

11/80

IN THE PRIVY COUNCIL

No. 45 of 1978

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ON APPEAL  
FROM THE COURT OF APPEAL  
OF HONG KONG

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BETWEEN:

FAR EAST HAIRGOODS MANUFACTORY CO. LTD. (Plaintiff) Appellant

– and –

GRAND UNION INSURANCE CO. LTD. (Defendant) Respondent

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RECORD OF PROCEEDINGS

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CAMPBELL HOOPER & AUSTIN WRIGHT,  
15 Jermyn Street,  
London, SW1Y 6LT

Appellant's Solicitors

INCE & CO.,  
Knollys House,  
11 Byward Street,  
London, EC3R 5 EN

Respondent's Solicitors

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ON APPEAL  
FROM THE COURT OF APPEAL  
OF HONG KONG

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BETWEEN:

FAR EAST HAIRGOODS MANUFACTORY CO. LTD. (Plaintiff) Appellant

– and –

GRAND UNION INSURANCE CO. LTD. (Defendant) Respondent

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RECORD OF PROCEEDINGS

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#### LIST OF DOCUMENTS NOT TRANSMITTED TO THE PRIVY COUNCIL

Description of Document
Exhibit No. 1 – Grand Union Insurance Co. Ltd.'s policy relating to Appellant's premises on the 2nd floor of the King Wan Factory Building.
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10. Writ of Subpoena & Praecipe (a) Jackson Lam (b) Toplis & Harding (c) Tse Chi On	14th June 1976 14th June 1976 16th June 1976
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THE RECORD

IN THE PRIVY COUNCIL

No. 445 of 1978

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ON APPEAL

FROM THE COURT OF APPEAL  
OF HONG KONG

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BETWEEN:

FAR EAST HAIRGOODS MANUFACTORY CO. LTD. (Plaintiff) Appellant

– and –

GRAND UNION INSURANCE CO. LTD. (Defendant) Respondent

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RECORD OF PROCEEDINGS

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In the Supreme  
Court of Hong Kong

No. 1

No. 1  
Statement of Claim  
16th June 1975

STATEMENT OF CLAIM

No. 1243 of 1975

IN THE SUPREME COURT OF HONG KONG  
ORIGINAL JURISDICTION

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BETWEEN FAR EAST HAIRGOODS MFTY. CO. LTD. Plaintiff

and

GRAND UNION INSURANCE CO. LTD. Defendant  
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WRIT OF SUMMONS ISSUED ON THE 22nd DAY OF MAY, 1975

STATEMENT OF CLAIM

No. 1  
Statement of Claim  
16th June 1975  
(Cont.)

1. The Plaintiff is a company limited by shares incorporated under the laws of Hong Kong having its registered address at 54 Hung To Road, King Wan Factory Building, 5th floor, Block B, Kwun Tong, Kowloon in the Colony of Hong Kong.

2. The Defendant is a company limited by shares incorporated under the laws of Hong Kong having its registered address at 1205 Melbourne Plaza, 33 Queen's Road Central, Victoria in the said Colony of Hong Kong.

3. By a policy of insurance No. 003F14511 dated the 8th day of August 1974 made between the Plaintiff of the one part and the Defendant of the other part, in consideration of premium paid and/or payable by the Plaintiff, the Defendant agreed to insure the Plaintiff in respect of the items particularised hereinbelow at No. 54 Hung To Road, "King Wan Factory Building" 2nd floor, Block "C", Kwun Tong, Kowloon (hereinafter called "Premises A") against loss or damage by fire. 10

PARTICULARS OF INSURANCE

On stock-in-trade and/or Merchandise HK\$150,000.000  
=====

4. By a policy of insurance No. 003F14512 dated the 8th day of August 1974, made between the Plaintiff of the one part and the Defendant of the other part, in consideration of premiums paid and/or payable by the Plaintiff, the Defendant agreed to insure the Plaintiff in respect of the items particularised hereinbelow at No. 54 Hung To Road, "King Wan Factory Building" 5th floor, Block "B", Kwun Tong, Kowloon (hereinafter called "Premises B") against loss or damage by fire. 20

PARTICULARS OF INSURANCE

(a) On Machines, Utensils and Tools of Trade excluding  
Moulds of any kind \$40,000.00

