Tripoli, Benghazi, Piareus (sic) (accept transhipment cargo to Limassol Alexandria) Ta Shun". The first advertisement gave that vessel's arrival date as 25th July and her sailing date as 28th July. The second advertisement postponed the two dates to 28th and 30th July. The third advertisement again postponed those dates to 30th and 31st July. The final advertisement postponed them to 2nd and 3rd August. All the advertisements carried the name of Seawise Shipping Co. as general agents with an address in Hong Kong. The Ta Shun never reached Hong Kong at this time. It was stated that she had broken down.

Mr. Cheung was told by Mr. Yip that shipping orders would be required. He supplied the form. Wantex in the person of Mr. Cheung filled the form in. In their Lordships' view the shipping orders are of importance to the understanding of what happened. They will refer to the shipping order relating to one of the parcels of fifty-eight bales. The form is headed "Seawise Shipping Company". Underneath that name appear the words "(Fully owned and operated by Seawise Agency Limited)". The form is then addressed to "The Commanding Officer of MS Ta Shun". It states "Please receive on board from Messrs. Wantex Trader ... the undermentioned goods in good order and condition for shipment to Limassol". The printed space for transhipment was not completed. The buyers are mentioned as the party to be notified. Typed on the shipping order are particulars of the fifty-eight bales and then beside the stamp "Seawise Godown" were added in manuscript "received fifty-eight (58) bales 4.8.76". Printed at the bottom below that addition were the words "Other terms and conditions as per Carrier's Bill of Lading". Below a printed line was the remainder of the form. This was never completed but was obviously intended if and when completed to operate as a mate's receipt when the goods were received on board.

The next step in the story is the issue of bills of lading. Their Lordships will refer only to that issued in respect of one of the parcels of fifty-eight bales. The form was headed "Blue Sky Shipping Co., Ltd" with an address in Taiwan. The printed form was a "receipt for shipment" form. The bill of lading was dated 3rd August 1976 and was signed by Seawise Shipping Co. as agents. The named vessel was the Ta Shun. The port of discharge was Limassol. Stamped on the face of the bill of lading were the words "shipped on board 8th August 1976".

The bill of lading contained a clause paramount and a miscellany of other clauses seemingly borrowed from other forms and put together in an ill-assorted jumble. They included the well-known "demise" clause and also a forwarding clause, clause 13, and a transhipment clause, clause 14. It also provided that

the bill of lading was to be construed and governed by Chinese Law. Their Lordships do not find it necessary to set out any of these clauses verbatim nor the warehouse to warehouse clause in the "Institute Cargo Clauses (All Risks) 1/1/63".

This and the other bills of lading contained many untruths, as is indeed obvious from what has already been stated. The goods were not shipped on board the Ta Shun on the bill of lading date or indeed on that date on any other ship. They had not been loaded on that ship in Hong Kong and they were not at that time on the beginning of a voyage to Limassol.

That Seawise Shipping Co. were guilty of fraud admits of no doubt. It was not suggested before their Lordships that Wantex were a party to that fraud though they successfully used these bills of lading to negotiate the credit sometime during the first fortnight of August 1976. They thus received the purchase price and the property of the goods then passed to the buyers together with such rights as there might then or thereafter be under the policies of insurance. In fact at the end of July and in the early part of August the goods were all in Seawise's godown in Hong Kong and whoever prepared those bills of lading and signed them on behalf of Seawise in one or other of their manifestations must have known that fact perfectly well.

On 16th August 1976 the goods were included among 957 packages shipped on a vessel named Ta Hung under a bill of lading of that date signed by "Oneness Shipping Company Limited" as agents. That name also appeared on the top of this form. "Seawise Agency Limited" were described as shippers. Hong Kong was the name of the loading port and Keelung in Taiwan was the named port of discharge. The named consignees were "Blue Sky Shipping Co. Limited" with an address in Taiwan. The bill of lading was marked "Cargo to be transit to Mediterean (sic) sea at Taiwan by consignee themselves at their own risks and expenses". The goods were discharged at Keelung on 20th August 1976. They remained there until 16th November 1976 when they were shipped on the MV Intellect to Cyprus. Regular enquiries by the unfortunate buyers of both Wantex and Blue Sky failed to elicit the truth. On 27th November 1976 the Intellect caught fire and the goods suffered water damage whilst attempts were made to put the fire out and were thus actually totally lost.

Their Lordships cannot but feel great sympathy with the buyers. They were plainly defrauded by Seawise who arranged the carriage with Blue Sky. Though they were not defrauded by Wantex they had a clear if worthless cause of action against them for tendering untrue bills of lading by means of which the letters

Privy Council Appeal No. 13 of 1982

George Kallis (Manufacturers) Limited *Appellants*

v.

