IN THE PRIVY COUNCIL No. 10 of 1978

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION

COMMERCIAL LIST IN ACTION No. 9307 of 1974

BETWEEN:

SOUTH COAST BASALT PTY. LIMITED and PIONEER CONCRETE (N.S.W.) PTY. LIMITED — Appellants

- and -

R.W. MILLER & CO. PTY. LIMITED — Respondent

- and -

HETHKING STEAMSHIPS PTY. LIMITED — Appellant

- and -

R.W. MILLER & CO. PTY. LIMITED — Respondent

CASE FOR THE RESPONDENT R.W. MILLER & CO. PTY. LIMITED

Record

1. These appeals concern claims which arose out of the contamination, by a solution of sugar and water, of a cargo of blue metal aggregate which had been transported from Bass Point on the coast of New South Wales to Sydney aboard the M.V. "Cobargo". The affected aggregate was used in the manufacture of concrete. Sugar operates as a retarding agent inhibiting the setting of concrete and its presence, even in very small quantities, can have detrimental effects upon the quality of concrete.

p.221 LL 12-32
p.229 LL 15-21

2. The original claims which resulted from the contamination of the aggregate in question were numerous and complicated. Various builders

p.544 L 35 to p.545 L 10

Record

and owners of building sites brought claims against two suppliers of concrete, namely Pioneer Concrete (N.S.W.) Pty. Limited ("Pioneer (N.S.W.)") which was the second plaintiff and was a member of the Pioneer Group of companies, and an unrelated company named Marley Readymixed Concrete Limited ("Marley"). Those claims were ultimately resolved by litigation or otherwise in favour of the claimants. The contaminated aggregate had originated from a quarry the lessee of which was South Coast Basalt Pty. Limited ("South Coast Basalt") the first plaintiff. Marley sued South Coast Basalt and the case was settled on a basis which sustained Marley's claim.

Exhibit A pp.703-727

3. The aggregate had been transported pursuant to a contract of affreightment the parties to which were the parent company of the Pioneer Group, namely Pioneer Concrete Services Limited, South Coast Basalt, and R.W. Miller & Co. Pty. Limited ("Miller"). Pioneer (N.S.W.) was not a party to that contract. The parent company was not a party to the proceedings. Miller, in turn, had chartered the "Cobargo" from the owner Hethking Steamships Pty. Limited ("Hethking"). In this action South Coast Basalt sought (successfully) to recover from Miller the damages it paid to Marley. Miller, by a successful cross-claim, passed the liability on to Hethking. So far as Pioneer (N.S.W.) was concerned its liabilities to third parties were unsuccessfully sought to be passed on to Miller in two alternative ways. First, it was contended that South Coast Basalt was under a legal liability to Pioneer (N.S.W.), and that it was entitled to add that alleged liability as a further head of damage in its claim against Miller for breach of contract. Alternatively, it was contended that Miller was liable to Pioneer (N.S.W.) directly in tort. Since both those contentions (which were the only relevant contentions pleaded and argued) failed the question of Miller's cross-claim against Hethking did not arise in relation to the Pioneer concrete. Both of the plaintiffs (South Coast Basalt and Pioneer (N.S.W.)) and the cross-defendant (Hethking) have appealed.

Exhibit 9 pp.694-695 pp.695-696

4. The Parties

(a) South Coast Basalt and Pioneer (N.S.W.)

were at all material times wholly owned subsidiaries of a public company, Pioneer Concrete Services Limited. They, together with a number of other companies, made up the "Pioneer Group". The Pioneer Group was engaged, inter alia, in the manufacture and sale of ready-mixed concrete and also in the sale of blue metal aggregate to third parties. South Coast Basalt was, at all material times, the lessee of a basalt quarry at Bass Point. Basalt in the form of blue metal aggregate of various sizes was quarried at Bass Point and shipped by sea to Sydney where it was discharged at a shipping terminal owned and operated by the Pioneer Group at Blackwattle Bay in Sydney Harbour

Record

p.191 LL 12-18

pp.114 LL 15-40

p.33 L 20 to p.35 L.10

(b) Hethking carried on the business of ship-owners.

p.383 LL 5-15

(c) Miller carried on, inter alia, the business of carriage of goods by sea.

p.316 LL 5-10

5. The Contract of Affreightment:

Exhibit A pp. 703-727

By a written agreement, dated the 22nd June, 1973, Miller agreed with South Coast Basalt and Pioneer Concrete Services Limited that it would provide ships of approximately 3,000 tons capacity (whether belonging to or chartered by it) to carry blue metal aggregate from Bass Point to Blackwattle Bay.

