3/84

No. 57 of 1982

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

IN PROCEEDINGS 166 of 1981

B E T W E E N :

MAYNEGRAIN PTY. LIMITED — Appellant (Defendant)

- and -

COMPAFINA BANK — Respondent (Plaintiff)

APPELLANT'S WRITTEN CASE

Bird & Bird
2 Gray's Inn Square
London WC1R 5AF

Solicitors for the Appellant

MAYNEGRAIN PTY LIMITED v COMPAFINA BANK

WRITTEN CASE

Record Reference (volume.page.line)

GENERAL

1. This is an appeal as of right by Maynegrain from a judgment of the Court of Appeal Division of the Supreme Court of New South Wales.

2. The proceedings which gave rise to this appeal were brought in the Common Law Division of the Supreme Court (Commercial List) by Compafina Bank of Geneva against Maynegrain and Bulk Terminals and Exporters Pty Limited (B.T.E.) which was controlled by a Mr Jamieson. 1.209.36

3. Maynegrain operates a bulk grain storage terminal at Pinkenba, Brisbane, Queensland which is able to receive grain by road or rail and to discharge it into ocean-going vessels.

4. Between November 1976 and March 1977 approximately 28,000 tonnes of barley purchased by B.T.E. were delivered to Maynegrain's terminal. Maynegrain were entitled to mix this barley in its terminal with other barley of similar quality. 2.33 2.58.11 2.90 2.268.12 1.289.3 1.291.28

5. B.T.E.'s purchase of the barley were financed as to 80% by Compafina in amounts totalling $US2,562,326 and the A.N.Z. Banking Group provided additional finance. 1.49.19 1.95.25,39 1.4.20 2.193.36

6. Compafina alleged that the barley had been pledged to it by B.T.E. pursuant to warehouse receipts issued by Maynegrain.

7. The warehouse receipts relied upon were in the same terms and were issued progressively from January as the barley was delivered to the terminal. The last receipt dated 25 March was in the following terms:- 2.81 2.90

"The Manager,
A.N.Z. Banking Group Limited,
4 Bligh Street, Sydney ..

Bulk Terminals and Exporters
Pty Limited
Barley Stocks

Dear Sir,

Further to our warehouse receipt dated 21st March 1977, we further warrant that we have received an additional 39.83 Metric Tonnes of Feed Barley, making the total held on your account 2,523.48 Metric Tonnes of Feed Barley and 25,510.98 Metric Tonnes of Malting Barley."

8. As far as Maynegrain were aware A.N.Z. was acting as a principal, but in fact it was acting as agent for Compafina. 1.292.26 2.77 1.379.38

9. During August 1977 Maynegrain on the instructions of B.T.E. loaded the barley in bulk onto the M.V. Bellness and on the 13th the vessel left Brisbane for Kuwait. B.T.E. acted contrary to the express instructions of Compafina in directing the shipment of the barley. Maynegrain was not aware of these instructions at the time. 2.108.17,21 2.122.25

10. A.N.Z. was aware of the proposed shipment and one of the issues in the appeal is whether it consented to the shipment, and if so whether such consent affects the rights of Compafina.

11. B.T.E. being unable to pay the freight informed Compafina of what had happened and sought further finance. 1.56.11 - 1.58.17

12. Compafina paid the freight amounting to US$550,000, issued a demurrage guarantee and on 25th August obtained possession of the bill of lading. 1.228 2.94 2.91

13. Penmas Inc., a company related to B.T.E., had contracted to sell 25,000 tonnes plus or minus 10% of bagged barley to Gulf Fisheries W.L.L. of Kuwait which in turn had contracted 2.222 - 2.22 2.249.20 -2.253

to sell the barley to Kuwait Supply Co. at a price of $US160 per tonne.

14. On 10/7/77 Kuwait Supply Co. opened a letter of credit with the Commercial Bank of Kuwait to the value of $US4.4 million in favour of Gulf Fisheries. On 25/9/77 this credit was transferred to Compafina to the extent of $US3.3 million "as and when negotiations are taking place" at the rate of $US120 per tonne. 2.126 - 2.130; 2.155 - 2.156

15. The vessel arrived in Kuwait on 4/9/77. The sellers had to arrange for the barley to be bagged after discharge. 2.105.4; 2.108.23 - 2.108.28

16. For various reasons Compafina did not obtain the full amount of $US3.3 million under the assignment of the credit but only received $US2,447,508. The short-fall arose as a result of the following payments and losses:- 1.100 - 103; 2.264

(a)	$480,000	remitted to A.N.Z.
(b)	$399,000	obtained by the Gulf Bank
(c)	$ 61,000	obtained by Sheikh Hamad
(d)	$353,220	nett loss and damage to barley in Kuwait due to rain after receipt of $67,500 from salvage.
	US$1,293,220	Total (a) to (d)

(e) $ 7,500 short-fall in receipts from rain-damaged barley (incl. in (d) above)

(f) $ 40,000 monies paid to Thai boatmen from proceeds of rain-damaged barley deducted from gross salvage before payment of $67,500 referred to in (d) above)

17. The action was tried by Rogers J. who held that Compafina had a valid pledge and that Maynegrain was liable to it in conversion and detinue for loading the grain without its authority. Judgments were entered against Maynegrain and B.T.E. for $A1,664,377. Rogers J. rejected Compafina's claim against Maynegrain in negligence.