(b)	On Stock-in-trade and/or Merchandise Manufactured, Un-manufactured or in the Process of Manufacture	\$150,000.00
(c)	On Business and Office Furniture, Fixtures and Fittings and all other contents not otherwise insured (including 2 units air-conditioners)	30,000.00
		<hr/>
		\$220,000.00
		=====

5. On the said 8th day of August 1974 and at the time of loss and damage hereinafter mentioned the Plaintiff was interested in the said stock-in-trade and merchandise at Premises A and in the said machinery, utensils, tools of trade, stock-in-trade, goods, merchandise, furniture, fixtures and fittings at Premises B to the extent of the said amount so insured thereon respectively. 10

6. On the 1st day of January 1975 while the said policies were in force a fire broke out in the said King Wan Factory Building and the said stock-in-trade and merchandise at Premises A and the said machinery, utensils, tools of trade, stock-in-trade, goods, merchandise, furniture, fixtures and fittings at Premises B were damaged and destroyed and the Plaintiff has suffered loss and damage particulars whereof the Plaintiff has supplied to the Defendant.

7. The Plaintiff notified the Defendant of the said loss on the 2nd day of January 1975 and subsequently submitted an inventory list of the property destroyed or damaged by the fire to Messrs. Toplis and Harding (Hong Kong) Limited, the loss adjusters appointed by the Defendant. 20

8. The loss and damage suffered in respect of the stock-in-trade and merchandise at Premises A, as adjusted by the said loss adjusters amount to \$33,758.50. Wrongfully and despite requests the Defendant has not paid the said sum or any part thereof to the Plaintiff or otherwise indemnified the Plaintiff in respect of the said loss.

9. The loss and damage suffered in respect of machineries, utensils, tools-in-trade, stock-in-trade, goods, furniture, fixtures and fittings at Premises B, as adjusted by the said loss adjusters, amount to \$170,873.13. Wrongfully and despite requests the Defendant has not paid the said sum or any part thereof to the Plaintiff or otherwise indemnified the Plaintiff in respect of the said loss. 30

AND THE PLAINTIFF THEREFORE CLAIMS:—

(a) The said sum of HK\$33,758.50 under the policy of insurance No. 003F14511;

(b) The said sum of HK\$170,873.13 under the policy of insurance No. 003F14512;

(c) Interest thereon at the rate of 8% per annum on the sum of HK\$33,758.50 from the 5th day of February 1975 to the date of payment or at such rate and for such periods as this Honourable Court may deem fit;

(d) Interest thereon at the rate of 8% per annum on the sum of HK\$170,873.13 from the 18th day of April 1975 until date of payment or at such rate and for such periods as this Honourable Court may deem fit; 10

(e) Further and/or other relief;

(f) Cost.

*Denis Chang*  
COUNSEL FOR THE PLAINTIFF

Dated the 16th day of June 1975.

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No. 2  
DEFENCE

1. Paragraphs 1 and 2 of the Statement of Claim are admitted. 20
2. As to paragraphs 3 and 4 of the Statement of Claim, the Defendant admits, subject to the matters pleaded below, the making of the said policies, and will refer to them for their terms.
3. No admission is made as to paragraph 5 of the Statement of Claim.
4. Save that it is admitted that a fire broke out at the said time and place, no admission is made as to paragraph 6 of the Statement of Claim.



5. No admission is made as to the accuracy of the said notification; but paragraph 7 of the Statement of Claim is otherwise admitted.

6. As to paragraphs 8 and 9 of the Statement of Claim, it is admitted that the said adjusters have adjusted as pleaded and that the Defendant has not paid the Plaintiff the said sums or any part thereof and has not indemnified the Plaintiff at all; but it is denied that the Defendant was wrongful.

7. The said policies provided that the due observance and fulfilment of the terms, conditions and endorsements of them in so far as they related to anything to be done or complied with by the Plaintiff were conditions precedent to any liability of the Defendant to make any payment under them, i.e. the said policies. 10

8. One of the terms and/or conditions and/or endorsements of the said policy No. 003F14511 was: 'Warranted that during the currency of the policy no process of manufacture be permitted on the within described premises.' The described premises mentioned are those called Premises A in the Statement of Claim.

9. The Defendant breached this term and/or condition and/or endorsement in that the said described premises were used for, inter alia, process of manufacture, namely, electro-plating.