Clause 21(c) was in the following terms:

"21. AREAS OF RESPONSIBILITY

(c) Miller shall ensure that there is no contamination of aggregate by coal or other materials (excluding sea water) or by different sizes of aggregate from the time of loading at Bass Point until discharge on to Basalt's conveyors."

The particular reference to coal was no doubt connected with the fact that Miller has colliery interests.

6. The Time Charter

Exhibit 9

Record

Miller provided a vessel for the carriage of the blue metal aggregate pursuant to the agreement. This vessel, the "Lisa Miller", ran aground and it became necessary for Miller to arrange an alternative ship. By a Baltime 1939 Uniform Time Charter made on the 3rd October 1974, Miller chartered from Hethking the M.V. "Cobargo".

Clause 1 of the Time Charter was in the following terms:

> "1. The owners let, and the Charterers hire the Vessel for a period of 30 consecutive days subject to an extention of time being mutually agreed from the time (not a Sunday or a legal Holiday unless taken over) the Vessel is delivered and placed at the disposal of the Charterers between 9 a.m. and 6 p.m., or between 9 a.m. and 2 p.m. if on Saturday, at SYDNEY, NEW SOUTH WALES in such available berth where she can safely lie always afloat, she being in every way fitted for bulk cargo service, with all cargo spaces swept clean. The Vessel to be delivered on or about 3rd October, 1974."

Other relevant clauses were Clauses 3 and 13. They were as follows:

> "3. The Owners to provide and pay for all provisions and wages, for insurance of the Vessel, for all deck and engine-room stores and maintain her in a thoroughly efficient state in hull and machinery during service.
>
> 13. The Owners only to be responsible for delay in delivery of the Vessel or for delay during the currency of the Charter and for loss or damage to goods onboard, if such delay or loss has been caused by want of due diligence on the part of the Owners or their Manager in making the Vessel sea-worthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager. The Owners not to be responsibile in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants. The Owners not to be liable for loss or damage arising or resulting from strikes, lock-outs

or stoppage or restraint of labour (including the Master, Officers or Crew) whether partial or general. Record

The Charterers to be responsible for loss or damage caused to the Vessel or to the Owners by goods being loaded contrary to the terms of the Charter or by improper or careless bunkering or loading, stowing or discharging of goods or any other improper or negligent act on their part or that of their servants."

7. The Cause of the Contamination

The learned trial judge made the following findings of fact:

(a) The "Cobargo" had for many years carried sugar from the northern rivers of New South Wales to Sydney, and had been used for the carriage of bulk sugar immediately prior to being chartered to Miller. p. 535 LL 40-42

Immediately before the commencement of the charter from Hethking to Miller the bulk of the sugar residue in the afterhold of the vessel was removed using a front-end loader, a shovel and then a broom. This method of removal of sugar from the hold could not and did not remove sugar lying under the ceiling timbers in the hold forming the floor of the hold or between the side hopper boards and the skin of the ship. p.547 LL 15-25

(b) The "Cobargo's" first two voyages under the charter to Miller involved the carriage of coal from Hexham to Sydney, but on the 9th, 10th and 11th October, 1974 she carried blue metal from Bass Point to Blackwattle Bay in discharge of Miller's obligations to South Coast Basalt under the contract of affreightment. Thereafter voyages 6 to 28 inclusive (the last being on the 14th November, 1974) involved the carriage of coal from Hexham to Sydney. p.535 L 44 to p.536 L8