18. Maynegrain appealed to the Court of Appeal and Compafina cross-appealed.

19. The Court of Appeal allowed in part both the appeal of Maynegrain and the cross-appeal of Compafina and reduced the damages awarded against Maynegrain to $A1,067,350 (including $US684,736 for principal, the balance being interest.)

20. Maynegrain now appeal to the Board seeking the entry of judgment in its favour or a further reduction in the damages.

21. Compafina obtained conditional leave to cross-appeal but failed to obtain final

leave. It has petitioned the Board for special leave. Maynegrain does not oppose the grant of special leave on issues going to the substantive rights of the parties, and has consented to the petition being listed with this appeal.

ISSUES ON THE APPEAL AND PROPOSED CROSS-APPEAL

22. The appeal raises the following issues:-

(a) Whether Compafina held a valid pledge of the barley under the warehouse receipts given by Maynegrain in favour of A.N.Z.

(b) Whether A.N.Z. consented to the loading of the barley and if so, whether such consent is a defence to the action.

(c) Whether the damages awarded to Compafina should be further reduced by all or any of the amounts referred to in para.16. The appellant contends that these losses were not caused by its acts or alternatively are too remote.

23. The proposed cross-appeal by Compafina raises the question whether the Court of Appeal were correct in holding that The Winkfield

(1902) P.42 was distinguishable, and that Compafina was only entitled to recover the value of its own interest in the barley.

COMPAFINA HAD NO TITLE TO SUE IN CONVERSION AND DETINUE

24. The trial Judge assumed that Compafina as the undisclosed principal of A.N.Z. could rely upon the warehouse receipts as creating a pledge in its favour.

25. In the Court of Appeal Maynegrain for the first time took the point that the warehouse receipts could not operate to effect a constructive delivery to Compafina which therefore was not a pledgee and could not maintain conversion and detinue against Maynegrain.

16. The Court of Appeal rejected these submissions. Hope and Hutley J.J.A. held that an undisclosed principal could enforce a pledge arising under a constructive delivery to its agent; Hutley J.A. further held that the point could not be taken for the first time on appeal. Mahoney J.A. concurred in the orders of the Court. 1.382.2 1.382.13 1.391.14

27. The warehouse receipts operated by attornment and estoppel to effect a constructive delivery

of possession to A.N.Z. and a constructive redelivery so that Maynegrain held as bailee for A.N.Z. See Official Assignee of Madras v. Mercantile Bank of India Ltd (1935) A.C.53 at 58-59.

28. An actual delivery of possession to A.N.Z. as the disclosed agent for Compafina would not, we submit, pass possession to Compafina. The consequences of a constructive delivery of possession to A.N.Z. acting for Compafina as undisclosed principal should not be any different.

29. There is no general principle of the Common Law that goods in the custody of an agent, other than a servant, are in the possession of the principal. See Davis v. Artingstall (1880) 49 L.J. Ch.609 and Consolidated Co. v. Curtis (1892) 1 Q.B.495 at 499 where it was held that auctioneers had possession.

30. Goods in the custody of a servant are generally in the possession of the master. See Pollock & Wright "Possession in the Common Law" 58-59, The Jupiter (1927) P.122 at 131, Willey v. Synan 57 C.L.R. 200 at 216-7, 219-20 per Dixon J.

31. Where goods were delivered by a third party to a servant for the benefit of the master it was held that possession did not automatically pass to the master, so that the servant who misappropriated such goods was not guilty of larceny. R. v. Bazeley (1799) 2 Leach 835 168 E.R.517. Parliament had to intervene and create the crime of embezzlement. 39 Geo III c.85.

32. It is possible to find sale of goods and other cases in which judges have referred to bailees such as warehousemen and carriers as "agents" for the buyer or seller. It is submitted however that this is a loose and inaccurate use of the word "agent". C.f. Kennedy v. De Trafford (1897) A.C. 180 at 188, International Harvester v. Carrigan (1958) 100 C.L.R. 644 at 652.

33A. The mere fact that an intermediary is employed to procure some transaction or service for the benefit of the "principal" does not mean that privity of contract is created between the "principal" and any third party with whom the intermediary contracts for that transaction or service. See -

New Zealand & Australian Land Co. v. Watson (1881) 7 Q.B.D. 374.

Garnac Grain v. Faure (1966) 1 Q.B.650 at 684.

34. It is also possible to find cases where an owner of goods has been said to be in possession by his agent, or his bailee. Again it is submitted that these statements involve a loose and inaccurate use of language.

35. It is well established that a bailee with custody has possession, and that his bailor does not. U.S.A. v. Dollfus Mieg (1952) A.C. 582 at 605. Strictly, a bailor cannot be in possession by his bailee but he does have powers of control over the goods through his bailee, which may enable him to resume possession at any time.

