods in question, claims had been made on the [Appellants] and rejected in reliance upon the exemption clauses." This was an error. There was no such evidence. The Respondents submit

that there was no original authority.

11. Ratification: If ratification is to bind it must be made within a reasonable time after the contract was purportedly made on behalf of the principal (Managers of the Metropolitan Asylums Board v. Kingham & Sons (1890) 6 T.L.R. 217; re Portuguese Consolidated Copper Mines Ltd. (1890) 45 Ch.D. 16.) Sheppard J. followed Beattie J. in The Eurymedon in holding that the stevedores ratified the contract by relying upon it in their Defence in the action. (The other ratification relied upon by Beattie J. does not apply on the facts of the present case.) Sheppard J. followed Beattie J. without considering the matter for himself because he considered that the Privy Council had impliedly approved this part of Beattie J.'s judgment. It is respectfully submitted that Sheppard J. was wrong in this conclusion; this part of Beattie J.' s decision was not argued before the Privy Council which did not refer to ratification in its decision. The Respondents submit that ratification by the Appellants in their Defence was not made within a reasonable time especially having regard to the fact that performance of any contract had by then been wholly concluded and that by such ratification in their Defence the Appellants sought to confer on themselves a right to rely upon a time limit which would make the writ already issued ineffective. Further any such ratification by the Appellants came after they had themselves been in fundamental breach of the alleged contract being ratified (see paragraphs 26 to 30 below.)

12. Lord Reid's head (4): This is whether the Appellants gave consideration to the Respondents; it can also be referred to in terms of mutuality or bargain. Sheppard J. held that this point was concluded by The Eurymedon and decided it in favour of the Appellants. The Court of Appeal disagreed and held that on the evidence The Eurymedon should be distinguished. In the High Court Barwick C.J. and, for different reasons, Mason and Jacobs JJ. preferred to follow and apply The Eurymedon on this point. Murphy J. while being unwilling to apply The Eurymedon disagreed with the reasoning of the Court of Appeal. It is respectfully submitted that The Eurymedon should be distinguished or, if indistinguishable, should not as a matter of the law of Australia be followed.

page 137 lines 38-46
Page 169 lines 3-5
page 177 lines 35-42
page 199 line 43
page 207 line 13
page 234 line 28
page 237 line 49
page 250 lines 15-36

13. Although at the trial the Defendants called senior witnesses from the Shipowners' agents and

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from the Appellants, none of these witnesses sought to prove any actual authorisation by the Appellants of any bill of lading contract being made on their behalf nor any reliance by the Appellants upon the terms of the bill of lading. All that the Appellants proved was that they knew the terms of the standard bill of lading and that they made a contract with the Shipowners for the

Page 291-296

stevedoring of the "New York Star" which contained no reference to the bills of lading and was on terms inconsistent with those of the bill of lading (cf. The Tarantel /1978/ 1 F.C. 269 at 294). It was pursuant to this contract that the stevedoring services were performed.

14. It is submitted that the Court of Appeal were correct. If an act is to be treated as the consideration for a promise or the acceptance of an offer the act must in truth have been done in response to the promise/offer. (The Crown v. Clarke (1927) 40 C.L.R. 227; Australian Woollen Mills v. The Commonwealth (1953) 92 C.L.R. 424). Thus -

> "In cases of this class it is necessary, in order that a contract may be established, that it should be made to appear that the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement." (92 C.L.R. at 456 emphasis supplied.)

If there really had been reliance, the Appellants could easily have proved it. In truth the services performed by the Appellants were performed pursuant

Page 289-90

to a defined contractual obligation owed to the Shipowners. The wording of clause 2 of the bill of lading was not drafted so as to suggest any offer to, or invite the performance of any act by, the Appellants. In the circumstances of this case it is submitted that it is wrong to infer reliance from the mere proof of knowledge of clause 2 of the standard form.