(c) On the 15th November, 1974 on voyage 29 the "Cobargo" carried blue metal aggregate from Bass Point to Blackwattle Bay. At the commencement of voyage 29 there was a quantity of water (between one and two tons) in the No. 2 hold of the "Cobargo", the afterhold, and this water was derived p.536 LL8-12

p.536 LL15-25

p.544 L8 to L25

Record

from an excessively wet cargo of coal previously carried from Hexham to Sydney. The sugar in the hold dissolved in that water.

p.544 L 15 to L 22
p.551 LL5-20

(d) On the 15th November, 1974 the bilge pumping system of the "Cobargo" was defective and it was not able to remove this water from the afterhold.

p.551 LL 21 to L 25

p.694 LL 33-35

(e) On the 15th November, 1974 at Bass Point approximately 400 tons of 10 m.m. blue metal aggregate was loaded into the No. 2 hold of the "Cobargo" and transported to Sydney. During such loading and transportation the blue metal aggregate became contaminated in the hold in that a considerable amount of it was coated with sucrose.

8. <u>South Coast Basalt's Claim Against Miller</u>:

South Coast Basalt alleged both a breach of Clause 21(c) of the Contract of Affreightment and a breach of the implied warranty of seaworthiness of the vessel. His Honour based the judgment for that plaintiff on the latter, not the former, claim. The breach of the implied warranty of seaworthiness was alleged and found to result from the fact that the bilge pumping system of the "Cobargo" was defective and inoperable and there was water in the hold which could not be removed.

p.605 LL25-40
p.695 LL5-8

9. South Coast Basalt's appeal relates to his Honour's refusal to allow as part of its damages its alleged legal liability to Pioneer (N.S.W.) in damages. The respondent submits that his Honour's reasons for this refusal were correct. In particular the respondent submits that in reaching his conclusion on this point the learned trial judge simply applied well settled principles of law to the determination of the plaintiff's claim as pleaded in the light of the evidence (and lack of evidence) and having regard to the way the case was conducted. His Honour's decision essentially involved findings of fact and was based mainly upon the plaintiff's failure to satisfy him of facts proof of which was essential to the success of the claim it made.

10. Paragraphs 11, 15 and 16 of the Amended

Statement of Claim set forth the allegations of fact upon which the plaintiff relied. It was never claimed by South Coast Basalt that it could recover the losses suffered by Pioneer (N.S.W.) other than by showing that it was liable to indemnify Pioneer (N.S.W.) in respect of those losses. At the hearing, in relation to the Marley claim against South Coast Basalt, the respondent contended that although Marley had obtained a judgment against South Coast Basalt nevertheless that liability should not be passed on to the respondent because South Coast Basalt had failed to plead an exclusion clause contained in its contract with Marley. It was in that context that the learned judge expressed the view that even if that exclusion clause had been available a failure by South Coast Basalt to rely on it for commercial reasons would not prevent it treating its liability to Marley as a head of damages. However it was never suggested that any such considerations applied as between South Coast Basalt and Pioneer (N.S.W.). South Coast Basalt claimed that the basis of making the Pioneer (N.S.W.) losses part of its damages was an alleged liability to recoup Pioneer (N.S.W.). The existence of any such liability was challenged from the outset, and during the hearing directors of South Coast Basalt sought to overcome the problem by passing a resolution to bear responsibility to Pioneer (N.S.W.) and tendering that resolution as evidence in the case. If it be necessary to do so the respondent submits that the appellant was correct in accepting this onus at the trial. It was one thing for South Coast Basalt, which had itself been sued to judgment by a third party with whom it dealt at arm's length to claim against Miller that it had suffered damages in the form of a legal liability to that third party. Its position vis-a-vis Pioneer (N.S.W.) was significantly different. It never dealt at arm's length with Pioneer (N.S.W.). The only merit of its claim that it was damnified in respect of Pioneer (N.S.W.)'s alleged losses was that if successful it would overcome the awkward circumstance that Pioneer (N.S.W.) was not a party to the contract that Miller was found to have broken. No commercial explanation of the resolution to bear responsibility was advanced. It's only purpose was to meet the exigencies of the litigation.

