

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
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14, 1959

IN THE PRIVY COUNCIL

No. 20 of 1958

55532

ON APPEAL
FROM THE COURT OF APPEAL OF THE COLONY OF
SINGAPORE, ISLAND OF SINGAPORE

BETWEEN

SZE HAI TONG BANK LIMITED (First
Third Party) ... Appellants

and

10 RAMBLER CYCLE CO., LIMITED
(Plaintiffs) ... Respondents

SOUTHERN TRADING COMPANY }
(Second Third Party) } Pro Forma
GLEN LINE LIMITED (Defendants) } Respondents

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal from the judgment of the Court of Appeal of the Colony of Singapore Island of Singapore given on the 30th September 1957 whereby the Court dismissed an appeal from that part of the judgment of Mr. Justice Whitton sitting in the High Court of the Colony of Singapore on the 17th January 1957 giving judgment for the Respondents against the Defendants for a sum equivalent in Singapore currency at the date of the judgment of £3014.18.6 (being \$25,958.10) and ordering that the Appellants indemnify the Defendants in respect of such sum together with the costs of the Respondents and the Defendants. pp 80-84
- 20 judgment of Mr. Justice Whitton sitting in the High Court of the Colony of Singapore on the 17th January 1957 giving judgment for the Respondents against the Defendants for a sum equivalent in Singapore currency at the date of the judgment of £3014.18.6 (being \$25,958.10) and ordering that the Appellants indemnify the Defendants in respect of such sum together with the costs of the Respondents and the Defendants. pp 45-62
- 30 2. The action was brought by the Respondents against the Glen Line Ltd. (hereinafter referred to as "the Glen Line") as Defendants for damages. The Glen Line pp 62-63

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joined the Appellants and the Southern Trading Company (hereinafter referred to as "Southern Trading") as Third Parties and claimed against each for a declaration of indemnity in respect of the Respondents' claim. For the purposes of the Record Glen Line and Southern Trading are identified as pro forma Respondents.

pp 12-14

3. The Respondents are an English company manufacturing cycles and cycle parts. For some time both before and since 1954 the Respondents have exported cycles and cycle parts to Southern Trading in Singapore who marketed the Respondents' products throughout the Far East. Orders would be sent by Southern Trading to the Respondents and on the shipment of goods against such orders the Respondents would send to the Bank of China in London for transmission to the Bank of China in Singapore the relevant shipping documents and a first and second bill of exchange drawn upon Southern Trading. This course of dealing contemplated that the Bank of China as the Respondents' bankers would collect payment on the draft and release the shipping documents to Southern Trading who would then take delivery of the goods. However a practice was prevalent at Singapore (of which the Respondents were unaware) for banks to give importers a form of indemnity which enabled them to take delivery of shipments without producing the Bill of Lading. What happened was that when the shipping documents had not been received in Singapore by the time the ship was ready to discharge her cargo the importers' bank would (if the importer was a selected customer) issue a form of indemnity which the importer would pass to the shipping company indemnifying the shipping company in respect of the release of specified goods before presentation of the Bill of Lading. At all material times Southern Trading was a selected customer of the Appellant bank.

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pp 36-37

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4. No dispute arises on this appeal in regard to the facts as found by the learned Judge. The issues raised primarily concern the true construction of the terms

and conditions of the relevant Bill of Lading in relation to such facts. The material provisions of the Bill of Lading are contained in Clauses 2 and 10.

Clause 2

p. 67

10 "During the period before the goods are loaded on or after they are discharged from the ship on which they are carried by sea, the following terms and conditions shall apply to the exclusion of any other provisions in this Bill of Lading that may be inconsistent therewith, viz., (a) so long as the goods remain in the actual custody of the carrier or his servants (otherwise than as mentioned in sub-clause (b) hereof), the carrier shall not be liable for loss damage or detention arising or resulting from the act neglect or default of the servants or agents of the carrier nor from any other cause whatsoever arising without the actual fault or privity of the carrier nor in any event for an amount exceeding the declared value of goods paying freight on an ad valorem basis or the invoice value whichever shall be least or in the case of other goods the invoice value or £100 per package or unit or £25 per cubic foot or half hundred-weight, whichever shall be least.

