Privy Council Appeal No. 10 *of* 1978

South Coast Basalt Pty. Ltd. and
Pioneer Concrete (N.S.W.) Pty. Ltd. – – – – *Appellants*

v.

R. W. Miller and Co. Pty. Ltd. – – – – – *Respondent*

and

Hethking Steamships Pty. Ltd. – – – – – *Appellant*

v.

R. W. Miller and Co. Pty. Ltd. – – – – – *Respondent*

(Consolidated Appeal)

from

THE SUPREME COURT OF NEW SOUTH WALES (COMMON LAW DIVISION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND OCTOBER 1979

Present at the Hearing:

LORD DIPLOCK
LORD FRASER OF TULLYBELTON
LORD SCARMAN
SIR GARFIELD BARWICK
SIR CLIFFORD RICHMOND

[*Delivered by* LORD DIPLOCK]

The facts of this case are complex, though once they have been ascertained the law to be applied to them is simple. Those facts that are merely physical can be narrated briefly. A consignment of 10 mm. basalt aggregate that had been quarried at Bass Point and was destined to be used as an ingredient of ready-mixed concrete, was shipped at Bass Point in a vessel, the "Cobargo", for carriage by sea to Blackwattle Bay in Sydney Harbour. One of the holds into which the aggregate was loaded was awash with a concentrated solution of cane sugar, i.e. sucrose, resulting from residues of previous cargoes of sugar having become dissolved in water that had drained from an exceptionally wet cargo of coal on the previous voyage. This aqueous solution of sucrose could not be pumped out because the bilge lines to the holds were blocked. It remained there during the voyage and the cargo of aggregate became impregnated with it. On arrival at Blackwattle Bay the aggregate was discharged into bins from which it was supplied to manufacturers of ready-mixed concrete for use as an ingredient of their product. Sucrose, when present in a concrete mix even though in miniscule quantities only, stops the concrete from hardening and makes it unfit for the purposes for which ready-mixed concrete is used. And that is what happened in the instant case.

The complexity lies not in the physical facts but in the legal relationships between the various parties who had dealings with the aggregate from the time that it was extracted from the quarry at Bass Point until its defects as an ingredient of ready-mixed concrete, which resulted from its contamination by sucrose, had become manifest.

The first plaintiff South Coast Basalt Pty. Ltd. ("SCB") is the lessee of the quarry from ICI Australia Ltd. under a mineral lease of 22 December 1972 which contains a convenant against assignment, sub-letting or parting with possession of the quarry and obliges SCB to work it with all expedition and to pay a royalty based upon the tonnage of quarry products sold. At the material time it was the practice for the basalt extracted from the quarry to be crushed and graded into aggregates of various sizes at Bass Point by SCB and to be shipped from a jetty there to Blackwattle Bay where it was discharged into the storage bins of SCB.

Shipment of aggregate from Bass Point to Blackwattle Bay was undertaken by the defendant and cross-claimant R. W. Miller and Co. Pty. Ltd. ("Miller") under a long-term contract of affreightment dated 22 June 1973 between SCB and Miller under which Miller undertook upon twenty-four hours' notice to "provide ships (whether belonging to or chartered by it)" to carry aggregate as required by SCB from Bass Point to Blackwattle Bay.

Until October 1974 Miller had performed this contract with its own vessel but owing to a marine casualty this ship became temporarily unavailable and Miller chartered from the cross-defendant, Hethking Steamships Pty. Ltd. ("Hethking"), a one-ship company, their only ship the "Cobargo". The charterparty, dated 3 October 1974, was in the "Baltime 1939 Uniform Time Charter" form with certain additions and amendments to which it will be necessary to refer later. Under this charterparty the "Cobargo" was first employed by Miller in carrying coal from Hexham to Sydney; thereafter on three voyages, on 9, 10 and 11 October, she carried aggregates from Bass Point to Blackwattle Bay in performance of Miller's obligations under the contract of affreightment. She next reverted to carrying coal until 15 November 1974 when she undertook the laden voyage from Bass Point to Blackwattle Bay in the course of which the aggregate in the after hold became contaminated with sucrose.