Record

p.624 LL 15-30

p.520 L35 to p.521 L15
Exhibit NN p.793

Record

11. (a) There was a substantial issue at the trial as to whether South Coast Basalt ever sold any blue metal aggregate to Marley. There was a further issue as to the terms on which it supplied aggregate to Pioneer (N.S.W.). Marley obtained its aggregate from the Pioneer Group pursuant to a contract the terms of which were contained in various documents tendered in evidence, including general letters covering details of supply, and individual delivery dockets. These documents, and the way business was done within the Pioneer Group, left as a matter of considerable doubt whether the seller to Marley was South Coast Basalt or Pioneer (N.S.W.). His Honour found as a fact that Pioneer (N.S.W.) acted as South Coast Basalt's agent, and therefore resolved that issue in favour of the appellants. On that aspect of the case the main doubt was not as to the terms of the contract of sale, which his Honour thought were clear enough, but as to which member of the Pioneer Group was selling to the outside buyer.

Exhibit O p.749-751
Exhibit U p.774
Exhibit L
p.591 LL40-48
p.592 LL17-25

(b) As to the sales of aggregate from South Coast Basalt to Pioneer (N.S.W.) there was great uncertainty as to the terms of the relevant contract. The first witness, Mr. Kells, who was the distribution manager of Pioneer (N.S.W.) was asked directly, with reference to paragraph 11 of the Statement of Claim, what the contract was and when and how it was made, and he said he didn't know. The contract was called for and not produced. It emerged from the evidence that Pioneer (N.S.W.) was the company which employed all staff in the Pioneer Group. The trial judge accepted that evidence, which was led by the plaintiffs. It follows that South Coast Basalt itself had no employees. It was the lessee of the Bass Point quarry but the evidence was that the man in charge of the quarry and the staff there were employees of Pioneer (N.S.W.). When a load of aggregate arrived at Blackwattle Bay an employee of Pioneer (N.S.W.) would "allocate" it to Pioneer (N.S.W.) or to some outside purchaser. Delivery dockets and invoices were sent out to any outside purchaser in the name of Pioneer (N.S.W.). Where the aggregate was used by Pioneer (N.S.W.) there were

p.47 L.20-30
p.48 LL35-44
p.192 LL6-7
p.588 LL8-10
p.141 LL22-35
p.172 LL 1-22
p.35 LL24-38
p.127 LL1-18
Exhibit R
p.192 LL9-13

Record

delivery dockets but their function was merely to record the movement as between various plants. Once a month accounting entries were made in the books of Pioneer (N.S.W.) crediting South Coast Basalt with the proceeds of sales of aggregate to outsiders, and with the value of deliveries to Pioneer (N.S.W.) during the preceding month. There was an inter-company loan account between South Coast Basalt and Pioneer (N.S.W.). The proceeds of the sales went to that account. The foregoing constituted the entirety of the evidence as to the sale of aggregate by South Coast Basalt to Pioneer (N.S.W.). There was no written agreement between the parties and the only contractual terms were those that could be spelled out of the above conduct.

p.128 LL13-22
p.206 LL10-20
p.192 L23 to p.193 L8
p.191 LL28-32
p.127 LL33-38

(c) The role of South Coast Basalt in relation to the supply of aggregate seems to have been entirely passive. Employees of Pioneer (N.S.W.) took charge of the winning of aggregate from its quarry, the loading of the aggregate on board the vessel, the discharge of the aggregate at Blackwattle Bay, the allocation of some of the aggregate to outside purchasers and some to within the Pioneer Group, the invoicing of outside purchasers, and the making of necessary accounting entries. Sales by South Coast Basalt to outsiders were made through the agency of Pioneer (N.S.W.). The price was collected on its behalf by that company. As to the sales from South Coast Basalt to Pioneer (N.S.W.) it is difficult to imagine a case in which any element of reliance by a purchaser upon a seller could be less evident.

p.172 LL1-22
p.35 LL20-38
p.36 L8 to p.37 L35
p.192 LL12-13

12. South Coast Basalt alleged that it was liable to Pioneer (N.S.W.) for breaches of terms of sale said to be implied under Section 19 of the Sale of Goods Act, one relating to fitness for a purpose and the other to merchantability.