36. Maynegrain submits that the warehouse receipts could not at the same time effect constructive deliveries to Compafina and A.N.Z. and then constructive redeliveries by both.

(a) Possession is essentially indivisible. See Pollock & Wright above at 20, 129.

(b) If the warehouse receipts operated in accordance with their terms as constructive deliveries to A.N.Z. they could not also operate as constructive deliveries to Compafina.

37. It would be contrary to principle to hold that immediate rights to possession can arise simultaneously in favour of two different persons (not being co-owners) against a third person as a result of the one transaction.

38. The point does not appear to be covered by authority. However, in Andrews v. Nominal Defendant (1968) 70 S.R. (NSW) 419 the N.S.W. Court of Appeal had to consider whether an undisclosed principal was entitled to possession of a motor vehicle under a hire-purchase agreement entered into by his agent.

39. Walsh J.A. (later of the High Court of Australia) said at p.425:-

> *"The question here is to whom did (the finance company) by means of the agreement grant the right to possession? It could not have granted it simultaneously both to the plaintiff and to Blandford."*

40. Maynegrain submits that:-

(a) Bailment may exist independently of any contract. See Gilchrist Watt &

Sanderson Pty. Ltd. v. York Products Pty. Ltd. (1970) 1 W.L.R. 1262, 1267 (P.C.); Hobbs v. Petersham Transport Co. Pty. Ltd.(1971) 124 C.L.R. 220 at 239-243.

(b) There was no contract in this case between Maynegrain and A.N.Z. or Compafina. There was no offer or acceptance and no consideration moved from A.N.Z. or Compafina to Maynegrain.

(c) There is no justification for extending the anomalous doctrines relating to the rights of undisclosed principals beyond the law of contract.

41. The principles relating to the rights and liabilities of undisclosed principals under contracts entered into by agents on their behalf have been recognised as anomalous. They should not be extended. See -

Keighley Maxsted v. Durant (1901) A.C.240 at 256, 261.

Garnac Grain v. Faure (1966) 1 Q.B.650 at 685.

Andrews v. Nominal Defendant (1968) 70 S.R. (NSW) 419 at 431.

42. The general principle of the Common Law is that "civil obligations are not to be created or founded upon undisclosed intentions". See Keighley Maxsted v. Durant (1901) A.C. at 247, 251.

43. Even if the doctrine of the undisclosed principal could be extended it is subject to limitations which make it inapplicable in the present case. One such limitation is that the doctrine cannot apply where the identity of one of the contracting parties is a matter of importance to the other. See:-

Andrews v. Nominal Defendant (above) at 431-2.

Keighley Maxsted v. Durant (1901) A.C. at 261-2.

44. Hutley J.A. said:-

> *"This was not a case in which it has been shown that there was anything specifically important in the person of the pledgee to the appellant."* 1.381.45

Since the pledgee had no active duties to perform his personality may have been of no

importance but it is obvious that it is important to a warehouseman that he should know the identity of the person who can demand delivery from him. An attornment to a Bank in Switzerland could impose more onerous obligations on a warehouseman in Queensland than an attornment to a local Bank. It may be more difficult to obtain clear and reliable instructions.

45. Evidence of the existence of an undisclosed principal is not admissible where it would contradict a term of the contract.

Fred Drughorn v. Rederiaktiebolaget Transatlantic (1919) A.C. 203 at 206-7, 210.

In the present case evidence of the undisclosed agency would contradict the term that the grain was held for A.N.Z.

45A. An undisclosed "principal" cannot ratify a contract made by an "agent" in his own name but on behalf of the "principal" if at the time the "agent" had no authority from the "principal" to contract in that way so as to bind the "principal". See Keighley Maxsted (above).

45B. A.N.Z. had authority to obtain warehouse receipts in favour of Compafina, but it had no authority to obtain such receipts in its own name for the benefit of Compafina.

1.95.12
1.120.11
1.174.12
1.175.39
2.19.19
2.59.1
2.66.12
2.74.24
2.61 - 2.73
2.193.39
2.233.22

45C. Due to this lack of authority in A.N.Z., privity was not established ab initio between Compafina and Maynegrain, and for the same reason Compafina could not ratify A.N.Z.'s actions so as to create such privity retrospectively. See Keighley Maxsted (above).

45D. If for example P instructs A to have a tonne of coal delivered to his (P's) home, and A mistakenly contracts in his own name for the coal to be delivered to his (A's) home, P cannot ratify A's actions so as to create privity with the seller, and even if he could this would not make the contract one for delivery of coal to P's home.

46. Hope J.A. acknowledged "the difficulty of treating the one attornment as effecting a constructive delivery to a person believed to be a principal but who is an agent as well as a constructive delivery of possession to the undisclosed principal". However, because undisclosed principals could sue and be sued on contracts for the sale of goods, he

1.374.6

considered that therefore Compafina as undisclosed principal could obtain a right to possession under the warehouse receipts.

