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IN THE PRIVY COUNCIL

No. 45 of 1978

ON APPEAL
FROM THE COURT OF APPEAL
OF HONG KONG

BETWEEN:

FAR EAST HAIRGOODS MANUFACTORY COMPANY LIMITED

(Plaintiffs) Appellants

— and —

GRAND UNION INSURANCE COMPANY LIMITED

(Defendants) Respondents

CASE FOR THE APPELLANTS

CAMPBELL HOOPER & AUSTIN WRIGHT,
15 Jermyn Street,
London, SW1 6LT.
Ref: JMR/AR.

Appellants' Solicitors

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– and –		
GRAND UNION INSURANCE COMPANY LIMITED	(Defendants)	<u>Respondents</u>

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RECORD

1. This is an appeal from the order of the Court of Appeal of Hong Kong (Briggs C.J., Pickering J.A. and McMullin J.A.) dated 4th December 1976 allowing the Respondents' appeal against the judgment of the High Court of Hong Kong (Cons J.) dated 13th July 1976 whereby it was adjudged that the Respondents should pay to the Appellants HK\$170,873.13 together with interest thereon at the rate of 8% per annum from 18th April 1975 to the date of judgment and the costs of the action. By an order dated 28th February 1977 the Court of Appeal granted to the Appellant final leave to appeal to Her Majesty in Council. p. 26
p. 12
p. 32
- 10 2. This action arises out of a policy of insurance dated 8th August 1974 under which the Respondents agreed to indemnify the Appellants against destruction of or damage to the property described in the schedule by fire. The policy contained, inter alia, the following terms:— p. 28

“Provided always that due observance and fulfilment of the terms, conditions and endorsements of this policy insofar as they relate to anything to be done or complied with by the insured shall be conditions precedent to any liability of the Company to make any payment under this Policy.

...

CONDITIONS

10 21. All warranties to which the property insured or any item thereof is or may at any time be made subject shall attach and continue to be in force during the whole of the currency of the policy, and non-compliance at any time with any of the warranties shall be a bar to any claim in respect of such property of item.

...

9. Storage warranty (INDUSTRIAL RISKS) Warranted that during the currency of this policy no waste materials or goods of any description whatsoever whether belonging to the insured or not shall be stored temporarily or otherwise on any staircase or landing or in any passageway within or in common use with the premises described in the policy.

Warranted also that all waste materials will be kept in metal receptacles and removed from the building daily.”

20 3. At the material time the Appellants carried on business as manufacturers of P.V.C. goods at the insured premises which were a factory unit within a building known as “King Wan Factory Building”, Kowloon. On 1st January 1975 a fire occurred in the building causing the destruction of and damage to part of the Appellants’ property covered by the policy. The amount of the loss was HK\$170,873.13.

4. The Respondents admitted the loss but declined to indemnify the Appellants under the policy on the grounds that

(i) the Appellants were in breach of the policy conditions in that waste materials were stored in the lift lobby outside the Appellants’ premises and were not kept in metal containers contrary to warranty 9;

and

30 (ii) compliance by the Appellants with the terms and conditions of the policy, including warranty 9, was a condition precedent to their liability to make any payment under the policy.

5. Access to the Appellants' premises which were on the 5th floor of the building was gained by a door opening directly onto the lift lobby, an area measuring approximately 20 feet by 15 feet. At the end of the working day on 1st January 1975 the Appellants had put out into the lift lobby some P.V.C. waste in gunny sacks and some pieces of iron machinery for collection and removal by the cleaners early the next morning. This the Respondents rely on as constituting a breach of warranty 9.

6. The Appellants submit that on the true construction of the policy there was no failure to comply with warranty 9 in that

- (i) the P.V.C. waste and iron machinery in question was not "stored" in the lift lobby;
 - 10 (ii) the lift lobby does not fall within the words "... any staircase or landing or in any passage way in common use with the premises ..."
- and
- (iii) the warranty that waste materials would be kept in metal receptacles applies only to waste materials within the premises described in the policy.

7. The Appellants submit, as appears more fully below, that the policy wording is unclear in certain respects and is capable of various interpretations. Insofar as they were faced with these problems the Court of Appeal sought to resolve them by looking primarily to what they regarded as the object of the warranty in question. The Appellants submit, however, that this approach is too narrow and regard must be had to the purposes of the policy as a whole. They also submit that the warranty in question is capable of operating harshly against the Insured to deprive him of much of the benefit of the policy, and does so as construed by the Court of Appeal. It is submitted, however, that their approach was wrong. It is unsatisfactory to construe such a warranty, particularly one which seeks to derogate from the cover which the policy purports to provide, in favour of the insurers and in such a way as to achieve objects which they may be supposed to have desired. It is well established that the proper course in the case of ambiguity is to construe such clauses in favour of the insured and to require that the cover which prima facie has been granted by the policy shall not be cut down or removed otherwise than by the use of clear language.

p. 23

8. "Stored"

30 The Appellants submit that the first paragraph of warranty 9 is not naturally limited to the storage of waste materials but applies to goods of any description. The warranty also in terms applies to goods belonging to persons other than the insured and to parts of the premises which, although in common use with the insured premises for the purposes of access (e.g. staircases), may be far removed from them physically. In both these latter respects the warranty extends to matter beyond the control of the insured. In these

p. 29

circumstances the Court should lean in favour of a narrower rather than a wider construction of the language used.