In order to establish the first of these it had to show that the purpose for which Pioneer (N.S.W.) was buying the aggregate was made known by Pioneer (N.S.W.) to South Coast Basalt "so as to show that Pioneer relied upon South Coast

Record

Basalt's skill or judgment". His Honour held that the evidence failed to establish any such demonstration of reliance by Pioneer upon South Coast Basalt. All that the evidence showed was that Pioneer, as a vendor of concrete, had acquired some of its aggregate from its sister-company, which owned a quarry, presumably because that was convenient for the purposes of the group. The reality of the situation was that neither had any real choice in relation to the supply of the aggregate and Pioneer (N.S.W.) obtained it, not in reliance upon any skill or judgment or pursuant to a contract for sale by description, but because as a member of the group it was obliged so to do.

p.637 LL32-36

p.637 LL38-45

13. One would expect as a matter of commonsense, that where a basic and common material is being supplied for use in a technical manufacturing process, it would be unusual for the purchaser to be relying upon the vendor's skill and judgment as to the suitability of the material for such use. Pioneer (N.S.W.) was a substantial organisation and there were within it at least some people who knew that sucrose was a contaminant of aggregate. South Coast Basalt does not appear to have had any organisation at all, much less one that was capable of detecting and preventing what occurred in the present case. In fact it was an employee of Pioneer (N.S.W.) at Bass Point who directed the aggregate to be loaded into a hold which he knew contained sugar. There was no one outside the employment of Pioneer (N.S.W.) upon whom Pioneer (N.S.W.) could be said to have placed reliance.

p.89 LL18-21

p.176 LL22-38

p.179 LL10-40

14. The absence of any element of reliance is, the respondent submits, fatal to both aspects of the claim of a breach of terms said to be implied under the Sale of Goods Act. The common principle which links sub-sections (1) and (2) of Section 19 is the reasonable reliance of the buyer on the seller's ability to make or select goods which were reasonably fit for the buyer's purpose coupled with the seller's acceptance of the responsibility so to do. "The key to both subsections is reliance". (See the speech of Lord Diplock in Ashington Piggeries Ltd. & Anor. v. Christopher Hill Ltd. (1972) A.C. 441). The defect in the aggregate was its having been contaminated with sucrose in the hold of the vessel. It did not lie within the sphere of

expertise of South Coast Basalt to detect and avoid such a defect nor did the responsibility for that unfitness lie with South Coast Basalt. (Cammell Laird & Co. Ltd. v. The Manganese Bronze & Brass Co. Ltd. (1934) A.C. 402 at 508; see also Henry Kendall & Sons v. William Lillico & Sons Ltd. (1969) 2 A.C. 31 at 107).

15. Insofar as the first plaintiff claimed that there was a liability under Section 19(2) of the Sale of Goods Act for a breach of an implied condition that the aggregate be of merchantable quality, the learned trial judge declined to find as a fact that the aggregate was not of merchantable quality. This conclusion was based upon an insufficiency of evidence. The Plaintiffs led no evidence directed to the question of the uses to which aggregate may be put, or the effect of sucrose contamination upon its marketability or value. His Honour declined to find as a fact that in the contaminated condition in which it was delivered the aggregate was of no use for any purpose for which aggregate would normally be used, and hence was not satisfied that there was any breach of the implied term within the meaning of Section 19(2) of the Act. The trial judge applied the test as suggested by Lord Reid in Henry Kendall & Sons v. William Lillico & Sons Ltd. (supra), that is to say, "merchantable can only mean commercially saleable", and ".... if the description was so general that goods sold under it are normally used for several purposes then goods are merchantable under the description if they are fit for any one of those purposes..." (see also B.S. Brown & Son Ltd. v. Craiks Ltd. (1970) 1 W.L.R. 752). So far as the evidence disclosed the blue metal aggregate here could have been fit to be used as road base, filling or for gravel shoulders as suggested by his Honour, even in its contaminated state. Putting the respondents case at its lowest, it is submitted that the evidence does not require a conclusion that the aggregate was unmerchantable. The respondent further submits that the evidence does not permit such a conclusion.

p.637 LL23-27

p.637 LL6-23

16. The respondent further submits that the plaintiffs failed to prove that the relevant sales of aggregate were "by description". The absence of facts or circumstances indicating reliance by the second plaintiff on the first

Record

plaintiff is itself a factor tending against a conclusion that the sale was by description. Moreover the fact that it was officers of Pioneer (N.S.W.) who handled all aspects of the supply of aggregate by South Coast Basalt, points up, and probably explains, the absence of any relevant act of description.