The three companies, SCB, Miller and Hethking, are not associated with one another; the legal relationships between them that are relevant for the purpose of this appeal are contractual only and derived from the contract of affreightment and the charterparty respectively. There is nothing novel or unusual in these relationships.

It is otherwise, however, with the relationship between SCB and its co-plaintiff Pioneer Concrete (NSW) Pty. Ltd. ("Pioneer"). Both these companies are fully owned subsidiaries of Pioneer Concrete Services Ltd. ("Services"), a company which holds all the shares in companies operating in several Australian States. Pioneer had become from 1 April 1974 its principal operating company in New South Wales by the transfer to it of all the quarrying, manufacturing and trading activities of five other wholly-owned subsidiary companies that had previously been operating separately in the State. This left SCB as Pioneer's only co-subsidiary that was an operating company in New South Wales. Its obligations as lessee under its mineral lease from ICI Australia Ltd. made it necessary for SCB to maintain its own identity separate from that of Pioneer and to carry out on its own behalf the quarrying activities at Bass Point and the marketing of the quarry products. As a matter of administration, however, Pioneer after 1 April 1974 undertook on SCB's behalf day to day purchasing of supplies, collection of debts and banking functions, for which appropriate debit and credit entries were made in SCB's loan account with Pioneer. SCB had no employees of its own. The contracts of employment of all members of the staff and work force at Bass Point quarry and at SCB's

discharging facilities and storage bins at Blackwattle Bay were with Pioneer as employer. Those who worked there were on secondment by Pioneer to SCB and, while so engaged, their wages were debited to SCB's loan account with Pioneer.

One of the activities of Pioneer was the manufacture of ready-mixed concrete which it undertook at several different plants at various locations in New South Wales, including one at Blackwattle Bay itself. This plant was adjacent to SCB's discharging facilities and storage bins. From these Bass Point aggregate could be discharged on to a conveyor belt and carried to the plant by this means.

The aggregate shipped from Bass Point quarry to SCB's storage bins at Blackwattle Bay was disposed of in three different ways. A part was sold to a company wholly independent of the group, Marley Readymixed Concrete Ltd. ("Marley"), who took delivery in their own trucks into which the aggregate was discharged directly from the bins. The rest was sold to Pioneer, who took delivery of aggregates either by conveyor belt for manufacture into ready-mixed concrete at their Blackwattle Bay plant, or into trucks for manufacture into ready-mixed concrete at some other plant. The concrete that it manufactured from the Bass Point aggregates Pioneer sold to its own customers.

Before the Supreme Court two matters arising out of the legal relationship between SCB and Pioneer were the subject of a good deal of evidence and a great deal of argument. The first was whether on the sales of aggregate to Marley the seller was SCB or was Pioneer. The second was whether delivery of aggregate by SCB to Pioneer at Blackwattle Bay was by way of sale. In a careful judgment which includes a very full review of the relevant evidence the learned judge (Yeldham J.) found that the seller of aggregate to Marley was SCB, not Pioneer; and that the delivery of aggregate by SCB to Pioneer was by way of sale. The absence of any challenge to these findings on appeal greatly simplifies their Lordships' task and enables them to deal with this appeal with greater brevity than was possible for the learned judge.

Of the consignment of aggregate that was shipped on the "Cobargo" on 15 November 1974 and arrived at Blackwattle Bay contaminated with sucrose, a part was sold by SCB to Marley for use as an ingredient of ready-mixed concrete. Some of this was manufactured into ready-mixed concrete by Marley and sold to its own customers before the defect in the aggregate was discovered. This gave rise to claims for damages against Marley by its own customers which Marley settled and claimed over against SCB as part of the damage it had sustained as a result of SCB's breach of its contract of sale to Marley. Marley also claimed damages in respect of the remainder of the defective aggregate of which they had taken delivery but had not yet sold on to customers before its defects were discovered.