10. Another of the terms and/or conditions and/or endorsements of the said policy No. 003F14511 was: 'Warranted that during the currency of this policy no waste material 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.' This refers to the premises called Premises A in the Statement of Claim. 20

11. The Plaintiff breached this term and/or condition and/or endorsement in that these were (as the Plaintiff has through its managing director, Mr. Yip Wai, has admitted in a signed statement dated February 25, 1975) a stack of printed matter and a set of machines on the lift lobby of Premises A at the time of the said fire. 30

12. The said policy No. 003F14512 contained a term and/or condition

and/or endorsement identical to the one mentioned in paragraph 10 hereof.

13. The Plaintiff breached this term and/or condition and/or endorsement in that there were (as the Defendant admitted in the manner mentioned in paragraph 11 hereof) a pile of sacks, comprising of PVC waste, and a set of machines in the lift lobby of Premises B at the time of the said fire.

14. None of the items mentioned in paragraphs 11 and 13 hereof were kept in metal receptacles.

15. Accordingly, it is denied that there is any liability on the part of the Defendant to make any payment under either of the said policies.

16. Save as hereinbefore expressly admitted each and every allegation of 10  
the Statement of Claim is denied as if hereinafter set out and traversed seriatim.  
It is denied that the Plaintiff is entitled to relief as claimed or at all.

*(Sd.) Kemal Bokhary*  
*COUNSEL FOR THE DEFENDANT*

Dated the 25th day of June 1975.

No. 3

**REPLY**

1. The Plaintiff joins issue with the Defendant on its Defence save for admissions contained therein.

2. At all material times, in its dealings with the Plaintiff, the Plaintiff was 20  
represented by one Jackson Lam.

3. Policy No. 003F14511 was a replacement of Policy No. F14463 and  
Policy No. 003F14512 was a replacement of Policy No. F14464, all issued  
by the Defendant.

4. At the time of issuing Policy No. 003F14511 in replacement of the previous policy as aforesaid and at the time of acceptance of the premium the Defendant through the same Jackson Lam well knew that part of Premises A was being and would continue to be used for some electroplating work but the Defendant acquiesced in the same and did not draw the attention of the Plaintiff to or explain the full effect of the Warranty pleaded in paragraph 8 of the Defence. By reason of the aforesaid matters the Defendant has waived the alleged breach of warranty, if any, or is otherwise estopped from relying on the same. Alternatively the Plaintiff was and is not bound by the alleged warranty.

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5(a). Further and/or alternatively the Plaintiff says that the said Jackson Lam visited both Premises A and Premises B prior to the replacement of the said policies and knew full well the nature of the occupancy of both premises and operations carried out therein. The Plaintiff at all material times relied on the said Jackson Lam to attend to all the necessary formalities in effecting the two policies of insurance with the Defendant and relied on him to draw to the Plaintiff's attention any terms conditions or warranties which might be detrimental to or significantly affect the Plaintiff's rights or obligations under the said policies or which might necessitate a change in the nature of the occupancy or nature or mode of operations at the said two premises. The said Jackson Lam failed to draw to the Plaintiff's attention or explain to the Plaintiff any of the Warranties terms or conditions now relied upon by the Defendant.

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5(b). By reason of the matters aforesaid, the Defendant is estopped from and has waived its right to relying on the alleged warranties.

6. Save as expressly admitted herein, the Plaintiff puts the Defendant to strict proof of the matters alleged in its Defence and says as follows:—

(a) The items referred to in paragraphs 11 and 13 of the Defence were not "stored" in breach of the Warranties as alleged or at all;

(b) The machines did not belong to and were not under the control of the Plaintiff and the Plaintiff did not cause the same to be put there. Alternatively they were not "stored" in breach of the warranties as aforesaid;

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(c) In so far as may be necessary, the Plaintiff will rely on the maxim "de minimis non curat lex".

*(Sd.) Denis K.L. Chang*  
*COUNSEL FOR THE PLAINTIFF*

Dated this 13th day of March 1976.

JUDGMENT OF THE HON. MR. JUSTICE CONS

The plaintiff is a limited company apparently engaged in the manufacture of plastics. It carries on its business at two premises in a factory building in Kowloon. One is on the second floor of Block C and the other on the fifth floor of Block B.