Success Insurance Limited *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND APRIL 1985

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD DIPLOCK
LORD ROSKILL
LORD BRANDON OF OAKBROOK
SIR WILLIAM DOUGLAS

*[Delivered by **Lord Roskill**]*

This is an appeal from an order of the Court of Appeal of Hong Kong (Huggins V-P., Leonard and Cons JJA.) dated 3rd October 1981 reversing a decision of Mr. Commissioner Mills-Owen Q.C. dated 10th July 1980. The learned Commissioner had then given judgment in favour of the appellants upon their claim for the actual total loss of their goods by fire when being carried on board the motor vessel Intellect on 27th November 1976. In this appeal the appellants seek the restoration of the learned Commissioner's judgment.

The events which give rise to this appeal thus happened nearly nine years ago. The appellants ("the buyers"), who are manufacturers of jeans in Cyprus, agreed in the early part of 1976 to buy denim from a firm in Hong Kong known as Wantex Traders ("Wantex"). Their Lordships were told that Wantex no longer exists. The sale was on C.I.F. Limassol terms. No written contract or contracts for sale appear to have been put in evidence at the trial but the terms of the sale emerge with sufficient clarity from those documents which were in evidence. Ultimately four parcels of denim were involved, one of sixty-six
[12] bales, one of fifty-eight bales, one of forty-one

bales and one also of fifty-eight bales. Payment was to be made against documents. Two letters of credit were duly opened. Both credits described the goods in terms of yards of denim rather than of number of bales. The first credit dated 25th May 1976 allowed for three shipments "in three about equal consignments". The credit expressly prohibited transhipment. Differing shipment dates were prescribed for each of those shipments. The second credit dated 29th June 1976 called for one consignment only, to be shipped before 31st July 1976. The second credit allowed transhipment. Both credits called for insurance "warehouse to buyers' warehouse in Nicosia against Marine and War Risks, all risks as per Institute Cargo clauses including S.R. and C.C. clauses, ..." those last mentioned being "Strikes Riots and Civil Commotions Clauses". In due course policies of insurance were issued to Wantex by the respondents in respect of those several quantities of bales. There was no material difference between the policies and for ease of reference their Lordships will refer only to that issued in respect of the sixty-six bales on 22nd July 1976. The schedules to the policies were especially stamped "against all risks of physical loss or damage from any external causes whatsoever, irrespective of percentage including warehouse to warehouse as per:- Institute Cargo Clauses (All Risks) 1/1/63 including theft, pilferage and non-delivery (Insured Value) Clauses 16/7/28 Institute War Clauses (Including on-carriage by air 1/7/76) Institute Strikes, Riots and Civil Commotions Clauses 1/1/63". Also typed on the schedule were the words "including from warehouse to buyer's warehouse in Nicosia".

It was of course necessary for Wantex to make shipping arrangements and procure bills of lading conforming with the sale contracts and with the letters of credit which together with the respective invoices and policies of insurance could be presented to the bank so that payment could be made to Wantex and the property in the denim then pass from Wantex to the buyers. It seems from oral evidence given at the trial by a Mr. Cheung who had been employed by Wantex at the material time that the intention had been to ship the denim on a ship named the Oceania Maru but that vessel was unable to accept them. Contact was then made between him and a Mr. Yip who told him that there was a ship named Ta Shun going to Limassol. Mr. Yip worked for a company calling itself Seawise Shipping Company which like Wantex no longer exists. Mr. Yip showed Mr. Cheung a "shipping list" which included the name of the Ta Shun. There were in evidence copies of advertisements in the South China Morning Post dated 15th, 20th, 27th and 30th July. All these advertisements were headed "Seawise Line". Below under "Blue Line" was the advertisement "Mediterranean Sea Service for

of credit were negotiated. They also had a cause of action against Blue Sky. But those causes of action are, as already stated, of no avail. They have asserted a claim against the respondents under the policies. The goods were of course an actual total loss by fire and fire was an insured peril. But the respondents maintain that on the story which their Lordships have outlined the risk never attached because the insured adventure was the carriage of the goods from Hong Kong to Limassol on the Ta Shun and that since that voyage never took place the risk never attached so that the goods were not on risk when actually totally lost. The buyers on the other hand maintained that the risk attached under the warehouse to warehouse clause in the policies, that the terms of the contracts of affreightment concluded by Seawise and contained in the shipping orders included the bill of lading clauses and in particular the forwarding clause, clause 13 and the transhipment clause, clause 14; and that accordingly, since the goods were forwarded to Keelung there to be transhipped to Limassol, the insured voyage to Limassol, performed in accordance with the bill of lading liberties, began when the goods left Wantex's packers' warehouse in Hong Kong to be carried on the insured voyage to Limassol performed in this way.