The rest of the consignment was sold to Pioneer. Part of this was delivered from SCB's bins on to the conveyor belt for use as an ingredient in ready-mixed concrete manufactured at Pioneer's plant at Blackwattle Bay; the remainder was discharged into Pioneer's trucks for similar use at Pioneer's other concrete manufacturing plants. As in the case of Marley, some of the defective aggregate was manufactured into ready-mixed concrete that was sold by Pioneer to its own customers before the defect was discovered. The mode of its discovery was bizarre. As a result of the evaporation by the summer heat of the water in which the sucrose was dissolved, clouds of bees were attracted to the deposited sugar in a batch of aggregate passing along the conveyor belt to the Blackwattle Bay plant. Pioneer's claims against SCB for damages for breach of its contract of sale with SCB are similar to those of Marley.

SCB and Pioneer brought in the Supreme Court an action for damages against Miller. By the time the case came on for hearing SCB's claim was based (a) upon breach of the contract of affreightment and (b) upon negligence. The claim for damages under both these heads included the amounts that they had paid in settlement of Marley's claims against them and the amounts that it was alleged that SCB was legally liable to pay to Pioneer in satisfaction of Pioneer's claims against them. Pioneer's claim against Miller was based on negligence alone. They claimed the damage that they had themselves sustained in respect of that part of the consignment that had been sold and delivered to them by SCB. This in effect was an alternative claim to that of SCB in respect of the same damage.

Miller brought in Hethking as cross-defendants claiming against them a complete indemnity against any damages awarded against Miller in the main action. Miller's cross-claim was based upon breach of the charterparty.

Questions of liability were tried first.

Upon the issues raised in the main action the learned judge reached the following findings.

(1) As regards the liability of Miller to SCB for damages for breach of contract he held that:

(*a*) Miller was in breach of an express warranty in the contract of affreightment that they should ensure that there was no contamination of aggregate by coal or other materials (excluding sea water) during the voyage; and

(*b*) Miller was also in breach of the warranty of seaworthiness to be implied in the contract of affreightment.

(2) As regards the measure of damages for breach of contract recoverable by SCB from Miller, he held that

(*a*) SCB was entitled to recover as damages for breach of the warranty of seaworthiness the amounts that they had paid and costs that they had incurred in settling Marley's claims against them; and

(*b*) The sale of aggregate by SCB to Pioneer was not one which entitled Pioneer to recover from SCB damages in respect of the contaminated aggregate delivered under it and that accordingly there was no legal liability of SCB to Pioneer in respect of which they could claim to be indemnified by Miller.

(3) As regards Pioneer's claim against Miller in negligence, he held that this claim failed. The same reasoning would apply to SCB's claim based on negligence.

Upon the issues raised on the cross-claim the learned judge decided that Hethking were in breach of two clauses of the charterparty (Clauses 1 and 3) and that the measure of damages in respect of the breach of Clause 3 was the full amount that Miller was liable to pay to SCB in the main action.

The amount of damages payable upon the basis of the judge's findings as to liability were subsequently agreed between the parties and judgment was entered for SCB against Miller in the main action for $163,408.16, and for Miller against Pioneer (whose claim had failed). On the cross-claim judgment was entered for Miller against Hethking for the like sum together with the costs incurred by Miller in defending SCB's claim in the main action. Special orders for costs were made in both the main action and on the cross-claim to take account of the fact that Pioneer had failed in its claim in the main action and SCB had failed in part; but it is not necessary to recite the terms of these.