47. Hope J.A.'s reasoning appears in the following passages from his judgment:-

(a) *"... it would surely be an anomalous exception to an anomalous principle if a contract for the sale of goods to an undisclosed principal could not be effected when the goods were held by a bailee in a warehouse without a disclosure of the existence of the principal."* 1.376.27

(b) *"I think that the undisclosed principal doctrine applies to contracts for the sale of goods and can operate to vest the title to goods in an undisclosed principal even though the goods are at all relevant times held by a bailee who attorns to the agent of the undisclosed principal."* 1.377.31

(c) *"The flexibility which the doctrine of attornment and estoppel hav e shown in other difficult situations would enable any necessary constructive delivery (including if relevant any severance) to be treated as having taken place so as to give a title to the goods to the undisclosed principal."* 1.377.37

(d) *"If the doctrines of attornment and estoppel can be applied to effect a constructive delivery to the undisclosed principal of an attornee, the non-disclosure that A.N.Z. was an agent and was acting for Compafina would not prevent Compafina from obtaining a right to possession to the barley."* 1.377.50

48. With respect the statement in subpara. (a) above is correct but of no assistance. The fact that goods were in the possession of the seller's bailee could never prevent their sale to an undisclosed principal.

49. In subpara (b) above His Honour concluded that an attornment by a bailee to the agent of the undisclosed buyer will pass title to the buyer under the contract of sale. We agree, with respect, but it does not follow that the attornment operated as a constructive delivery to the principal. The right of the principal against the bailee is based upon his title.

50. With respect we also agree with His Honour's conclusions in subpara (c) above. The case supposed however, is one where constructive delivery to the agent operates to pass title to the principal. There is no need for the law in that case to resort to the fiction of a constructive delivery to the undisclosed principal.

51. In our submission, where an undisclosed principal is buyer neither principle nor authority require the Courts to treat a constructive delivery to the agent as a constructive delivery to the undisclosed principal as well. The principal's right to the goods is based on his title.

52. If there is no constructive delivery to an

undisclosed principal in such cases there is no justification for "recognising" a constructive or fictional delivery to the undisclosed principal in cases of pledge.

53. It is well established that a plaintiff can only sue in conversion and detinue if he has a legal title. An equitable title is not sufficient. See -

Clements v. Matthews (1883) 11 Q.B.D. 808

Joseph v. Lyons (1884) 15 Q.B.D. 280

Akron Tyre v. Kitson (1951) 82 C.L.R. 477 at 482, 485, 488, 489, 491.

POINT AVAILABLE ON APPEAL

54. Hutley J.A. held that it was too late for Maynegrain in the Court of Appeal to take the point that Compafina had no title to maintain conversion and detinue. He said:

> *"The point was not taken at the trial. If it had been it could have been cured by joining the (ANZ) Bank as a co-plaintiff and if it refused to join, as a defendant. The objection being curable should not be allowed to be raised at this stage to defeat the whole proceedings."* 1.382.13

55. With respect the point, if valid, establishes that Compafina had no cause of action against Maynegrain, and such a point may be taken for

the first time on appeal. See:

Banbury v. Bank of Montreal (1918) A.C.626.

Hampton Court v. Crooks (1957) 97 C.L.R. 367.

56. Moreover the point, if valid, was curable by the joinder of A.N.Z. as either co-plaintiff or defendant by order of the Court of Appeal. The rule that a plaintiff with an equitable title cannot obtain final relief based on the legal rights of his trustee is satisfied by allowing parties to be added at any stage of a case.

Performing Right Society v. London Theatre of Varieties (1924) A.C. 1 at 14.

57. In the Court of Appeal Counsel for Compafina expressly declined to apply to join A.N.Z. as a party. The title of Compafina to the barley, and the relationship of agency between A.N.Z. and Compafina were not admitted on the pleadings. In these circumstances Maynegrain was entitled to press the point, and to have the action dismissed if the point was upheld.

1.352.13 - 20
1.353.24
1.355.23
1.356.39
1.358.5
1.360.9
1.10.40
1.11.5

A.N.Z. CONSENTED TO SHIPMENT

58. A.N.Z. knew in advance of the proposed loading of the barley, that it was going to

1.255.25, 38
2.143.18
2.186.22
2.187.12
2.189.6
2.190.15

Kuwait, when the vessel was due to sail, and the terms of payment. Arrangements had also been made between A.N.Z. and Jamieson for A.N.Z. to receiv e part of the proceeds of sale from Kuwait. 2.191.16 2.192.12 2.219.40 2.230.19 2.285 - 286

59. Jamieson showed Davidson of A.N.Z. a copy of the letter of credit before the shipment took place.

60. We submit that in these circumstances the inference is inescapable that A.N.Z. consented to the shipment.

61. When B.T.E. directed Maynegrain to load the barley it was, therefore, acting with the consent, i.e., with the actual authority of A.N.Z. to whom Maynegrain had attorned bailee.

62. In our submission it does not matter that Maynegrain was not aware that A.N.Z. had consented to the loading of the barley. Maynegrain here relies upon the <u>actual</u> consent of A.N.Z. Nor does it matter that Jamieson did not purport to act as agent for A.N.Z.