15. Mason and Jacobs JJ. set out their reasoning on this point. They cited the statement by Starke

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lines 33-43

J. in The Crown v. Clarke 40 C.L.R. at 244: "As a matter of proof any person knowing of the offer who performs its conditions establishes prima facie an acceptance of that offer." Such an approach does not assist the Respondents. Clause 2 on any reading of its actual language did not

contain any offer. Likewise they cited from Australian Woollen Mills v. The Commonwealth 92 C.L.R. at 457, "The necessary connection or relation between the announcement and the act is provided if the inference is drawn that A has requested B to go to Sydney". But clause 2 contains no request by the consignor to the stevedore; the consignor has no interest in making any such request. It is submitted that the reasoning of Mason and Jacobs JJ. should have lead them to decide this point in favour of the Respondents. However they also treated the point as concluded by The Eurymedon, citing the statement, "To describe one set of promises, in this context, as gratuitous, or nudum pactum, seems paradoxical and is prima facie implausible" (1975 A.C. at 167). Yet clause 2 as drafted has just such a gratuitous character being at pains to deny any mutuality; its sole function is to negative any legal liability whatsoever of the independent contractor to the consignor. It is submitted that The Eurymedon is not an authority on a matter of inference of fact nor apparently was it argued in that case. If it is such an authority it is respectfully submitted that it is wrong. In so far as the reasoning of Murphy J. or Barwick C.J. includes the above considerations the Respondents make the same submissions.

page 236 lines 34-37

Page 206 lines 26-41

Page 250 lines 32-36

16. The reasoning of Barwick C.J. involved there having been an initial bargain between the Appellants and the consignor at the time of the issue of the bill of lading to which the Respondents became parties by 'accepting' the bill of lading and which then applied to the Appellants' activities. Thus reliance was not a necessary part of the analysis. It is submitted that this reasoning is wrong.

page 201 lines 35-48

(a) It depends on there having been an original or 'antecedent' authority which there was not in this case (paragraph 10 above).

(b) The Appellants were not at the time of the issue of the bill of lading persons who at that time had been employed by the Shipowners to perform any service in relation to the subject matter of the bill of lading. (per Barwick C.J. at p.203 lines 22-32).

(c) Clause 2 of the bill of lading by its terms was totally lacking in any mutuality or any element of consideration or bargain. Barwick

C.J. erroneously construed the bill of lading as imposing obligations on the Appellants. (p.207 lines 3-9.)

(d) 'Acceptance' of the bill of lading by the Respondents did not create a contract between the Respondents and the Appellants nor did it transfer any contract between the Appellants and the consignor. (The Usury, Bills of Lading and Written Memoranda Act (1902) section 5.)

17. It is submitted that on the facts of the present case clause 2 of the bill of lading does not suffice to form the basis of a contractual relationship between the Appellants and the Respondents. The Eurymedon should be distinguished. The facts in that case contained features absent from the present case including -

(a) The fact that the stevedore was itself a carrier and used the form of bill of lading also used by the actual Carrier.

(b) The fact that the Carrier was a wholly owned subsidiary of the stevedore.

(c) The fact that before the arrival of the vessel at the discharge port the consignee had presented and surrendered the bill of lading to the stevedore in return for a delivery order.

(d) The fact that the negligence complained of fell clearly within the scope of the bill of lading contract.

18. If the decision in The Eurymedon is not to be distinguished, it should not be followed on the present appeal. The decision of The Eurymedon was accompanied by the dissent of two members of the Judicial Committee and involved the overruling of a unanimous decision of the Court of Appeal of New Zealand. The decision of the Privy Council sought to apply established legal principles to a factual situation and to support this by considerations of policy. It is respectfully submitted that the considerations of policy were unsound and that the application involved a departure from and not a following of such legal principle.