SCB and Pioneer have appealed to Her Majesty in Council against so much of the judgment of the Supreme Court as denied to both of them the right to recover from Miller the amount of the damage sustained by Pioneer as a result of the contamination of the aggregate by sucrose. Before this Board they have attacked the correctness of the judge's findings at (2)(*b*) and (3) above, viz. that Pioneer was not entitled to recover damages for breach of contract against SCB in respect of the contaminated aggregate, and that the claim of Pioneer against Miller based on tort also failed. This dual attack is really in the alternative; if SCB succeed in reversing the judge's findings at (2)(*b*) the damages recoverable against them by Pioneer will be added to the damages that they can recover against Miller and there is no need for either company to pursue the attack upon his failure to find negligence on the part of Miller.

Miller do not appeal against the judgment against them in the main action. They accept the findings against them at (1)(*a*) and (*b*) and at (2)(*a*). They seek to uphold the findings in their favour at (2)(*b*) and (3).

Hethking have appealed against the judgment in Miller's favour on the cross-claim. In their appeal Hethking do not challenge the judge's finding that they were in breach of Clause 3 of the charterparty. Their appeal is on the ground that the damage in respect of which SCB had claimed indemnity from Miller and Miller cross-claimed indemnity against Hethking was too remote a consequence of that breach. Hethking also supported Miller's grounds for resisting the appeal of SCB and Pioneer in the main action; but in addition they submitted that upon two matters the judge's findings in the main action were wrong. It was open to Hethking to do this on the issue as to the measure of damages sought to be recovered against them on the cross-claim, notwithstanding that Miller as the only appellants in the main action had not appealed against these findings themselves. Hethking's first submission was that the judge's finding at (1)(*b*) that Miller was in breach of the implied warranty of seaworthiness was wrong. Their second was that he ought to have held that the damage sustained by SCB in settling the claims against them made by Marley was too remote a consequence of Miller's breach of any warranty in the contract of affreightment whether express or implied.

Their Lordships will deal first with the appeal in the main action against the judge's finding at (2)(*b*) that the sale of aggregate by SCB to Pioneer was not one which entitled Pioneer to recover damages in respect of the contaminated aggregate. Miller did not dispute the finding of the learned judge that the implied warranty of fitness for a particular purpose for which s. 19(1) of the Sale of Goods Act, 1923–1953, provides, applies to the contract for the sales of aggregate by SCB to Marley. In their Lordships' view it is also applicable to sales by SCB to Pioneer.

One starts with three undisputed findings of fact: the first, that the contaminated aggregate was delivered by SCB to Pioneer as buyer under a contract for the sale of goods; the second, that it was unfit for the purpose of being used as an ingredient of ready-mixed concrete; the third, that the aggregate was goods of a description which it was in the course of SCB's business to supply.

The contracts of sale of aggregate by SCB to Pioneer were entered into with the minimum of formality, as might be expected between two subsidiaries of the same parent company. Whenever Pioneer required to replenish its stocks of basalt aggregate from Bass Point quarry needed for manufacturing ready-mixed concrete at any of its plants in the Sydney area, a member of the managerial staff of Pioneer would so inform by telephone the person who was in charge of the quarry on behalf of SCB. He would then arrange with Miller for its carriage under the contract of affreightment to Blackwattle Bay, where it would be deposited in SCB's storage bins until removed, either in Pioneer's own trucks or along the conveyor belt, to one or other of Pioneer's concrete manufacturing plants

and there mixed, without further examination, with cement, water and other ingredients to form ready-mixed concrete. The market price of the aggregate delivered would be credited to SCB in its loan account with Pioneer.

There is here a contract for the sale by description of unascertained goods which are not appropriated to the contract until the aggregate is delivered from the storage bins into the buyer's truck or onto his conveyor belt. The property passes then and it may well be that there is no concluded contract until then. Nearly all the terms of the contract of sale are left to implication except the description and quantity of the goods, the price and the place and time of delivery.