63. The Court of Appeal rejected Maynegrain's submissions on this issue for the following reasons given by Hutley J.A.:

"Consent imports some positive act, not mere passivity; though consent may be inferred ... there is no basis for inferring consent. In my opinion there was no consent, indeed no evidence of consent." 1.382.27

64. We submit that consent as a defence to an intentional tort does not require a positive act, but if such is required the conversations between Jamieson and Davidson from A.N.Z. are sufficient positive acts for this purpose. The relevant principles are stated in Salmond "Law of Torts" 18th Ed. (1981) at 466 as follows:-

"No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it ... No man can enforce a right which he has voluntarily waived or abandoned. The maxim applies to intentional acts which would otherwise be tortious."

65. Maynegrain having done the acts complained of with the consent of A.N.Z. prior to the intervention of Compafina can rely upon that consent as a defence to this action.

COMPAFINA'S CONSEQUENTIAL LOSSES NOT CAUSED BY MAYNEGRAIN'S ACT OR TOO REMOTE

65A. Maynegrain is only liable for losses caused by its tortious act provided any losses so caused are not too remote. Reasonable foreseeability is not a test of causation in fact. Chapman v. Hearse (1961) 106 C.L.R.112.

66. The bill of lading was endorsed in blank and delivered to Compafina which thereby obtained possession and control of the goods. 1.228 2.94 2.91

67. The only evidence of the value of the barley in Brisbane was the agreed statement during the trial that it was worth $A100-104 per tonne f.o.b. Kuwait. 1.200-201

68. Compafina did not prove that there was another market for these goods, or their value in any such market. It did not even prove that there was any other buyer in Kuwait apart from Penmas Inc. and Gulf Fisheries both of whom were committed to a sale of bagged barley.

69. During April the malting barley was downgraded to feed barley. B.T.E.'s inability to dispose of the grain over a number of months while interest and storage charges accrued and the barley deteriorated in quality raises a real doubt as to its saleability and value if sold in Brisb ane otherwise than f.o.b. Kuwait. 1.243.7 2.240.5

70. Recovery of the barley by Compafina did not put an end to any cause of action in conversion, but it ceased to be entitled to recover the value of the goods or of its interest therein,

and can only recover its consequential losses.

Hiort v. London & N.W. Railway (1879) L.R.4 Ex.D.188 at 195-6.

71. The recovery of the barley also put an end to any cause of action in detinue apart from the right to damages for detention in the interval.

72. The Court of Appeal held that Compafina was not entitled to recover the full value of the barley, but only the value of its interest as pledgee. Hutley J.A. said:-

> *"(Compafina) is entitled to be put back in the position that it would have been in if there had been no conversion of its pledge by the appellant."* 1.386.23

73. The value of the barley in store at Brisbane can only be inferred from its value f.o.b. Kuwait. Accordingly damages can only be assessed on the basis that the grain was going to Kuwait.

74. It is consistent with the evidence that Compafina is no worse off, or is better off, as a result of the shipment and sale to Kuwait than it would have been if the barley had been sold in Brisbane.

75. If the best or only market was in Kuwait and involved a sale in bulk to Penmas Inc. and/or Gulf Fisheries, then Compafina, having obtained the bill of lading, suffered no loss as a result of the loading and shipment of the grain..

76. Moreover in these circumstances Compafina is not entitled to have its consequential losses assessed on the basis that it became committed to a sale to Kuwait with the attendant risks as a result of the tort, so that these risks should fall upon the "wrongdoer".

77. If Kuwait was the best or only market then the risks associated with that market were not incurred as a result of the tort.

78. Hutley J.A. held that since the pledged property was adequate security for Compafina's loan its measure of damages was the value of its interest in the security being the total debt less recoveries. He then added:-

> *"It is possible that there should be added to (the recoveries) ... any sum which ought to have been received, if it were not for the wilful neglect and default of the pledgee, assimilating the assessment of damages to the taking of an account between pledgor and pledgee or in the alternative any sum which it would have received had it done what was reasonably.required in mitigation."*

1.386.38

79. This analysis assumes that Compafina was totally deprived of its pledge as a result

of the tort but in fact the pledge was reinstated when it obtained possession of the bill of lading. Since it did not lose its pledge it cannot recover the full amount due from the pledgor on taking the accounts.

80. It would be oppressive and unjust if a converter who returned the pledged goods to the pledgee in an undamaged condition were to remain responsible in damages for the ultimate realisation of the security. How long will such responsibility last? Such a result would make the converter a guarantor or insurer.

81. In our submission the liability of Maynegrain for any conversion is limited to the consequential losses suffered by Compafina as a result of the tort.

82. Moreover, for the reasons we have already given, Compafina are not entitled to hav e the consequential damages assessed on the basis that it and the barley were subjected to the risks at Kuwait as a result of the tort.