19. In 1956 the High Court of Australia in Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd. 95 C.L.R. 43 carefully and authoritatively considered the right of stevedores to rely upon

bill of lading clauses. It was held that no concept of vicarious immunity could be recognised. The Court deplored the "curious and seemingly irresistible anxiety to save grossly negligent people from the normal consequences of their negligence". This decision of the High Court was followed and adopted by the House of Lords in Midland Silicones Ltd. v. Scruttons /1962/ A.C. 446 These decisions have also been followed and adopted by the Supreme Court of Canada in Canadian General Electric Co. Ltd. v. Pickford and Black "The Lake Bosomtwe" (1971) 14 D.L.R. 372. The reasoning in The Eurymedon imposes a different solution solely as the result of the inclusion of a different, and notably inept, printed clause in the relevant bill of lading. It is this feature that opens The Eurymedon to criticism that it has (as Murphy J. describes it) "conjured up" a fictional contract and in reality reverses rather than follows the previous law. (See also the citation at /1975/ A.C. 169 of Carle and Montenari v. American Export Isbrandtsen Lines /1968/ 1 Lloyd's Rep. 260, U.S. District Court which is based on the American principle of the contractual "beneficiary").

page 251 line 21

20. In so far as The Eurymedon might be considered to be encouraging uniformity in the law, it is respectfully submitted that it has not had this effect. Its subject matter is not the construction or application of an International Convention but rather the granting of a domestic law immunity to stevedoring companies. In any event the current Convention, the 1968 Brussels Protocol (see the United Kingdom Carriage of Goods Act 1971), expressly excludes independent contractors from the benefit of the carriers' defences (Article IV bis rule 2) and does not permit the stipulation of blanket immunities. Further, subsequent reported cases do not make it clear that The Eurymedon will be widely followed, quite apart from what has been said in the present case. In the Kenya High Court it has been treated as an open question whether the majority or minority opinion should be followed. In Canada the position is still open. (Contrast The Suleyman Stalskiy /1976/ 2 Lloyd's Rep. 609, British Columbia, The Tarantel /1978/ 1 F.C. 269, Quebec, and The Federal Schelde /1978/ 1 Lloyd's Rep. 285, Quebec, with Eisen und Metall v. Ceres Stevedoring /1977/ 1 Lloyd's Rep. 655, Quebec.) There, the only clear cut decision in favour of a stevedore has been in The Federal Schelde which was expressly decided as a matter of Civil not Common Law and the application of "stipulation

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pour autrui". In the other cases, The Eurymedon was distinguished either in its application or in the result. In New Zealand, The Eurymedon was distinguished in Herrick v. Leonard & Dingley [1975] 2 N.Z.L.R. 566 on an application of Lord Reid's criteria. In the United States, where different principles apply, no uniform result has been achieved, as indicated by Stephen J. at p. 221 (lines 8-39).

21. It is further respectfully submitted that the reasons of policy given at [1975] A.C. page 169 are unsound. In the present case they have been respectfully criticised in their application to Australia by Sheppard J. whose observations were expressly adopted by each of the majority in the High Court. It is submitted that Stepehn J. correctly commented that:

page 160 line 22
page 161 line 11 -43
page 246 line 54
page 247 line 7
page 251 line 17-19
page 219 lines 34-43

> "This divorcing of the power of control from any liability for the consequences of its non-exercise .....may also be thought to be positively undesirable in the public interest."

page 220 lines 15-23

> "It is not clear to me that Australia Courts should regard it as in any way in the public interest that carriers' exemption clauses should be accorded any benevolent interpretation either so as to benefit carriers or so as to benefit independent contractors by extending the scope of such clauses to include such contractors."

page 251 line 12

To make attributions of contractual intention to persons such as the Respondents is, as Murphy J. pointed out, a 'distortion'. It is further respectfully submitted that it was mistaken to speak at any material time of the presumed efficacy of clauses such as the present clause 2.