20 Liability for partial loss or damage shall be adjusted at such proportion as the percentage of loss or damage bears to the sum which would have been payable in the event of total loss. (b) Whilst the goods are being transported to or from the ship by lighter or other craft whether owned by the carrier or not or are being loaded or unloaded on or from such craft and such transport or loading or unloading is done

30 by the carrier it shall be done at the sole risk of the owners of the goods including risk of unseaworthiness or unfitness of lighter or other craft (c) in all other cases the responsibility of the carrier whether as carrier or as custodian or bailee of the goods shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom."

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Clause 10

p. 72

"Discharge and Delivery. The goods may be discharged from the ship as soon as she is ready to unload and as fast as she is able continuously day and night, Sundays included, on to wharf or quay, or other spaces, open or covered or into store, hulk, lazaretto or lighters, whether insulated, bonded or not, at ship's option and at the risk and expense of the owners of the goods, any custom of the port to the contrary notwithstanding, and always subject to the regulations and conditions of any such wharf or quay, spaces, store, hulk, lazaretto or lighters, whether the property of the carrier or other persons, to which regulations and conditions the owners of the goods hereby authorise the carrier to agree on their behalf. If discharge is impeded by consignees not taking delivery as fast as the ship can discharge, such consignees shall pay the carrier demurrage at the rate of 1/- per gross registered ton per day for any detention caused to the ship, and the goods may at carrier's discretion be carried on and discharged at the first convenient port, which shall for all purposes be considered the port of discharge under this Bill of Lading."

5. The material facts set out in the judgment of Mr. Justice Whitton are as follows:-

pp.45-46

"By a Bill of Lading dated 30th July 1954 the Defendants (Glen Line) acknowledged shipment in apparent good order and condition on board their steamship Glengarry at London of forty cases of bicycle parts and hub brakes for carriage to Singapore and for delivery there to the order of the Plaintiffs /Respondents/ or their assigns at the freight and upon terms and conditions therein specified. The Plaintiff Company (Respondents) were the manufacturers of the goods and the intended consignees were Southern Trading Co. to whom the Plaintiffs

10 Respondents had been sending similar shipments for a year or more before July 1954. The practice followed by the Plaintiff Company Respondents in these transactions was as follows:
In the first place there was a written agreement dated 1st July 1953 between these two parties which inter alia prescribed terms of payment for shipments. Then whenever an order from Southern Trading Company arrived The Rambler Cycle Co., (Respondents) manufactured the goods and as soon as these were ready arranged shipment. In each case the Plaintiffs Respondents obtained a Bill of Lading through their London shipping agents and this together with an insurance certificate invoices and other relevant documents was forwarded to the London branch of the Bank of China for transmission to their Singapore branch with a view to collection. The next step if the procedure envisaged by the Plaintiffs Respondents was followed was that Southern Trading Company in due course made payment to the Bank of China for the consignment and thereupon the Bill of Lading was released to them. In the present case what happened was this. The Glengarry arrived in Singapore on 1st September 1954. The goods in question were discharged into the Harbour Board's godowns on September 2nd-3rd. An indemnity issued by the Sze Hai Tong Bank Ltd., Appellants in respect of the goods was received on September 3rd by the agents of the Defendant Company Glen Line and they issued on the same day a delivery order in favour of Southern Trading Company. As may be inferred from this the Bill of Lading had not been produced. On September 4th and 6th the goods were removed from the Harbour Board premises by Southern Trading Company. These goods have never been paid for and the original Bill of Lading relating to them was subsequently received back by the Plaintiffs Respondents from the Bank of China.....
40 The first (Appellants) and second Southern Trading third parties have both

contract. By the opening words of the Bill of Lading the Appellants agreed to carry the goods to Singapore and there deliver the same "unto order of his or their assigns." But both carriage and delivery were subject to the conditions. If Southern Trading had presented the Bill of Lading prior to discharge of the cargo delivery might have been effected on the quay; but the Bill of Lading was not surrendered so the Appellants placed the goods in a warehouse as they were entitled to do under Clause 10. By Clause 2 however the responsibility of the Glen Line - whether as carrier or as custodian or as bailee - ceases on discharge of the cargo. It is submitted that Clause 2 upon its true construction is not so much an exemption clause as a definition of the scope and duration of the contract. Even if this is not so the agreement set out in Clause 2 (c) is perfectly clear in its terms and leaves no room for an implication that the Glen Line should be liable for acts done during the period after discharge.