83. Before The Waggon Mound (No.1) (1961) A.C.388 restated the law on remoteness of damage for

negligence, it had been held that the test for remoteness of damage in conversion was whether the damage was the direct result of the tort. See -

Re Simms (1934) Ch.1 at 17.

The Arpad (1934) P.189 at 232-3.

It had also been held that in such circumstances consequential losses were recoverable when they fell within the first limb in Hadley v Baxendale. See -

The Arpad (1934) P.189 at 201-2, 203-4, 210-11, 216.

84. The types of damage recoverable within these rules as to remoteness include a fall in the value of shares during their wrongful detention; Williams v Peel River (1887) 55 L.T. 689; a commercial rate of hire as damages for detention of goods of a type ordinarily used for letting out to hire; Strand Electric v Brisford Entertainments (1952) 2 Q.B. 246; and loss of profits from conversion of a tradesman's tools of trade: Bodley v Reynolds (1846) 8 Q.B. 779; 115 E.R. 1066. However, losses which arose only because of some contract entered into between the plaintiff and a third party were held to

be too remote; The Arpad (1934) P.189.

85. Liability in conversion is strict and persons who in good faith and without negligence interfere with the possession or property of others are liable. Reasonable foresight does not enter into the determination of liability. In these circumstances there is no justification for adopting reasonable foreseeability as the test for remoteness of damage in this tort.

86. We submit that Maynegrain should not be held liable for the losses sustained by Compafina in Kuwait due to the unseasonal rainfall which damaged the barley while it was in the open awaiting bagging and delivery to the purchaser. The rain was a causally independent event in the nature of a coincidence which should not increase Maynegrain's liability. See: 2.108.26 - 2.109.31 2.111.

Hogan v. Bentinck Collieries (1949) 1 All E.R.588 (H.L.).

Haber v. Walker (1963) V.R.339 at 357-8.

McGregor on Damages 14th Ed. para.143.

87. Furthermore, Maynegrain should not be held liable for the damage suffered by Compafina

as a result of the Commercial Bank of Kuwait remitting $US480,000 to A.N.Z. contrary to the terms of the partial assignment of the credit to Compafina, nor for the additional monies totalling $US460,000 demanded by Sheikh Hamad as the price for extending the expired credit. This sum is made up of amounts of $399,000 obtained by the Gulf Bank and $61,000 obtained by the Sheikh himself.

1.90
1.100.21
1.103.28
2.74.14
2.219
2.230
2.264
1.102-103
1.106-107
1.241-242
2.28.20
2.289-292, 295,296,297

88. In both cases Compafina's loss was due to deliberate human action by third parties which occurred some time after the alleged conversion. Furthermore the intervening act of the Commercial Bank was wrongful.

89. In our submission the deliberate acts of the Commercial Bank and the Sheikh were new intervening causes which prevent the resulting losses from being fairly regarded as caused by, flowing from, or consequential upon the prior conversion. The losses are too remote.

90. The relevant principles, we submit, were correctly stated by Lord Reid in Dorset Yacht v. Home Office (1970) A.C. 1004 at 1030 where His Lordship said:-

"These cases show that where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation."

91. There is no finding or any basis for a finding that the intervening action by the Commercial Bank and the Sheikh was something that was "very likely to happen" as a result of the conversion of the grain.

92. An extraordinary chapter of accidents occurred after Compafina obtained the bill of lading which resulted in losses which were not natural and probable consequences of a warehouseman loading bulk grain onto a vessel knowing no more than that it was destined for Kuwait.

93. A basic cause of Compafina's subsequent losses was the existence of the contract for the sale of bagged barley. Maynegrain did not know and could not reasonably have foreseen that:-

(a) B.T.E. had sole to Panmas and/or Gulf Fisheries in bulk on terms which did not secure payment on shipment;

(b) Gulf Fisheries had contracted to sell the barley in bags to a Kuwait buyer;

(c) the terms of the sub-sale and the credit were such that receipt of the proceeds of sale would be dependent on the success and speed of the bagging operation in Kuwait.

94. Many of the practical difficulties which arose in Kuwait were also due to factors which were beyond the control of all parties and could not in themselves have been foreseen. These factors included -

(a) congestion in the port which prevented the ship berthing for four weeks after arrival; 1.120.20 2.105.15 2.108.22

(b) further delays in unloading so that discharge and bagging took nine weeks; 2.108-109

(c) heavy rainfall which was very rare in Kuwait at that time of year; 2.111.33

(d) the arrival of another cargo of 15,000 tonnes of barley which was given priority in the port. 2.28.17 2.203.17 2.233.7

95. As a result of these delays the credit expired on 10/11/77 before delivery of the barley in bags had been completed.

96. The damage to the barley by rain while it was left in the open awaiting bagging was neither a direct, a natural and probable, nor a foreseeable result of the loading of bulk barley in Brisbane onto a ship bound for Kuwait. The very unusual rain for that time of the year represents a new intervening cause rendering the resulting damage too remote. The rain damage occurred after the barley had come into the possession of Compafina, and while it was in the possession of Compafina's bailee. The damage was either such as could have been prevented by the exercise of reasonable care by the bailee (storage in sheds, covering with tarpaulins etc.) or it could not have been so prevented. In either event it is clearly too remote.