17. At the hearing Hethking supported various arguments advanced by Miller in support of a conclusion that South Coast Basalt's action should have failed entirely and been dismissed. Miller does not desire to make any independent submission to that effect upon this appeal. However, in the event that Hethking should advance such arguments in its appeal Miller would seek to have the benefit of them, if successful, against South Coast Basalt and would seek an order that it be given special leave to cross-appeal nunc pro tunc (c.f. Toronto Railway Company v. King (1908) A.C. 260). The other parties have been given prior notice of Miller's attitude in this regard, which results from the nature of proceedings by way of cross-claim under the relevant Rules of Court.

18. PIONEER'S CLAIM AGAINST MILLER

This claim was based solely in tort.

The trial judge found that Miller owed a
p.639 LL36-38 duty to Pioneer (N.S.W.) to take reasonable care in the carriage of the aggregate. It knew the aggregate was to be used in part by Pioneer
p.639 LL39-45 (N.S.W.) in the manufacture of concrete. In applying the principles contained in Overseas Tank Ship (U.K.) Limited v. Morts Dock & Engineering Co. Limited (1961) A.C. 388; Hughes v. Lord Advocate (1963) A.C. 837; Chapman v. Hearse & Anor. 106 C.L.R. 112; The Kufos (1969) 1 A.C. 350; Dorset Yacht Club (1970) A.C. 1004; Mt. Isa Mines Limited v. Pusey 125 C.L.R. 383; Caterson v. Commissioner for Railways 128 C.L.R. 99, his Honour concluded that the proximity of the parties gave rise to a
p.650 LL34-38 duty owed by Miller to Pioneer (N.S.W.) to take reasonable care.

19. In considering whether there was a breach of the duty of care, and whether the damage suffered from any such breach was too remote the trial judge, correctly, it is submitted, took

into account the following facts: Record

(a) there was no person in the employment of Miller who either knew or ought to have known that sugar could have a deleterious effect on aggregate or concrete; p.652 LL5-15

(b) whilst Miller employees were aware that the "Cobargo", when it went on charter, had residues of dry sugar in the hold, there was no employee of Miller who was or should have been aware prior to the voyage in question of the deficiencies in the Cobargo's equipment, and particularly, the bilge pumping system, which resulted in the dispersal of that sugar through a cargo of aggregate; p.653 LL30-40

(c) it was an employee of Pioneer (N.S.W.) at Bass Point, Mr. Ellerton, who, also knowing of the presence of sugar in the hold, (but being himself unaware of the effect of sugar upon concrete), finally directed the loading of the cargo; p.653 LL10-20

(d) between any conduct on the part of Miller employees in not ensuring that when the vessel first went on charter all dry sugar was removed from it and damage to Pioneer (N.S.W.) there was the conduct of Hethking in sending the Cobargo on voyage 29 with defective machinery and Pioneer (N.S.W.) itself, by its employee Mr. Ellerton.

20. The trial judge considered whether Miller was in breach of such duty by failing to remove sugar which was known by it to be present and the presence of which it should have anticipated in any event because of the use to which the vessel had previously been put to its knowledge and whether Miller should have foreseen the occurrence of the general kind of damage which occurred as "not unlikely to happen". His Honour held that it was not foreseeable by Miller that the presence of dry sugar in the hold in the places and in the quantities in which they existed would be "not unlikely" to affect deleteriously the concrete in any way which may have required its removal. Accordingly Miller was not in breach of the duty of care which it owed to Pioneer because damage of the general nature of that which occurred, insofar as the presence of p.653 LL1-10

Record

sugar contributed to it, was not reasonably foreseeable by Miller.