11. Further and as a separate argument the Appellants submit that where goods are to be delivered "unto order his or their assigns" and such goods are delivered to a person who has not got an order of assignment the misdelivery is a breach in the performance of the contract and not a fundamental departure or deviation.

12. The grounds on which the Court of Appeal held the Glen Line liable are summarised in the passage of the judgment of the Chief Justice where he says: p 82

"In my opinion Clause 2(c) of this Bill of Lading would exempt the Defendants (Glen Line) from liability if the goods had been improperly removed from the godown by e.g. the Harbour Board or by anyone else but not by someone authorised by the Defendants [Glen Line] (through their agents) so to remove them. In issuing such authority, moreover, the Defendants clearly re-assumed dominion over the goods thereby extending the duration of the contract to carry and deliver. In these circumstances, as I see it, the Chartered Bank case [Chartered Bank of India v.

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British India Steam Navigation Co. (1909)
A.C.3597 has no application."

pp 84-85

It is submitted that no such case was pleaded or taken in argument. It is further submitted that the grounds stated are not justified by any evidence. If the words "re assumed dominion" are intended to imply that the goods were "in the actual custody of the carrier or his servants" then Clause 2(a) would have been relevant. But the Court of Appeal refused to allow the Appellants to rely on sub paragraph (a) of Clause 2 because it was not raised in the first court and because they considered that reliance upon it might have involved further evidence. The reason why no argument was raised in the first court was because neither by their pleading nor at the trial did the Respondents suggest that the goods were "in the actual custody of the carriers or his servants" after discharge. Accordingly it is submitted that it was not open to the Court of Appeal to make findings upon an assumption of actual custody by the Glen Line or their servants. Furthermore a finding of such actual custody would in any event be wrong. But if contrary to these submissions this fresh point could have been taken the Appellants should have been allowed to meet it by relying on Clause 2(a). If by "re-assumed dominion" the Court of Appeal meant some dominion short of custody, it is submitted that the conversion pleaded was not a conversion by taking and/or delivering to a third party but conversion by a bailee to his own use evidenced by failure to deliver and that to such case Clause 2(c) is a complete answer.

13. If the words "thereby extending the contract" import a finding of some agreement to extend or vary the contract embodied in the Bill of Lading or to make a new contract the Appellants repeat the contentions put forward in the preceding paragraph. Nothing was pleaded to such effect: it was not taken in the first court and was not therefore open; any finding of a fresh contractual arrangement would not be justified. Finally, it is submitted that Clause 2(c) applied throughout the period after the discharge of the cargo.

14. The Appellants submit that the judgment of the Court of Appeal should be reversed and that judgment be entered for the Appellants for the following among other

R E A S O N S

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- (1) Because Mr. Justice Whitton was wrong in finding that there had been a fundamental breach of contract.
- (2) Because in any event Mr. Justice Whitton misconstrued the true effect of Clause 2 of the Bill of Lading.
- (3) Because the Court of Appeal was wrong in upholding the judgment of Mr. Justice Whitton.
- (4) Because the Court of Appeal based its findings on grounds not justified to by the evidence and not open to the Court.
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- (5) Because if it was open to the Court of Appeal to base its judgment on an assumption that the goods after discharge were in the actual custody of Glen Line the Court should equally have allowed Glen Line to rely on clause 2(a)
- (6) Because on the true construction of the Contract and in particular of Clause 2(c) and on the facts Glen Line were not liable to the Respondents and because the judgments of Mr. Justice Whitton and the Court of Appeal in favour of the Appellants were wrong.

T.G. ROCHE

G.R.F. MORRIS

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SZE HAI TONG BANK LIMITED
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... .. Appellants

_____ and _____

RAMBLER CYCLE CO., LIMITED
(Plaintiffs) Respondents

SOUTHERN TRADING)
COMPANY (Second)
Third Party) Pro Forma
GLEN LINE LIMITED) Respondents
(Defendants))

CASE FOR THE APPELLANTS

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Solicitors for the Appellants.