22. It is submitted that The Eurymedon in relation to Wilson v. Darling Island and Midland Silicones v. Scruttons raises questions of policy and of the allocation of the burden of risks between parties engaged in trade or commerce in Australia and their insurers. It is submitted that of the six judges who have considered the policy implications of this case for Australia, five rightly doubted that The Eurymedon would give general satisfaction and cause no difficulties in practice. (See Geelong Harbour Commissioners v. Gibbs Bright [1974] A.C. 810 at 818-9 per Lord Diplock; Australian Consolidated Press v. Uren [1969] 1 A.C.590;

Viro v. The Queen 52 A.L.J.R. 418.)

THE CAPACITY QUESTION

23. This question only arises if it has been held that there was a contract on the bill of lading terms between the Appellants and the Respondents. If so, then was the taking care of the goods after discharge something which the Appellants were employed to do by the Carrier for the purposes if clause 2 of the bill of lading? It was held by the majority of the High Court (disagreeing with the lower Courts) that it did not. It is submitted that the bill of lading should be construed strictly against the Appellants and that the negative answer is correct.

Page 224 line 10-page 228 line 19
page 244 line 11
page 247 line 7
page 253 line 28

24. Clause 8 of the bill of lading expressly provides:

> "Delivery ex ships 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 custom of the port being to the contrary."

Similarly clause 5 provides -

> "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."

At the material time the goods had been discharged and were no longer in the custody of the carrier. (See also Australian United S.N. Co. v. Hiskens (1914) 18 C.L.R. 646, Keane v. Australian Steamships (1929) 41 C.L.R. 484 Automatic Tube Co. v. Adelaide Steamship /1966/ W.A.R. 103 and York Products v. Gilchrist Watt & Sanderson (1968) 3 N.S.W.R. 551). Under these circumstances an appropriate reading of the bill of lading requires the conclusion that at the material time the Appellants were not independent contractors employed by the carriers to perform the carriers' obligations under the bill of lading.

25. It is submitted that, if The Eurymedon is to be applied to cases such as the present, then it should only be in the clearest cases that an immunity conferred by a bill of lading should be recognised after the completion of the carriage by sea and outside the scope of the Hague Rules

legislation. The present is not such a case. (See also The Suleiman Stalskiy [1976] 2 Lloyd's Rep. 609, and Mitsubishi v. S.S. Eurymedon [1977] A.M.C. 2370). In contrast, The Eurymedon involved the operation of discharging, and it was stressed by the Privy Council, [1975] A.C. at p. 167 F-G, that this was one of the contractual obligations assumed by the carrier and was, in that case, being performed for him by the stevedore.

THE "FUNDAMENTAL BREACH" QUESTION

26. This question only arises if it is held that there was a contract on the bill of lading terms between the Appellants and the Respondents which did prima facie apply to the Appellants in relation to the goods after discharge. Sheppard J. and the Court of Appeal considered that there had been fundamental breach but concluded (as did Barwick C.J.) that the Appellants could nevertheless rely upon clause 17 of the Bill of lading as opposed to clauses 2 and 5. This conclusion was arrived at as a matter of the construction of clause 17. It is submitted that such a conclusion was wrong both in principle and as a matter of construction.

page 157 lines 18-21
page 178 lines 2-4
page 158 lines 15-34
page 179 lines 20-25
page 214 lines 3-7

27. It was held by Sheppard J. and affirmed by the Court of Appeal that the conduct of the Appellants in delivering the Respondents' goods to the thief without production of the bill of lading and without requiring any evidence of title amounted to a breach by the Appellants of their fundamental obligations. It was an unauthorised delivery not permitted by the contract; it was a conversion of the Respondents' goods. (Sydney City Council v. West (1965) 114 C.L.R. 481; Alexander v. Railway Executive [1951] 2 K.B. 882). It has never at any stage been suggested that the Respondents elected to affirm the contract or waived their right to rely upon the fundamental breach as a repudiation of the contract. Sheppard J. and the Court of Appeal rightly recognised that such fundamental breach would as a matter of construction fall outside the provisions of clauses 2 and 5. However, they and Barwick C.J. considered that, as a matter of construction, the breach fell within the terms of clause 17 and the Appellants could still rely on clause 17 notwithstanding any fundamental breach. Glass J.A. said:

p.157 lines 22-26
p.178 lines 50-54
page 158 lines 15-34
page 179 lines 20-25

> "This submission treats the doctrine as a rule of law which view has now been exploded (Suisse Atlantique pp.392, 399, 400, 410, 425-6, 431-2) instead of treating it as a rule of construction (Thomas National Transport v. May & Baker 115 C.L.R. 353 at