p.653 LL41-45

21. Further his Honour found that even if there were a breach of duty by Miller, the presence of a substantial quantity of water in the hold, to the knowledge of Pioneer (N.S.W.) and brought about by blockages and defects in the bilge pumping system of the "Cobargo" was an intervening act which was not itself reasonably foreseeable. Miller submits that these conclusions of the trial judge were correct.

p.653 L49 to p.654 L9

22. Further, Miller raised a defence of contributory negligence. Presumably because the learned judge found against the plaintiffs on their tort claim he did not deal with this defence in his reasons for judgment. If, contrary to the respondent's submissions, the tort claim were to succeed it would be necessary to consider this defence. The role of Mr. Ellerton at Bass Point in relation to the loading of the "Cobargo" would become a matter of particular significance. The respondent maintains this defence but its consideration may well involve findings of fact, especially relating to apportionment of blame, that have not been made and would, if the matter became relevant, require that the case be remitted.

23. MILLER'S CROSS-CLAIM AGAINST HETHKING:

The learned trial judge found that at the time of the receipt of the cargo in question the "Cobargo" was not fit for cargo of any kind and was unseaworthy. This was the basis of the finding of a breach by the defendant of an implied warranty of seaworthiness in favour of the first plaintiff. His Honour took the view that so far as the implied warranty of seaworthiness on the part of Hethking in favour of Miller was concerned, the relevant time was not the loading of the cargo for voyage 29, but was the commencement of the charter, and that there was no evidence that the vessel was unseaworthy at that time. The respondent denies the correctness of both of the steps in that process of reasoning, but the matter may be academic because his Honour found that Hethking was in breach of two express obligations in the charter-party, that is to say the obligations contained

p.605 LL25-31

p.657 L25-45

p.659 LL10-20

Record

in clause 1 and clause 3. p.665 LL39-43

24. The respondent submits that the trial judge was correct, for the reasons which he gave, in finding the above breaches on the part of Hethking. In particular, the evidence given by the various witnesses as to the condition of the pumping system, as a result of which a large quantity of water that went into the afterhold could not be removed from the hold, established a clear breach of the obligation "to maintain (the vessel) in a thoroughly efficient state in hull and machinery during service". (c.f. Roddick v. Indemnity Mutual Marine Insurance Co. Limited (1895) 2 Q.B. 380; Snia Societa di Navigazione Industriae & Commercio v. Suzuki & Co. & Ors. (1924) 29 Com. Cas. 284). Indeed, the only working director of Hethking, Mr. Deane, said in evidence that if he had known on 15th November, 1974 what he later found out about the prior entries in the ship's records concerning the bilge pumps in October and November he would not have permitted the vessel to go to sea. p.393 LL19-25 LL35-40

25. Hethking relied upon two exclusion clauses in the charterparty, that is to say, clauses 9 and 13. As to clause 9 his Honour held that on its true construction it had nothing to do with a case such as the present, and the respondent submits that this is correct. As to clause 13 his Honour found as a fact that there was personal default on the part of the Owners, who had failed to institute and supervise a proper system of reporting and effecting repairs. It is submitted that in these respects his Honour was correct. p.669 LL25-35 p.686 LL32-36

26. If, contrary to the foregoing, it be held that one or more of the exclusion clauses would otherwise apply then the respondent relies upon section 5 of the Sea-Carriage of Goods (State) Act, 1921.

27. The respondent submits that the learned judge correctly concluded that the damage which Miller suffered by reason of Hethking's breaches of contract, that is to say, legal liability to the owner of the cargo for damages, was not so remote as to be irrecoverable. The condition of the vessel at the time of loading of the cargo

Record

was that it contained significant quantities of sugar and between one and two tons of water in the afterhold, and the vessel's bilge pumps, which had been causing trouble for weeks, were incapable of removing the resulting solution of sugar and water from the hold. It required no awareness of the particular propensities of sugar in relation to concrete for it to be within the reasonable contemplation of the Owners that in those circumstances the charterers were at risk of incurring some kind of legal liability to the owners of the cargo. It must have been within the contemplation of the parties when the charterparty was entered into, and at all relevant times, that a breach by the shipowners of their obligations under clauses 1 and 3 of the charter could result in damage to cargo and expose the charterers to liability at the suit of the cargo owners. The precise nature and extent of the liability that ultimately resulted is irrelevant. (Koufos v. C. Czarnikow Limited (1969) 1 A.C. 350; McGregor on Damages, 13th Ed., Articles 188, 189; Great Lakes S.S. Co. v. Maple Leaf Milling Co. (1924) 41 T.L.R. 21).