96A. 3506 tonnes of barley were damaged by the rain. But for the rain this barley would have been bagged and sold like the rest of the cargo, and Compafina would have received payment under the credit at the rate of US$120 per tonne. It would therefore have received $420,720. Instead it received net $67,500 from the salvage making its loss from the rain $353,220. 2.111.26 2.113.24

97. No explanation was given for the failure by Compafina to receive the sum of $7,500. The onus of proving that the damages were the consequence of the conversion, and were not too remote, was on Compafina. See - 1.104 - 105

Brandeis v. Western Transport (1981) Q.B. 864 at 870.

$40,000 PAID TO THAI BOATMEN

98. The trial Judge held that Compafina were not entitled to recover this sum. He said:-

"So far as the $40,000 paid to the Thai boatmen are concerned, I am not satisfied that the plaintiff has satisfactorily explained the reason for that payment, and I think that this is an amount which should go to the credit of Maynegrain and in relief of its liabilities." 1.341.2

99. The Court of Appeal rev ersed the trial Judge. Hutley J.A. said:-

"This was money laid out in payment to workmen necessarily employed in order to complete the deal. It is in my opinion clearly money which this pledgee was entitled to add to the sums secured by the pledge as a necessary incident of the realisation of the pledge by sale." 1.389.16

100. In our submission there was no evidence that this sum was "money laid out in payment to workmen necessarily employed in order to complete the deal". Compafina authorised its payment on 11/2/78. The last delivery of bagged barley under credit was a delivery 1.100.39

of 1,000 tonnes and on 15/12/77 Compafina received payment for this delivery. 2.109.4 2.264 2.241.30 1.123.35 2.177.33 - 2.178.10

101. The sum in question was not incurred by Compafina in realising its security. The trial Judge's conclusion that Compafina had not satisfactorily explained the reason for this payment is correct and the damages awarded to Compafina should be reduced by this amount plus interest.

CROSS-APPEAL: COMPAFINA'S DAMAGES LIMITED TO VALUE OF ITS PLEDGE

102. Compafina in its cross-appeal seeks the restoration of the judgment of the trial Judge who awarded damages based on the full value of the barley.

103. In our submission the Court of Appeal was correct in holding that the rule in The Winkfield (1902) P.42 did not apply where the defendant had an interest in the goods.

104. It has not hitherto been thought that The Winkfield was contrary to the decisions which had limited recovery by a bailee or bailor where the defendant had an interest in the goods.

105. We submit that Compafina cannot recover in respect of B.T.E.'s interest when the act

of conversion by Maynegrain was committed with the authority of B.T.E.

106. A wrongdoer sued in conversion can justify by pleading the jus tertii - the title of another - inter alia when he committed the act complained of by the authority of the true owner. See -

Salmond 16th Ed. pp.110-111
Clerk and Lindsell 13th Ed. p.671
Edwards v. Amos (1945) 62 W.N. (NSW) 204.

107. We submit that in principle a partial justification or reduction of damages should also be permitted where the plaintiff has a limited interest and the defendant did the act complained of with the authority of the owner of the remaining interest. In such a situation the defendant and the owner of the remaining interest are joint tortfeasers. Where no elements of aggravation are present the damages awarded against the defendant without an interest in the goods should not exceed those recoverable from his joint tortfeaser who had such an interest. See Wah Tat Bank Ltd v. Kum (1975) A.C.507 at 519.

106. In any event Maynegrain itself had a partial interest in these goods by virtue of its warehousemen's lien under the common law and under the Warehousemen's Lien Act 1973 (Qld.) The accrued but unpaid storage charges at the date of shipment totalled $A204,966.49. 2.288

109. It is true that in Mulliner v Florence (1878) 3 Q.B.D. 484 the Court of Appeal held that a lien (in that case of an innkeeper) was determined by an improper sale so that the owner became entitled to bring conversion for the full value of the goods without tendering or giving credit for the amount secured by the lien.

110. While any delivery by a warehouseman involves the loss of his lien we submit that the damages recoverable for a tortious mis-delivery should be assessed on the basis of the value of the plaintiff's interest in the goods immediately prior to the tort. This surely represents the real value of the plaintiff's loss.

111. An award of damages which ignores the value of a lien in existence immediately before the tort would over-compensate the plaintiff, and penalise the defendant in circumstances

where an award of aggravated or exemplary damages was not justified.

112. Accordingly, we submit that Mulliner v. Florence (above) should be reconsidered and overruled. The practical effect of that decision was promptly reversed by statute in England by the passing of the Innkeeper's Act 1878 which gave innkeepers a statutory right to enforce their lien by sale. Accordingly, no occasion has arisen for the decision to be reviewed by the House of Lords.

113. The decision is out of line with other authority in this field. Thus an improper sale or sub-pledge by a pledgee does not determine the pledge and the pledgor has no right to recover the goods or their value until after tender of the debt. See Donald v. Suckling (1866) L.R.1 Q.B.585, Halliday v. Holgate (1868) L.R. 3 Ex.299.