In their Lordships' view this contention cannot be supported. In the first place the only contracts of affreightment to which the buyers were parties were those contained in or evidenced by the bills of lading. The buyers were the indorsees of the bills of lading and as stated in *Scrutton on Charterparties* (19th Edition 1984 page 55) "The bill of lading ... in the hands of an indorsee is the only evidence". Second, those contracts of affreightment were "on board" bills of lading, since the denim was stated albeit untruthfully to be on board the Ta Shun for carriage to Limassol. Clauses 13 and 14 cannot operate inconsistently with on board bills of lading. There cannot be forwarding from or transhipment from a named ship going to a named destination when the goods in question had never been on board that ship bound for that destination. Moreover even if, contrary to their Lordships' view, it were permissible to look outside the bills of lading in order to ascertain the terms of the contracts of affreightment, the shipping notes so much relied on by the appellants referred to "<u>other</u> terms and conditions as per carriers' bill of lading". That must mean terms and conditions <u>other</u> than the acknowledgment that the goods had been shipped on board. Their Lordships are of the clear opinion that in these circumstances it is impossible to assert that the risk ever attached when the denim left the packers' warehouse in Hong Kong.

The buyers sought to derive support for their contentions from *Simon, Israel & Co. v. Sedgwick*

[1892] 67 L.T.N.S. 352 (Wright J.) and [1893] 1 Q.B. 303 (Court of Appeal). Properly understood however this decision, which was the foundation of section 44 of the English Marine Insurance Act 1906 and thus of section 44 of the Marine Insurance Ordinance of Hong Kong (Cap 329), is against them. The cargo there in question was insured from "the Mersey or London to any port in Spain on this side of Gibraltar". It was also insured "from the time of leaving the warehouse in the United Kingdom". The phrase "this side of Gibraltar" in the context plainly meant west of Gibraltar. The goods left the plaintiffs' warehouse in Bradford to go to Madrid but by some mistake they were sent by a ship which was destined to go to Cartagena which is east of Gibraltar. Whilst on that voyage the goods were totally lost. A claim on the policy failed in both courts. It was argued as here that the risk attached when the goods left the warehouse on the intended voyage. Wright J. [1892] 67 L.T.N.S. 352 at pages 353 and 354 said:-

> "The contention for the assured is that, when the goods left the warehouse, they being then intended by the consignors to proceed by a route covered by the policy, the declaration was rightly made, and the policy attached, and the clause applied, and the assured were entitled to change the voyage on the terms of paying extra premium to Cartagena, the amount of which is not in dispute. The point is a nice one, but I think that the contention of the underwriters must prevail. If the substance of the policy is the maritime risk, I think that the character of the preliminary conveyance before the ship is reached must be determined by that of the voyage on which the goods were actually shipped, and that the goods must, until shipment, be taken to have started for the voyage for which they were afterwards in fact shipped; and, if so, the voyage for which these goods were started was not a voyage for which they could be declared, and the policy and deviation clause never attached."

In the Court of Appeal Bowen LJ. [1893] 1 Q.B. 303 said at page 308:-

> "In the present case the goods started from Bradford, and it has been contended that the moment they started from Bradford they were upon the insured voyage. If the goods had started the insured voyage, it seems to me the risk during the time that they were between Bradford and Liverpool would have been covered as incidental to and supplementary to the insured voyage. But we have here a conclusive fact that the goods never started upon the insured voyage. Accordingly, the risk between Bradford and Liverpool never could be incidental or supplementary to it. It is not necessary to decide what would have been the case supposing the goods, after having been specifically

> appropriated by a contract of carriage to the insured voyage, had been injured or lost during the transit between Bradford and Liverpool. It is not necessary to decide that case. In this case the facts here shew conclusively that the goods were never specifically appropriated to the insured voyage, because the person who had the control of the goods ... fixed the voyage outside the policy; and if that is so, the policy never attached ...."

Here the goods were never "appropriated by a contract of carriage to the insured voyage", to use Bowen LJ.'s words, since the insured voyage was, as already stated, from Hong Kong to Limassol under a shipped on board bill of lading on the Ta Shun. The opening paragraph of the warehouse to warehouse clause does not therefore help the appellants. Nor does the third paragraph of that clause for there was never the exercise of any liberty granted to the shipowners under the contracts of affreightment.

Their Lordships do not therefore find it necessary to deal with any of the other matters canvassed in argument since in their view this appeal can be disposed of on these simple grounds. Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed with costs.

Their Lordships cannot however leave this appeal without mentioning the deplorable state of the exhibits to the record which they have had to attempt to read. Many of the documents, notably the policies, the shipping orders and the bills of lading, were virtually illegible in whole or in part. It seems that copies had been made from what were copies of copies. It was only thanks to the buyers' solicitors prompt telex message to Hong Kong during the hearing that it was revealed that the most crucial wording in the policies had not emerged at all on the photo-stats in the record. Their Lordships have sympathy with those responsible for preparing the record since the copies sent from Hong Kong to the Registrar were equally illegible. But illegibility of this kind makes effective advance reading of the papers prior to the hearing, which is now the invariable practice of their Lordships, impossible and without such reading the hearing of appeals is likely to take longer than it should. Their Lordships must therefore ask solicitors responsible for the preparation of the record and counsel, who when settling their cases must have the record before them, to ensure that the documents in the record are legible in their entirety. It should be remembered that copies typed from illegible documents however carefully typed are not likely to reflect what appeared on the original.