28. Hethking's breaches of clause 3 of its contract with Miller was the connecting factor between the presence of sugar in the vessel's afterhold and the damage which ultimately resulted, both to Miller and to others. The sugar that remained in the hold at the commencement of the charterparty caused no harm prior to voyage 29. However, the vessel's pumping system was defective. When the vessel took on a large quantity of water which could not be removed, and the cargo was loaded into a hold containing between one and two tons of water in which the sugar had dissolved, the presence of the sugar in the hold, which had previously done no harm, took on a new significance.

29. As to the decision to carry aggregate on voyage 29 notwithstanding the condition of the Cobargo's afterhold and her pumping equipment, it was only employees of Hethking who were fully aware of that condition. Even if there be no reason to conclude that they either knew or ought to have known of the effects of sugar upon concrete, nevertheless they had no knowledge of reasonable assurance that the cargo would not be damaged. They had no knowledge one way or the other, and they made no enquiries. They took a

risk. Whether one expresses the damage in terms of contamination of the aggregate, or the incurring of liability on the part of Miller to South Coast Basalt, it was neither "improbable" nor "unpredictable". The fact that it is possible to imagine some kinds of cargo which would not have been harmed is not to the point.

30. In the final analysis Hethking must be forced to contend that the Cobargo was "cargo-worthy". Once it is accepted that Miller was in breach of the "implied warranty (which) requires that the ship and her equipment be fit for the purpose of safely carrying (the aggregate) to (its) destination" (c.f. Carver, Carriage by Sea, 12th Edition Vol. 1. para. 112), and that the cause of that breach was in turn a breach by Hethking of its obligations under the charterparty, then it must follow that Miller is liable for damage to the cargo resulting from the lack of fitness of the ship and her equipment and that Hethking is in turn liable to Miller. The unfitness of the "Cobargo" to receive and carry aggregate on voyage 29, in the light of the learned judge's findings of fact as to what happened to the aggregate and why it happened, was demonstrated as a matter of objective fact. A prudent shipowner would have required that it be made good before undertaking the carriage of the aggregate.

31. In the event that the Plaintiffs or either of them should succeed in their appeal and there is a resulting increase in the amount for which the defendant is held liable to one or other of the plaintiffs, and Hethking's appeal fails, then the order as it stands against Hethking would not reflect the true result of the case. In that event the respondent submits that the appropriate course would be to vary the order against Hethking to make the amount for which it is liable on the cross-claim correspond with the amount for which the defendant is found to be liable.

CONCLUSION

32. The respondent submits that the appeals should be dismissed for the following amongst other

R E A S O N S

(1) BECAUSE South Coast Basalt, being obliged

so to do, failed to establish that it was under any legal liability to Pioneer (N.S.W.).

(2) BECAUSE Miller was not liable to Pioneer (N.S.W.) in damages for negligence.

(3) BECAUSE Hethking was in breach of its obligations to Miller under the time charter and was liable to Miller to the full extent of Miller's liability to South Coast Basalt or Pioneer (N.S.W.). 10

(4) BECAUSE the judgment of the Supreme Court was correct.

A.M. GLEESON

ROBERT STITT

IN THE PRIVY COUNCIL No. 10 of 1978

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION

COMMERCIAL LIST IN ACTION No. 9307 of 1974

BETWEEN :

SOUTH COAST BASALT PTY. LIMITED and PIONEER CONCRETE (N.S.W.) PTY. LIMITED — Appellants

- and -

R.W. MILLER & CO. PTY. LIMITED — Respondent

AND BETWEEN :

HETHKING STEAMSHIPS PTY. LIMITED — Appellant

- and -

R.W. MILLER & CO. PTY. LIMITED — Respondent

CASE FOR THE RESPONDENT R.W. MILLER & CO. PTY. LIMITED

RICHARDS, BUTLER & CO.,
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