of contract or for negligence in respect of damage done to the goods while in the custody of the respondents for the purpose of their on-carriage from Hong Kong to Melbourne. The nature of the appellants' claim was, however, clarified by a draft statement of claim which they put in evidence. As a result of considering that draft statement of claim their Lordships are satisfied, as apparently was the Court of Appeal, that the nature of the appellants' claim is for an indemnity by way of damages, either for breach of the contracts contained in or evidenced by the on-carriage bills of lading, or for negligence, in respect of their liability to CNTIEC in the main action. Whichever way the claim is put the terms of the on-carriage bills of lading, including the Hague-Visby Rules as compulsorily applied to them by the law of Hong Kong, would govern it. Such a claim would normally have been brought by proceedings in the nature of third party proceedings against the respondents in the main action, but the appellants chose to bring a separate action *in rem* against the "Andros" in respect of the claim in order to obtain security for it. Their Lordships will from now on refer to that action as "the recourse action".

On 23rd April 1985, for reasons about which their Lordships can only speculate, the plaintiffs in the main action (CNTIEC) discontinued that action as against the second defendants (the respondents) leaving it on foot against the first defendants (the appellants) only.

The grounds on which the Registrar and Mayo J. held that the recourse action should be dismissed for want of prosecution were, first, that the appellants had been guilty of inordinate and inexcusable delay in serving a statement of claim, and, secondly, that the respondents had been prejudiced in their defence to the action by that delay. In the Court of Appeal the appellants relied on two grounds of appeal. The first ground was that the finding that the respondents had been prejudiced by the delay, which the appellants admitted had been inordinate and inexcusable, was not justified. The second ground was that, if the recourse action were to be dismissed, the appellants, not being out of time, would be entitled to bring a fresh action in respect of the same claim: in these circumstances, on the principle laid down by the House of Lords in *Birkett v. James* [1978] A.C. 297 per Lord Diplock at p. 322 D-E, it was a wrong exercise of discretion to dismiss the recourse claim. This second ground, to which their Lordships will refer as the "*Birkett v. James* point", had not been raised before the Registrar or Mayo J., but was allowed to be raised for the first time in the Court of Appeal. That court rejected both grounds of appeal and the grounds of the appellants' present appeal is that it was wrong to do so.

The respondents conceded before their Lordships that, if the appellants are right on the *Birkett v. James* point, the appeal must succeed, irrespectively of the other point on prejudice. Their Lordships propose, therefore, to deal first with the *Birkett v. James* point.

The appellants' case on this point is founded on the provisions relating to the time allowed for the bringing of claims contained in the Hague-Visby Rules, to which, as their Lordships indicated earlier, the on-carriage bills of lading were compulsorily made subject. Article III paragraphs 6 and 6 bis of the Hague-Visby Rules provide so far as material:-

> "6. ... Subject to paragraph 6 bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered.
>
> 6 bis. An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself."

The appellants put forward four contentions. The first contention was that the recourse action was "an action for indemnity against a third person" within the meaning of that expression in paragraph 6 bis above. The second contention was that the time allowed by the law of the court seized of the case, namely, the High Court of Hong Kong, for bringing such an action was six years from the date on which the cause of action accrued. The third contention was that that period of six years had not run out at the date of the hearing before the Registrar, and indeed has not run out even now. The fourth contention was that, having regard to these matters, the appellants were entitled to succeed on the *Birkett v. James* point.

Since the respondents are no longer the owners of the "Andros" and there is no sister ship of hers to be proceeded against in an action *in rem*, any fresh action brought by the appellants would have to be an action *in personam* against the respondents. Under the Limitation Ordinance of Hong Kong (Cap. 347) section 4(1)(a) the time allowed for bringing an action founded on simple contract or tort, which is what any fresh recourse action brought by the

appellants would be, is six years from the date on which the cause of action accrued. On any view of the date of accrual of such cause of action, the appellants were at the time of the hearing before the Registrar, and are even now, in time to bring an action *in personam* in respect of it. It was further accepted by the respondents that, if the appellants were to bring a fresh recourse action *in personam* against them, the security given in the existing recourse action would, by the terms of the relevant guarantee, be equally available to the appellants in such fresh action.

The Court of Appeal would have accepted the whole of the contentions put forward by the appellants but for one crucial matter. That was that, in the view of that court, paragraph 6 bis only applied to a case in which not only the claim for indemnity was made under a contract subject to the Hague-Visby Rules, but the claim in the main action in respect of which indemnity was sought was also made under a contract subject to those Rules. Kempster J.A., who delivered the judgment of the Court of Appeal, said:-