It is not disputed that by the course of business between the two companies Pioneer had in the words of s. 19(1) "made known" to SCB that the aggregate was required for the "particular purpose" of being used as an ingredient of ready-mixed concrete. So the only remaining question that requires an affirmative answer in order to attract an implied warranty of reasonable fitness for that purpose is whether Pioneer showed, by the way in which sales between the two companies were conducted, that they relied upon SCB's skill and judgment to supply them with aggregate that was reasonably fit for such use.

In their Lordships' view the very facts that it was the practice of Pioneer as buyer to take the aggregate direct from SCB's storage bins to its own concrete manufacturing plants and use it without any further examination as an ingredient of ready-mixed concrete and that SCB and Pioneer each knew that the other was fully aware that this would happen, are sufficient to raise the inference that Pioneer relied upon SCB's skill and judgment to supply aggregate that would be reasonably fit to be so used and that SCB knew of such reliance.

Counsel for Miller, while acknowledging that this would be the case if SCB and Pioneer were not associated companies, contends that the inference of reliance is rebutted by their close association and in particular by the fact that the persons who operated the quarry on behalf of SCB were in the employment of Pioneer. Their Lordships are, however, unable to accept this argument. The fact that those who operated the quarry as agents for SCB had been selected by Pioneer and did so under contracts of employment entered into with Pioneer, so far from negativing Pioneer's reliance upon their exercising skill and judgment in what they did on SCB's behalf, would seem to their Lordships to fortify it. This, however, was not a ground on which the learned judge rejected the implied warranty of reasonable fitness. In a judgment which in general discussed the legal issues in considerable detail he dealt with this particular matter comparatively briefly. He did not seek to analyse the contractual relationship between the parties but took the view that because SCB and Pioneer were wholly-owned subsidiaries of the same parent company, Services, Pioneer had no choice but to buy the basalt aggregates that it required from SCB, because if it did not, Services could compel it to do so. This, in his view, excluded all reliance by one company on the skill and judgment of the other. Their Lordships would observe, however, that SCB and Pioneer are separate corporate entities and although there is a common beneficial owner of their shares, they have different creditors and in the event of insolvency the assets of each of them would not fall to be distributed among the same persons. The directors of each company when acting as its board in the management of its business affairs owe a duty to that company alone. Assuming Pioneer were to become insolvent it would be no defence to the directors in an action for misfeasance for them to say: we bought at market price and used without examination, for making ready-mixed concrete, aggregate from a seller upon whom we could not rely to supply material that was reasonably fit for that purpose; and we did this deliberately upon contractual terms that would give us no legal remedy if it were unfit for that purpose, because the unreliable seller was a

co-subsidiary of our parent company. In their Lordships' view the relationship between SCB and Pioneer as co-subsidiaries of Services does not rebut the inference, deriving from those other features of the contractual dealings between the parties to which their Lordships have referred, that Pioneer relied upon SCB's skill and judgment to supply aggregate that was reasonably fit for the purpose of being used as an ingredient of ready-mixed concrete and that SCB was aware of that reliance.

There is a further brief passage in the judgment which appears to their Lordships to suggest that the learned judge regarded as a possible alternative ground for holding SCB free from contractual liability to Pioneer, the fact that the contamination of the aggregate was caused by something that took place in the course of its sea carriage on board the "Cobargo" where, as Pioneer would know, no skill and judgment that SCB could exercise would have prevented it. It was, however, something against which SCB could protect itself, as in fact it did, by its contract of affreightment with the carrier. In the circumstances of the instant case, the time at which the implied warranty of fitness must be satisfied was when the aggregates were delivered from SCB's storage bins at Blackwattle Bay. If they are unfit then, neither the cause of their unfitness nor the time at which the goods became unfit, has any relevance; the warranty is breached.

Their Lordships, accordingly, would hold that the sale of aggregate by SCB to Pioneer was one that was subject to the implied warranty of fitness under s. 19(1) and entitled Pioneer to recover from SCB damages in respect of contaminated aggregate that was delivered under it. The appeal in the main action must be allowed.