As a plastics manufacturer it was not easy for the plaintiff to obtain insurance cover on its stock-in-trade, machinery, and so on. Eventually the defendant company agreed to provide that cover. Two separate policies were issued in respect of the two separate floors. While the policies were in force a fire broke out in the factory building and damage was caused to the plaintiff's property on both floors. The amounts of the damage are not in dispute. They are \$33,758.50 for the second floor and \$170,873.13 for the fifth floor. Yet the defendant company declines to pay. 10

The two policies, like most if not all insurance policies, contain many things that the plaintiff warrants he will either do or not do in relation to the premises. There is also a proviso of course that due compliance with the terms of the policies is a condition precedent to payment out by the company.

One of the warranties common to both policies runs as follows:

“Warranted that during the currency of this policy no waste material 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.” 20

Despite this there were goods in the lift lobbies outside each of the plaintiff's premises. In one case they did not belong to the plaintiff. It is said therefore on his behalf that he should not be held responsible, as it was impossible for him to ensure that the warranty was complied with. I do not think there is anything in this point. There was no evidence to support the suggestion of impossibility. And even if it were impossible, no authority was shown to me which would have excluded the effect of the clear words of the policy. Then it was said that the goods were not “stored”. It would seem that it was the common practice of all the tenants of that building to put out their rubbish at the lift lobbies at the end of the day's business and that cleaners would come round early next morning and remove it. That was what the plaintiff had done that night on the fifth floor. It had put out some waste PVC in a few gunny sacks and some old iron machinery that was no longer required. The goods on the second floor lift lobby were probably someone else's rubbish. It was suggested that as the goods were left there only overnight it was not 30

a sufficient length of time to justify the use of the word “stored”. I was referred to *Thompson v. Equity Fire Insurance Co.*<sup>(1)</sup> This is a case where their Lordships of the Privy Council refused to accept that “stored” applied to a small amount of petrol contained in the selfsame household stove in which it would be used. The facts in themselves were not relied upon, but counsel drew my attention to the words (at 596):

“The expression (stored) . . . . seems . . . . to import a notion of warehousing or depositing for safe custody or keeping in stock for trading purposes.”

Pausing there I do not think those words would necessarily exclude the notion of depositing for collection later on. Then their Lordships continue

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“It is difficult, if not impossible, to give an accurate definition of the meaning, but if one takes a concrete case it is not very difficult to say whether a particular thing is “stored” . . . . .”

I find no difficulty in the present instance. The goods in the lift lobbies were “stored” within the normal meaning of that word.

Then it was said that the machinery left there was neither “waste materia” nor “goods”. I fail to see the use of this submission when there was obvious and admitted waste material in the form of sacks of PVC and goods in the form of printed matter. But for the sake of the record I should say that I see nothing illogical in calling thrown away machinery “waste material”.

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Finally, and in this the plaintiff is successful, it was said that a lift lobby is neither a “staircase”, “landing” nor “passageway”. The most apposite would be “landing” but I agree with counsel that “landing” properly connotes a stop or resting place in a staircase. The omission of the word “any” before “landing” in the phrase “any staircase or landing”, but its inclusion in the following phrase, “or on any passageway” may indicate that the person who drafted the policy thought likewise. Be that as it may, I am not satisfied that the goods in the lobbies were in breach of that particular condition.

The next warranty reads

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

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It is admitted that none of the goods in the lobbies was in a metal receptacle but it is argued that the “building” referred to there means the plaintiff’s own particular premises. I accept that as the correct construction. If the draftsman had intended it to mean the common part of the building as a whole he would have been as specific there as he was in the preceding warranty.

(1) [1910] A.C. 592.

These are the only two warranties upon which the defendant company relies in relation to both floors. But the policy for the second floor contains an extra warranty that "no process of manufacture be permitted on the within described premises". Unfortunately for the plaintiff about nine months before the fire its managing director had rented part of the second floor to his brother-in-law. He was using it as an electro-plating factory. That is clearly in breach of the warranty. In the pleading it was said that the defendant, by reason of the prior knowledge of its agent, one Jackson Lam, and his acquiescence therein, was estopped from enforcing that warranty. But the argument, if not completely abandoned, was not seriously pursued at the trial. I have great doubt that Jackson Lam was in fact an agent of the plaintiff company. Even if he were, however, his evidence was not of assistance to the plaintiff. It has not been suggested by the defendant that the electro-plating business in any way caused or assisted the spread of the fire or aggravated the damage suffered by the plaintiff. Nevertheless it was in breach of the warranty and the defendant company is entitled to refuse payment of the claim relating to the second floor. It has no reason to withhold payment in respect of the fifth floor. 10

For those reasons judgment is entered for the plaintiff in the sum of \$170,873.13 with interest at 8% per annum from 18th April 1975 to the date hereof, with costs to the plaintiff and a stay of execution for fourteen days and if a notice of appeal be lodged within that time, until the hearing of the appeal or further order of this Court. 20

*(Sd.) D. Cons*  
*High Court Judge*

K.H.Woo (Chan & Ho) for plaintiff.