> "The through bills are not expressed to incorporate the Hague-Visby Rules and there is no evidence before us as to the general application of such Rules in China. Nonetheless the applicability of Hong Kong law to the through bills has not been the subject of argument. Hong Kong law only gives these Rules the force of law in relation to contracts for the carriage of goods by sea which, by Article 1(b), must be covered by bills of lading or their equivalent and where the port of shipment is Hong Kong or where the bill 'expressly provides that the rules shall govern the contract'. *Carriage of Goods by Sea Act* 1971 s 1(3) and (6). Rule 6 bis, to the material part of which rule 6 is subject, is therefore so to be construed as to include 'the carrier and the ship' within the meaning of the words 'a third person' and 'the person bringing such action for indemnity'. 'Indemnity' will then mean 'an action by A claiming from B full compensation for monies payable to C under a bill of lading subject to the Hague-Visby Rules'. We cannot so construe rule 6 bis as to give it a life of its own independent of rule 6. That being the case and the plaintiffs having failed to satisfy us that the through bills were subject to the Hague-Visby Rules we find the plaintiffs bound by rule 6 rather than by rule 6 bis in relation to the onward bills and, *a fortiori*, that they could not now commence a fresh action based on them whether *in rem* or *in personam*."

With great respect to the Court of Appeal their Lordships cannot accept either the reasoning or the

conclusion contained in the passage from the judgment of Kempster J.A. set out above. In their Lordships' opinion, paragraph 6 bis of Article III creates a special exception to the generality of paragraph 6. Paragraph 6 bis, must, therefore, in a case to which it applies, have a separate effect of its own independently of paragraph 6. The case to which paragraph 6 bis applies is a case where shipowner A, being under actual or potential liability to cargo-owner B, claims an indemnity by way of damages against ship or shipowner C. If that claim by shipowner A against ship or shipowner C is made under a contract of carriage to which the Hague-Visby Rules apply, then the time allowed for bringing it is that prescribed by paragraph 6 bis and not that prescribed by paragraph 6. There is no express requirement in paragraph 6 bis that the liability to cargo-owner B in respect of which shipowner A claims an indemnity against ship or shipowner C must also arise under a contract of carriage to which the Hague-Visby Rules apply. Nor do their Lordships see any good reason why, when such a requirement is not expressed, it should be implied.

This matter was the only ground for the Court of Appeal's rejection of the appellants' case on the *Birkett v. James* point. The respondents, however, put forward four main arguments in support of the view that, even if the Court of Appeal was wrong on that matter, the appellants' case still failed, and it is necessary for their Lordships to examine those arguments.

The respondents' first argument was that the expression "the time allowed by the law of the Court seized of the case" used in paragraph 6 bis of the Hague-Visby Rules referred to a time specifically prescribed for recourse claims under those Rules rather than for recourse claims generally. The Law of Hong Kong had not made any such specific provision and therefore the time of three months referred to in paragraph 6 bis should apply. Their Lordships do not accept that argument because it would involve reading into paragraph 6 bis a considerable number of words which it does not contain.

The respondents' second argument was that the intention of paragraph 6 bis was to allow a time for bringing a recourse action of no more than three months in any event. In support of this contention it was said that, in the light of the negotiations leading to the signing of the Brussels Protocol 1968, it was highly unlikely that the states which were parties to the Protocol could have intended that, while the time allowed for direct claims under paragraph 6 was only one year, the time allowed for recourse claims under paragraph 6 bis should be as much as six years, or even more if the law of the

Privy Council Appeal No. 62 of 1986

China Ocean Shipping Company, the owners of the ship or vessel "Xingcheng" *Appellants*

v.

The owners of the ship or vessel "Andros" *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH JULY 1987

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
LORD GOFF OF CHIEVELEY
SIR DUNCAN MCMULLIN

*[Delivered by **Lord Brandon of Oakbrook**]*

By a writ issued in the High Court of Hong Kong, Admiralty Jurisdiction, on 31st March 1983 the appellants, suing as the owners of the ship "Xingcheng", began an action *in rem* against the respondents' ship "Andros". Their Lordships will deal later with the nature of the claim made in that action. The respondents entered an appearance in the action and caused security to be provided for the appellants' claim in order to avoid the arrest of the "Andros". No statement of claim was served by the appellants and on 29th November 1985 Mr. Registrar Barnett made an order on the application of the respondents that the action be dismissed for want of prosecution. The appellants appealed against the order of the Registrar to Mayo J. who by order made on 16th January 1986 dismissed the appeal. The appellants appealed against the order of Mayo J. to the Court of Appeal of Hong Kong (Sir Alan Huggins V.-P., Fuad and Kempster JJ.A.) which by a judgment given on 16th May 1986 dismissed the appeal. The appellants with the leave of the Court of Appeal now bring a further appeal to Her Majesty in Council.

The material facts are these. On 30th August 1981 1,380 cartons of men's clothing ("the goods") were shipped on board the "Xingcheng" at Shanghai for carriage to Melbourne. Five bills of lading ("the through bills of lading") were issued on behalf of the appellants in respect of that shipment. In them the shippers were described as China National Textiles Import and Export Corporation ("CNTIEC") and the goods were stated to be consigned to shippers' order. The through bills of lading expressly provided for transhipment of the goods at Hong Kong. While they contained many terms according with the Hague Rules 1924, they did not incorporate, nor were they by law made subject to, the Hague Rules 1924 as amended by the Brussels Protocol 1968 ("the Hague-Visby Rules").