This makes it unnecessary for their Lordships to enter upon the alternative ground on which the appeal in the main action is brought, namely, Pioneer's claim to be entitled to recover directly from Miller as damages for tort the loss that it has sustained as a result of the contamination of the aggregate. Since no other ground of appeal was relied upon by the appellants in the main action, strictly speaking it also disposes of the appeal in that action; but since, even though it might be technically correct, it would be unsatisfactory to have inconsistent decisions, upon identical issues, in the main appeal and the appeal on the cross-claim, it is convenient at this point to dispose of the contention raised by Hethking in their appeal upon the cross-claim that the judge was wrong in holding Miller to be in breach of the warranty of seaworthiness to be implied in the contract of affreightment between SCB and Miller.

In their Lordships' view the state of the after hold of the "Cobargo" at the time of loading of the aggregate on 15 November 1974 only needs to be described to justify the judge's conclusion that the vessel was unfit to receive the cargo which Miller had contracted to carry and was in this respect unseaworthy. The hold contained, to a total depth of nine to twelve inches which rose three to six inches above the wooden "ceiling boards" which formed its floor, dirty water in which a considerable quantity of sugar was dissolved. This liquid could not be drained away either then or at any time during the voyage because the bilge lines to the hold were blocked; and, accordingly, it was liable to slosh about and impregnate the cargo laden in the hold by the time it reached its destination. That this did not amount to unseaworthiness seems to their Lordships to be unarguable.

Their Lordships accordingly now turn to the appeal on the cross-claim itself and to Hethking's contention that the damages awarded to Miller by the learned judge were too remote. The relevant clauses of the charterparty of which Hethking were found by the judge (as they concede correctly) to be in breach were Clauses 1 and 3. Clause 1 called for delivery of the ship at the commencement of the charter on 3 October 1974

"with all cargo spaces swept clean." The relevant provision in Clause 3 imposed on Hethking the obligation to "maintain [the "Cobargo"] . . . in a thoroughly efficient state in hull and machinery during service."

The state of the after hold at the time of loading of the aggregate on 15 November 1974 and during the voyage to Sydney which has already been described was due to a concatination of circumstances. First, at the time of delivery of the "Cobargo" under the time charter on 3 October 1974 and in breach of Clause 1, the cargo spaces had not been swept clean. They contained the residues of previous cargoes of sugar which had fallen through the gaps between the ceiling boards which formed the floor of the after hold and between the timbers which lined its walls, onto the tank top below the ceiling boards where considerable quantities had accumulated. This was a breach of Clause 1, but so long as the sugar remained both dry and beneath the ceiling boards it did not contaminate the aggregate carried on the first three voyages, on 9, 10 and 11 October 1974, and caused no damage to it. The next circumstance was that in breach of Clause 3, Hethking allowed the bilge lines to the after hold to get blocked by a solid mixture of coal-dust and molasses resulting from the combined effect of coal dust and small quantities of water from subsequent cargoes of coal upon the sugar residues below the ceiling boards of the after hold. Then came the cargo of coal carried in the "Cobargo" on the voyage immediately preceding that on 15 November 1974 when the aggregate that is the subject of this appeal was carried. It consisted of washed coal that was shipped while it was still very wet with fresh water; during the carriage the water drained out of it into the hold; but because the bilge lines remained blocked it remained there. The residues of sugar became dissolved in it so as to produce a concentrated solution of sucrose lying in the after hold and rising above the ceiling boards to the depth already mentioned.