9. The expression “stored” normally carries with it the notion of some degree of permanence and some element of security or preservation pending subsequent use or disposal. It may also carry with it an idea of quantity. None of these, however, conflicts with the concept of temporary storage which the warranty refers. Thus goods being delivered to the Appellants’ premises would not normally be described as being “stored” even temporarily in the lobby if deposited there during the course of moving them up from the entrance of the building and before taking them into the premises themselves. Equally
10 it is submitted that waste materials cannot be said to be “stored” in the lift lobby if they are not collected and kept there but are simply awaiting removal or disposal by the cleaners. Waste material is sometimes stored for particular purposes or prior to its disposal in a particular manner, but waste bagged up and put out for collection would not normally be considered to be “stored”. The Appellants submit that it is not legitimate to give this word a meaning which it does not naturally bear simply in order that the warranty should have the effect which the Respondents contend it was intended to have. The approach for which the Appellants contend was adopted by the Judicial Committee in **Thompson v. Equity Fire Insurance Co.** [1910] A.C. 592 to the construction of the expression “. . . for loss or damage occurring while gasoline is stored or kept in the building insured . . .”.
20 It was held that gasoline contained in a portable stove temporarily in use within the building could not be regarded as “stored or kept” in the building within the natural meaning of the expression. The construction adopted by the learned judge and by the Court of Appeal in this case exposes the Appellants to the complete loss of cover as a result of goods of any sort being left temporarily in the common parts of the building by other tenants or delivery men over whom they have no control.

10. “. . . any staircase or landing or in any passageway . . . in common use with the premises . . .”

p. 29

The parts of the building contemplated by these words are primarily the staircases and passages. It is submitted that in this context “landing” is closely linked to “staircase”
30 and contemplates primarily landings forming parts or associated with staircases. It is submitted that the area where the waste was left in the present case does not readily come within this expression. Although it is served by lifts and by the staircase, the area itself is of some size (15 feet by 20 feet) and is more in the nature of a service area than what would normally be described as a landing or passage.

11. The Appellants submit that the scope of this expression is imprecise and that it should for the same reason be construed narrowly rather than widely. This was the approach adopted by the learned judge whose judgment, it is submitted, was correct on this point. The Court of Appeal in holding that the area in question was a “passageway” seems to have been strongly influenced by the fact that people pass through it to gain access to the

p. 10
p. 24

factory units on that floor, or when using the stairs. This construction, however, necessarily leads to the conclusion that all common parts of the building which the Appellants as tenants of the stored premises are entitled to have access come within the ambit of this warranty. This renders the scope of the warranty very wide. If this had been intended it could have been clearly achieved by a simple reference to “any part of the building in common use with the insured premises”. It is submitted that the words of the warranty calls for a clear distinction to be drawn between such areas as staircases, landings and passageways (which are perhaps more easily recognised than defined) and public areas designed to serve purposes other than merely passage and repassage. The fact that an area is used by people passing about the building does not necessarily render it a “passageway” if it would not normally be so regarded – see, for example, the approach of the majority of the Court of Appeal in **Thornton v. Fisher & Ludlow Ltd.** [1968] 1 W.L.R. 655. It is submitted that the lift lobby in the present case would not normally be regarded as “a landing” or “passageway” and that the judgment of the learned judge on this point was right.

12. “. . . kept in metal receptacles and removed from the building daily”

The Respondents have never contended that the Appellants failed to comply with the requirement to remove waste from the building each day; nor have they contended that the Appellants failed to keep waste materials in metal containers while within the insured premises. The Respondents do contend, however, that by putting out waste in gunny sacks for disposal the Appellants were in breach of the warranty. Cons J. at first instance held that the Appellants were not in breach of the warranty; he construed the reference to “the building” as meaning the insured premises and held that this warranty applied only to waste materials while on those premises. That construction was rejected by the Court of Appeal.

p. 29

p. 10
p. 25

13. Since the premises for the purposes of the insurance are limited to the Appellants’ factory unit alone and since it is only on these premises that waste will be generated by the Appellants, the warranty primarily looks to the arrangements for containing waste on those premises during the working day. It can scarcely have been intended that this warranty should apply to waste generated by users of the building other than the Appellants. The construction for which the Respondents contend is that waste must be kept in metal containers at all times while it is within the Factory building as opposed simply to the insured premises. In adopting this construction the Court of Appeal were again influenced by what they regarded as the object of the warranty itself rather than the policy as a whole.

14. The Appellants submit that the reference to the “building” should be construed as meaning the insured premises only and that construed in this way warranty has ample effect. If, on the other hand, the Court of Appeal were correct in holding that “the building” here means the factory buildings as a whole, it is nonetheless not clear that the

warranty extends to waste material which has been removed from the insured premises and which is in the course of removal from the building as a whole. As occupiers of one of a number of factory units the Appellants could not reasonably be expected to have a great degree of control over the arrangements for the handling and disposal of waste from the building generally. To construe this warranty as extending to their waste at all times while it was within the building, even in the course of disposal is to extend its scope beyond its natural meaning and to expose the Assured to the risk of the loss of the whole of his cover without clear and unequivocal language.

10 15. The Appellants respectfully submit that this Appeal should therefore be allowed and that the judgment of the High Court should be affirmed for the following, among other,

REASONS

1. BECAUSE P.V.C. waste and disused machinery which the Appellants had put out for collection were not “stored” in the lift lobby within the meaning of warranty 9;
2. BECAUSE the lift lobby was not a “landing” or “passageway” within the meaning of warranty 9;
3. BECAUSE the obligation to keep waste material in metal receptacles did not extend to waste material other than on the insured premises;
- 20 4. BECAUSE the Appellants were not in breach of warranty 9;
5. BECAUSE the judgment of the learned judge was right and should be affirmed;
6. BECAUSE the order of the Court of Appeal was wrong and should be set aside.

MARTIN MOORE-BICK