The "Xingcheng" arrived at Hong Kong on 9th September 1981. There the goods were discharged from that ship, packed into containers and re-shipped on board the "Andros" for on-carriage to Melbourne. Five further bills of lading ("the on-carriage bills of lading"), corresponding to the five through bills of lading, were issued on behalf of the respondents in respect of that re-shipment. In them the shippers were described as China Merchants Steam Navigation Co. Ltd. on behalf of CNTIEC and the goods were stated to be consigned to the holders of the corresponding through bills of lading. China Merchants Steam Navigation Co. Ltd. were the agents of the appellants. The on-carriage bills of lading stated that the goods were shipped in apparent good order and condition. They were further, by virtue of the Carriage of Goods by Sea (Hong Kong) Order 1980, compulsorily made subject to the Hague-Visby Rules.

On 21st October 1981 the "Andros" arrived at Melbourne where the goods were discharged. On discharge some of the goods were found to be in a damaged condition.

On 8th September 1982 CNTIEC as plaintiffs began an action *in personam* against the appellants as first defendants and the respondents as second defendants in the High Court of Hong Kong. In that action, to which their Lordships will refer as "the main action", CNTIEC claimed against both defendants nearly A$160,000 in respect of the damage to the goods, together with interest and costs.

On 31st March 1983 the appellants began in the High Court of Hong Kong the Admiralty action *in rem* against the "Andros" in which the present appeal arises. There has been some dispute between the parties as to the nature of the claim made in that action. The claim endorsed on the writ was in wide terms, which included, but were not necessarily limited to, an indemnity by way of damages for breach

forum so provided. Their Lordships doubt the propriety of seeking to construe a provision in an international convention by reference to the negotiations leading to its being signed, except possibly (their Lordships express no concluded view on the matter) in the case of an ambiguity which cannot be resolved in any other way. So far as paragraph 6 bis is concerned, however, their Lordships can perceive no ambiguity of any kind. The words used in both the English and French texts are as clear as they could possibly be: their effect is to make the period of three months from the dates stated the minimum, and not the maximum, time to be allowed.

The respondents' third argument was that the appellants' claim was really based on damage done to the goods during the time between their discharge from the "Xingcheng" and the time of their re-shipment on board the "Andros" as a result of the containers into which the goods were packed not being clean. If that was so, three consequences followed. First, the damage occurred at a time when the Hague-Visby Rules had not yet begun to apply. Secondly, because those rules had not yet begun to apply, the respondents were protected from any liability in respect of the goods by clause 5 of the on-carriage bills of lading entitled "Period of Responsibility". Thirdly, the time allowed for the appellants to bring their claim was governed by clause 19 of the on-carriage bills of lading, which provided for a prescription period of only one year. In their Lordships' view this argument is fallacious. The appellants' claim, as framed in their draft statement of claim, is founded on two principal matters: first, that the on-carriage bills of lading stated that the goods were shipped in apparent good order and condition, and, secondly, that the goods out-turned damaged. These matters raise a *prima facie* case that the goods were damaged after their re-shipment on board the "Andros". On the footing that the recourse action proceeds, it will be open to the respondents to plead, by way of defence, that the damage to the goods was done before their reshipment on board the "Andros", so that clauses 5 and 19 of the on-carriage bills of lading apply to defeat the appellants' claim. The circumstance that the respondents can raise that defence, however, is not a ground for saying that the appellants' claim, as framed by them, is not a claim founded on the applicability of the Hague-Visby Rules.

The respondents' fourth argument was that the appellants could only claim as agents for CNTIEC, so that the nature of their claim could only be a direct claim for damage to the goods and not a recourse claim in respect of their liability to CNTIEC in the main action. Here again, however, the appellants'

claim is not framed in that way, and, while the respondents can rely on this point by way of defence to the claim, that does not alter the nature of the claim as framed.

For the reasons which their Lordships have given they are of opinion that all four arguments put forward by the respondents are unsound, and that the contentions put forward by the appellants and referred to earlier are correct and must prevail.

Having regard to their Lordships' opinion on the *Birkett v. James* point it becomes unnecessary for them to deal with the appellants' other ground of appeal relating to prejudice and they express no opinion one way or the other upon it.

In the result their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the judgment of the Court of Appeal given on 16th May 1986 and the orders of Mayo J. and Mr. Registrar Barnett made on 16th January 1986 and 29th November 1985 respectively, save in so far as those last two orders relate to costs, should be set aside, and that the respondents' application for dismissal of the recourse action for want of prosecution should be dismissed, subject to a term that the appellants do within 14 days serve a statement of claim in the terms of their draft statement of claim referred to earlier.

The respondents must pay the appellants' costs in the Court of Appeal and before their Lordships' Board. However, since the point on which the appellants have now succeeded was not taken before Mr. Registrar Barnett or Mayo J., the orders as to costs made by them should stand.