The state of the after hold was a direct consequence of Hethking's breaches of Clauses 1 and 3; and was a foreseeable consequence of the defective bilge lines and the presence in the hold of the sugar residues and the water, of all of which the master of the "Cobargo" ought to have been aware and, although this does not matter from the point of view of Hethking's liability under the charterparty, was in fact aware. It was also foreseeable, indeed it was inevitable, that during the voyage to Blackwattle Bay the cargo of aggregate would become contaminated by the concentrated solution of sugar that was present in the hold. So the kind of damage likely to result from the breaches of the charterparty, contamination of whatever cargo was laden in the hold, was clearly foreseeable at the time the cargo of aggregate was loaded on 15 November 1974. That kind of damage would also have been foreseeable at the commencement of the charter on 3 October 1974 if the parties had then asked themselves: is there a more than negligible risk that if we leave the residues of sugar cargoes in the hold and allow the bilge lines to get into such an inefficient state that they cannot remove from the bottom water that has drained from cargoes of wet coal, the result may be that subsequent cargoes will be contaminated by an aqueous solution of sugar?

What Hethking's case upon the cross-appeal amounts to is that, although contamination of the cargo by sucrose solution was damage of a kind that was a foreseeable consequence of the breach, the actual seriousness of the damage caused by such contamination to aggregate used in the manufacture of concrete, although it was common knowledge in the concrete industry, was not, in the state of knowledge to be attributed to a reasonable shipowner, foreseeable by Hethking. This may be so, but as the judge rightly held after a careful review and citation of many cases, both time-honoured and modern on the topic, it is sufficient that the damage actually resulting from the breach is of a *kind* which a reasonable shipowner at the time of entering into the charterparty would have foreseen as being a not unlikely consequence of the breach, if he had thought about the matter. That a

reasonable shipowner could not also foresee the degree to which the actual cargo which in the event sustained that kind of damage would be harmed by it, does not relieve him of liability to make good the whole damage. Their Lordships accordingly agree with the judge's finding that the damages in respect of which Miller claimed indemnity from Hethking were not too remote. His finding related to that part of the damages which reflected SCB's liability to Marley only; but as a result of their Lordships' allowance of SCB's appeal in the main action, SCB's legal liability to Pioneer is *pari materia.* It is recoverable by SCB from Miller and by Miller from Hethking. Hethking's appeal on the cross-claim must accordingly be dismissed.

The additional damages to which SCB is entitled against Miller in the main action and Miller is entitled against Hethking on the cross-claim, have not yet been assessed. The action and the cross-claim must be remitted to the Supreme Court for this to be done and for the learned judge to reconsider, if he thinks fit, the special orders as to costs that he made in consequence of SCB's failure to recover damages in respect of aggregate sold to Pioneer.

Their Lordships will humbly advise Her Majesty that

(1) The appeal of the plaintiffs against the defendant in the main action be allowed.

(2) The appeal of the cross-defendant against the cross-claimant on the cross-claim be dismissed.

(3) The main action and the cross-claim be remitted to the Supreme Court for the assessment of additional damages in accordance with the opinion of their Lordships expressed herein.

(4) The judgment of the Supreme Court be varied by adding to the sum recoverable thereunder by the first plaintiff against the defendant in the main action and to the sum recoverable by the cross-claimant against the cross-defendant on the cross-claim the amount of the additional damages as so assessed.

(5) The Supreme Court have power to vary its original order as to costs in addition to making any appropriate order as to costs of the remitted proceedings.

As regards costs of the two consolidated appeals, which were heard by their Lordships on one Record and one set of Cases, the defendant is liable in the first instance for the plaintiffs' costs but these costs are recoverable by the defendant from the cross-defendant; the cross-defendant must also pay the defendant's/cross-claimant's costs.

Privy Council Appeal No. 10 of 1978

SOUTH COAST BASALT PTY. LTD. AND PIONEER CONCRETE (N.S.W.) PTY. LTD.

v.

R. W. MILLER AND CO. PTY. LTD.

and

HETHKING STEAMSHIP PTY. LTD.

v.

R. W. MILLER AND CO. PTY. LTD.

Delivered by
LORD DIPLOCK

Printed by HER MAJESTY'S STATIONERY OFFICE
1979