376). There is therefore no rule of law which stipulates that a party in fundamental breach forfeits the protection of all exception clauses. The protection will only be lost if the fundamental breach is of such a character that the application to it of a given exception clause would defeat the whole purpose of the contract".

28. With respect, the Respondents' submission does not treat the concept of breach of a fundamental term as a rule of law but involves merely the application of the ordinary law of contract. In Suisse Atlantique S.A. v. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361 the plaintiff was seeking to enforce a contractual claim on the basis of his having affirmed the contract. He accordingly continued to be bound by the terms of the contract. The adoption of Suisse Atlantique by Windeyer J. at (1966) 115 C.L.R. 382 in his dissenting judgment in Thomas National Transport v. May & Baker is on the same basis and does not cover the position with regard to termination by acceptance of repudiation which he refers to at page 382. In Photo Production Ltd. v. Securicor Ltd. [1980] 2 W.L.R. 283 the plaintiff was seeking, contrary to the terms of the contract, to treat an excepted peril as if it were a breach of contract. In neither Suisse Atlantique nor Photo Production was the plaintiff able to rely upon the consequences of a repudiatory breach. In the present case the Respondents are properly making a claim independently of any contract (York Products v. Gilchrist Watt & Sanderson [1970] 2 Lloyd's Rep. 1). The Appellants have no basis for denying the tortious nature of their conduct and have committed a repudiatory breach of the contract. The character of repudiatory breach is that, unless waived, it releases the innocent party, the Respondents, from performing any further requirements of the special contract, including the performance of any conditions precedent to their right to sue the guilty party (Hochster v. de la Tour (1853) 2 El. & B. 678 at 693-4, Avery v. Bowden (1855) 5 El. & B. 714 at 728 and Frost v. Knight (1872) L.R. 7 Ex. 111 at 117). Here it is said that because the Respondents did not at a later date perform the condition of commencing proceedings within one year they are now contractually debarred from doing so. It is submitted that the Respondents were at that time under no obligation to perform that condition, nor were the Appellants after their repudiatory breach entitled to require the Respondents to do so.

29. Further, the present case concerns the Appellants' possession of the goods as bailees. Following the

repudiation of (or breach of a fundamental term of) the special contract by the bailee it is the law that the goods owner is entitled to treat the special contract as at an end and to assert his common law rights in respect of the goods. As was said by Lord Diplock in Photo Production Ltd. v. Securicor Ltd.

> "The bringing to an end of all primary obligations under the contract may also leave the parties in a relationship, typically that of bailor and bailee, in which they owe to one another by operation of law fresh primary obligations of which the contract is not the source." (/1980/ 2 W.L.R. 283 at 295G, where the word "not" is erroneously omitted.)

In the present case the Respondents are entitled to bring proceedings making claims in detinue and conversion and to commence those proceedings within the statutory limitation period.

