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IN THE PRIVY COUNCIL,

No. 45 of 1978

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

FAR EAST HAIRGOODS MANUFACTORY CO.
LIMITED

Appellants
(Plaintiffs)

- and -

GRAND UNION INSURANCE COMPANY
LIMITED

Respondents
(Defendants)

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CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from an Order of the Court of Appeal of Hong Kong (Briggs C.J., and McMullin J.A.) allowing the Respondents' appeal from a judgment in the High Court of Hong Kong, whereby the learned trial judge gave judgment for the Appellants. p.24 p.11

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2. This action arises out of a policy of insurance, the Respondents' Fire Insurance Policy No. 003F14512, dated 8th August 1974, by which the Respondents agreed to indemnify the Appellants against the destruction or damage by fire of their premises at No.54, Hung To Road, (King Wan Factory Building), 5th Floor Block B, Kwun Tong, Kowloon ("the Insured's premises"). The Policy contained inter alia the following terms : p.26 p.27

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"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

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 or 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.

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

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3. The Appellants carried on business in a factory flat on the 5th Floor of a factory building in Hong Kong as manufacturers of P.V.C. handbags and other plastic goods. On 1st January 1975, there was a fire in the building and the Plaintiffs property was damaged; the agreed amount of the loss was H.K. \$170,873.

4. The Respondents denied liability on the grounds that the Appellants were in breach of the warranty No 9 in the policy in that :-

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- (1) waste materials were stored in an area referred to in the Courts below as the "Lift Lobby", outside the Appellants factory flat.
- (2) such waste materials were not kept in metal containers and had not been removed from the building.

The waste materials were PVC waste and some discarded iron; the PVC waste was in gunny sacks.

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5. Two issues arise on this appeal :

- (1) Was "the lift lobby" "any staircase or landing or...any passageway"?
- (2) Was the waste material kept in metal containers and removed from the building?
- (1) Was the "lift lobby" "any staircase or landing or any passageway in common use with the premises"

7. The Learned Judge decided in favour of the Appellants on this issue as he considered that the "lift lobby" was (1) not a landing because it was not a stop or resting place in a staircase and (2) not a passageway. The Court of Appeal reversed his decision on this issue and decided that the "lift lobby" was a passageway on the grounds that any person wishing to reach any of the four factory flats, the lifts or staircase had to pass through the lift lobby and to that extent it was a passageway.

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8. The Respondents respectfully submit that the decision in the Court of Appeal is correct. From the plan of the building, there were four factory flats on 5th Floor; each of these flats, the two lifts and the staircase opened on to the lift lobby. The "lift lobby" was therefore used to get in and out of the lift, into and out of the factory flats and into and out of the staircase. On the ordinary meaning and dictionary definitions of "passageway" it was a passageway. In THORNTON v. FISHER & LUDLOW LTD. [1968] 1 W.L.R. 655 there was some discussion, obiter, of whether a roadway within factory premises, was a "passage" within s.28(1) of the Factory Act 1961: the Respondents respectfully submit that the approach of Diplock L.J. was correct in stating that the question whether the roadway was a passage depended on whether it was used for persons to pass along on foot. In the present case, the "lift lobby" was used for persons to pass into the factory flats, the staircase and the lifts.

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9. The Respondents alternatively contend that the lift lobby was a "landing" within the meaning of the warranty; the Court of Appeal did not decide whether it was in view of their decision that it was a passageway; the trial judge considered that "landing" was the most apposite word in the phrase, but decided that the "lift lobby" was not a landing. All four factory flats, the staircase between the flats, the staircase between the flats and the lifts opened on to the lift lobby: it was in this sense the area at the top and between parts of the staircase and such an area is commonly known as a "landing"; furthermore it is the place where people alight or come out of the lifts and it is in this sense also a landing.

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10. The Respondents submit further that such an interpretation in accordance with the ordinary meaning of the word is consistent and gives effect to the objects of the Policy; the purpose of the warranty is to ensure that

the risk of fire is not increased by the accumulation of waste materials and there is no obstruction to the access for firefighting; looked at in this way, it is quite clear that an area such as the "lift lobby" was within the phrase "staircase or landing... or passageway".

(2) Was the waste material kept in metal containers and removed from the building?

p.9 11. It is clear that the PVC waste was not in metal containers and that it was in the "lift lobby" outside the factory flat; the trial Judge decided in favour of the Appellants as he considered that the waste had been removed from the factory flat, the insured premises, and the "building" in this part of the warranty referred to the insured premises. 10

p.23 12. The Court of Appeal reversed the decision and held that the waste material should have been kept in metal receptacles; the "building" was not the insured premises, but the whole of the factory building and therefore the insured was in breach of that part of the warranty in leaving waste material in gunny sacks in the "lift lobby". 20

p.23 13. The Respondents respectfully submit that the decision of the Court of Appeal is correct; the ordinary meaning of the word "building" is not a specified part of it, but the whole. Furthermore the ordinary meaning is consistent with the object of that provision; the Court of Appeal found that the object was to reduce the risk of fire by requiring all waste within the factory building to be kept in metal containers and removed daily from the factory building; the risk of fire would not be much reduced if waste was left within the factory building in sacks. 30

14. "STORED"

p.9 The Appellants case which has been supplied to the Respondents seeks to raise a third issue - that the waste material was not "stored" in the lift lobby. The Trial Judge decided against the Appellants on this point, and held that the waste materials were stored. When the Respondents appealed to the Court of Appeal against the judgment of the Trial Judge, no Respondents Notice was served by the Appellants. The Appellants subsequently applied to the Court of Appeal for leave to serve a Respondents' Notice out of time to raise the issue whether the waste materials were "stored". The Court of Appeal refused the application and consequently heard the appeal without considering the issue. The Respondents humbly submit that the Appellants 40 50

are not now entitled to raise this issue. They did not seek or obtain leave to appeal against the refusal by the Court of Appeal to hear their application to serve a Respondents' Notice out of time. The Judgment of the Court of Appeal does not, as the issue was not before it, consider the issue as to whether the materials were "stored".

10 15. If contrary to the Respondents submission, the Appellants are permitted to argue this issue, the Respondents respectfully submit that the Judgment of the Trial Judge is correct on this issue; in the ordinary sense of the word, the waste was stored in the "lift lobby" in that it was put there awaiting disposal; the decision in THOMPSON v. EQUITY FIRE INSURANCE CO. [1910] A.C. 592 is in no way inconsistent with this.

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20 AND the Respondents humbly pray that this Appeal should be dismissed with costs for the following, among other,

R E A S O N S

1. BECAUSE the Appellants were in breach of Warranty 9.
2. BECAUSE the area identified as "the lift lobby" was a "passageway" or "landing" within the meaning of Warranty 9.
- 30 3. BECAUSE the waste materials were not kept in metal receptacles and had not been removed from the factory building as required by Warranty 9.
4. BECAUSE the Appellants are not entitled now to contend that the waste materials were not "stored" in the "lift lobby".
5. BECAUSE the waste materials were stored in the "lift lobby"
6. BECAUSE the judgment of Court of Appeal was right and should be affirmed.

MICHAEL OGDEN Q.C.

JOHN THOMAS

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LIMITED

Appellants
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- and -

GRAND UNION INSURANCE
COMPANY LIMITED

Respondents
(Defendants)

CASE FOR THE RESPONDENTS

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