114. Similarly where a vendor sells goods but remains in possession with a lien for the price, a wrongful sale by him does not entitle the purchaser to recover the full value of the goods, but only the difference between their value and the price. Chinery v. Viall (1860)

5 H. and N.288; 157 E.R. 1192 at 1195 and Butler v Egg Marketing Board (1966) 114 C.L.R.185.

115. The Courts have reached similar results where a wrongful sale by a hirer determines the hire-purchase agreement and puts an end to his interest. Wickham Holdings v. Brooke House Motors (1967) 1 W.L.R. 295 (CA).

116. It is submitted therefore that the reasoning and decision of the Court of Appeal on the present point were correct, and that the decision can also be supported on the basis of Maynegrain's own interest in the goods immediately prior to loading.

CROSS-APPEAL MAYNEGRAIN NOT LIABLE IN NEGLIGENCE

117. It is submitted that the trial Judge was correct in rejecting Compafina's claim in negligence. This issue was not dealt with by the Court of Appeal.

118. This claim only arises if Compafina's claims in conversion and detinue fail.

119. If Compafina had no legal or equitable interest in the goods it is hard to see how it could suffer any recoverable loss because Maynegrain loaded the goods for B.T.E.

120. If Compafina had an equitable interest there is no occasion to recognise any common law duty of care as owed to it. Its interests are sufficiently protected through its ability to enforce the legal rights of its trustee.

121. In our submission the recognition of a duty of care in the exercise of rights of dominion over chattels is outside the proper scope of Donohue v. Stevenson principles. The legal protection of proprietary and possessory interests in chattels against wrongful dispositions is not based upon the existence of duties of care, but upon torts of strict liability.

122. A bailee owes strict duties to his bailor with respect to his care, custody and disposition of the goods. He must at his peril act on the orders of his bailor. He is in general estopped from challenging his bailor's title.

123. In these circumstances it is impossible, we submit, for the common law to recognise the existence of any duty of care which conflicts with the duties owed by a bailee to his bailor.

124. On the assumptions on which this question arises for determination Maynegrain owed duties in bailment to B.T.E. and A.N.Z. and owed no such duties to Compafina. It was bound to act promptly on the mandate of B.T.E. How can that very act, done pursuant to a common law duty, involve a breach of another common law duty owed to another party of whom Maynegrain at the time was not aware?

125. We submit that the principle enunciated by Lord Wilberforce in Anns v. Merton London Borough (1978) A.C.728 at 752 is applicable. His Lordship said:-

> *"It is necessary to consider whether there are any considerations which ought to negative or to reduce or limit the scope of the duty."*

126. In cases where interference with possession and property rather than physical damage are involved, another consideration negativing the existence of a duty of care owed to those with purely contractual or equitable interests is the refusal of the Courts to extend the doctrine of constructive notice to commercial transactions. See Consul Development v. D.P.C. Estates (1975) 132 C.L.R. 373 at 413 per Stephen J. where the

authorities are collected.

127. In our submission there is nothing in Junior Books v. Veitchi (1982) 3 W.L.R.477 (H.L.) or Caltex Oil v. The Dredge Willemstad (1976) 136 C.L.R.529 which supports the recognition of a duty of care in this case. Maynegrain had no knowledge of the existence or interest of Compafina and it certainly could not reasonably foresee that it would suffer loss as a result of the loading of the barley.

128. Compafina's cross-appeal based upon the claim in negligence should therefore be dismissed.

129. Maynegrain therefore submits that this appeal should be allowed for the following (amongst other)

REASONS

1. Because the warehouse receipts in favour of A.N.Z. were not enforceable by Compafina in its own right.

2. Because the constructive deliveries and attornments by Maynegrain to A.N.Z. under the warehouse receipts did not also operate as constructive deliveries and attornments

to Compafina as the undisclosed principal.

3. Because Compafina was not a pledgee of the barley at the time of shipment.

4. Because A.N.Z. the bailor to Maynegrain and trustee for Compafina was not a party to the action.

5. Because A.N.Z. consented to the shipment of the barley.

6. Because some or all of the losses totalling $US.1,293,220 sustained by Compafina in Kuwait were not recoverable as consequential losses flowing from any tortious act by Maynegrain in Brisbane, and were too remote.

7. Because the Court of Appeal were not justified in reversing the trial judge's finding that Compafina were not entitled to recover the sum of $US.40,000 paid to the Thai boatmen.

130. Maynegrain further submits that the cross-appeal should be dismissed for the following (amongst other)

REASONS

1. Because the Court of Appeal were correct in holding that Compafina was only entitled to damages in respect of its own interest as pledgee in the goods.

2. Because the Court of Appeal were correct in distinguishing The Winkfield (1902) P.42.

3. Because the trial judge was correct in holding that Maynegrain owed no duty of care to Compafina.

K.R. HAN DLEY Q.C.

J. CAMPBELL

Counsel for the Appellant Maynegrain.