30. It is submitted that the foregoing principles of ordinary contract law were well-established prior to the decision in Suisse Atlantique;(see e.g. Lilley v. Doubleday (1881) 7 Q.B.D. 510, Thorley v. Orchis S.S. /1907/ 1 K.B. 660, Hain v. Tate & Lyle (1936) 41 Com. Cas. 350, Heyman v. Darwins /1942/ A.C. 356, Chandris v. Isbrandtsen-Moller /1951/ 1 K.B. 240, Scrutton on Charterparties 16th Edition (1955) page 297). The position of a goods owner following fundamental breach by the bailee is further illustrated by the case of North Central Wagon Co. v. Graham /1950/ 2 K.B. 7. These principles were in no way abrogated by the House of Lords in Suisse Atlantique. The House of Lords confirmed and distinguished the line of authority above referred to; per Viscount Dilhorne at pp.390-392, Lord Reid at pp.298-400, Lord Hodson at pp.411-413, Lord Upjohn at 442-425 and Lord Wilberforce at pp. 433-434. The relevant principles are not dependent upon the quite different principles found in Smeaton Hanscomb v. Sassoon I. Setty /1953/ 1 W.L.R. 1468 and Karsales. v. Wallis /1956/ 1 W.L.R. 936 which were disapproved by the House of Lords in Suisse Atlantique; likewise they are not dependent upon Charterhouse Credit v. Tolly /1963/ 2 Q.B. 683, Harbutts "Plasticine" v. Wayne Tank and Pump /1970/ 1 Q.B. 447 and Wathes v. Austins Menswear /1976/ 1 Lloyd's Rep. 14 which were over-ruled by the House of Lords in Photo Production v. Securicor /1980/ 2 W.L.R. 283.

31. If, contrary to the previous submission, the

Appellants are in principle entitled to rely upon clause 17 the question of its construction arises. In the Respondents' submission clause 17 should be construed strictly contra proferentem. The only words which might be thought to make it applicable to fundamental breach are "in any event". Such words should be construed as meaning "when the carrier is liable under one of the previous clauses". This was the construction rightly preferred by Mason and Jacobs JJ. at p.246 lines 1-18 and Murphy J. at page 252 lines 38-46. There is no need to read it as applicable to fundamental breach and it should not be. (Compare the wording of Article III rule 6 of the Hague Rules discussed in Scrutton op. cit. at pp. 427 and 440.)

32. Other points of construction arise on clause 17 which it is convenient to raise at this stage even though they are not dependent on there having been a fundamental breach. The clause expressly refers to "loss or damage" and does not cover mis-delivery or fundamental breach. Also clause 17 refers to the "Carrier and the ship". This terminology implies that clause 17 applies to the Carrier as Carrier and not in some other capacity or, if it has a wider meaning, refers to a liability of the Carrier under one of the previous clauses. The present action relates to matters after the carriage had been completed and for which the Carrier was not to be responsible, or liable, under the bill of lading clauses. The Respondents submit that either in conjunction with the concept of fundamental breach or independently of it, clause 17 should not be construed as having discharged the Appellants' liability in the present case.

THE RESPONDENTS respectfully submit that this Appeal should be dismissed and that the judgments of the Court of Appeal of New South Wales and the High Court of Australia be affirmed for the following among other

R E A S O N S

(1) BECAUSE the Appellants are liable to the Respondents in tort for the value of the Respondents' goods.

(2) BECAUSE the Appellants had no contractual defence to the Respondents' claim.

(3) BECAUSE the bill of lading did not evidence or contain any contract between the Appellants and the Respondents.

(4) BECAUSE the requisite agency and/or authority and/or reliance and/or consideration were lacking.

(5) BECAUSE neither the Usury etc. Act 1902 nor Brandt v. Liverpool apply to the Respondents' defence.

(6) BECAUSE The Eurymedon should be distinguished.

(7) BECAUSE alternatively The Eurymedon Should not be followed.

(8) BECAUSE alternatively the present matter was outside clause 2 of the bill of lading.

(9) BECAUSE alternatively of the Appellants' fundamental breach.

(10) BECAUSE alternatively the true construction of clause 17 does not afford the Appellants any defence.

(11) BECAUSE the Courts below were right to allow the Respondents to succeed.

J.S. HOBHOUSE

B.J. DAVENPORT

No. 5 of 1979

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

PORT JACKSON STEVEDORING PTY. LIMITED

Appellant
(Defendant)

- and -

SALMOND AND SPRAGGON (AUSTRALIA) PTY. LIMITED

Respondent
(Plaintiff)

CASE FOR THE RESPONDENTS

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