Kemal S. Bokhary (Vincent Lo & Co) for defendant.

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FORMAL JUDGMENT

the 16th day of  
July 1976.

BEFORE THE HONOURABLE MR. JUSTICE CONS IN COURT

JUDGMENT

Dated and Entered the 13th day of July 1976.

This action having been tried before the Honourable Mr. Justice Cons without a jury, at the High Court of Justice, Hong Kong, and the said Mr. Justice Cons having on the 13th day of July 1976 ordered that judgment as hereinafter provided be entered for the Plaintiff and directed that execution be stayed for the period and on the terms hereinafter provided. 10

It is adjudged that the Defendant do pay the Plaintiff \$170,873.13 together with interest thereon at the rate of 8% per annum from the 18th day of April 1975 to the date of judgment and costs of action.

It is further adjudged that execution be stayed for 14 days and if notice of appeal be lodged within that time, until the hearing of the appeal or further order.

*J.R. Oliver*  
*Registrar.*

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**NOTICE OF APPEAL  
IN THE COURT OF APPEAL**

**Civil Appeal No. 34 of 1976**

**(On appeal from High Court Action No. 1243 of 1975)**

**BETWEEN**

**GRAND UNION INSURANCE COMPANY LIMITED**

Appellant  
(Defendant)

and

**FAR EAST MFTY. HAIRGOODS COMPANY LTD.**

Respondent  
(Plaintiff)

**NOTICE OF APPEAL**

10

TAKE NOTICE that the Court of Appeal will be moved as soon as counsel can be heard on behalf of the Appellant (Defendant) on appeal from so much of the judgment of the Honourable Mr. Justice Cons given in High Court Action No. 1243 of 1975 on the 13th day of July, 1976, as adjudged that the Appellant (Defendant) was liable to the Respondent (Plaintiff) under a policy of insurance numbered 003F14512 and dated the 8th day of August, 1974, in respect of No. 54 Hung To Road, 'King Wan Factory Building', 5th floor, Block 'B', Kwun Tong, Kowloon in the Colony of Hong Kong and ordered that the Appellant (Defendant) pay to the Respondent (Plaintiff) the sum of \$170,873.13 plus interest thereon at 8 per cent per annum from the 18th day of April, 1975 to the 13th day of July, 1976, and costs, for an ORDER that the aforementioned part of the said judgment be set aside and that judgment be entered for the Appellant (Defendant) with costs.

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AND that the Respondent (Plaintiff) pay the Appellant (Defendant) the costs of this appeal.

AND FURTHER TAKE NOTICE that the grounds of this appeal are:

1. That the learned trial judge erred in law and/or fact in failing to hold that the lift lobby of the abovementioned premises was a landing and/or passageway within the meaning of the clause in the said policy headed,



‘9. Storage Warranty (Industrial Risks)’ which reads: ‘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’.

2. That the learned trial Judge erred in law and/or fact in limiting the requirement in the said clause that all waste materials be kept in metal receptacles to the premises of Respondent (Plaintiff) and excluding its operation in relation to the common areas of the building in question including the said lift lobby. 10

AND FURTHER TAKE NOTICE that the Appellant (Defendant) proposes to apply to set down this appeal in the Appeal List.

Dated the 19th day of July 1976.

Sd. Vincent Lo & Co.

Vincent Lo & Co., of 1201  
Melbourne Plaza, No. 33 Queen’s  
Road, Central, Hong Kong.

To: The Respondent (Plaintiff) and its solicitors, Messrs. Chan and Ho of Solar House, 7th floor, 26A–28A Des Voeux Road Central, Hong Kong. 20

and

The Registrar, Supreme Court, Hong Kong.

NOTICE OF MOTION

TAKE NOTICE that the Court of Appeal will be moved on Thursday, the 25th day of November 1976 at 10.00 o'clock in the forenoon or the sitting of the Court or so soon thereafter as Counsel for the above-named Plaintiff can be heard for an order that the Plaintiff be at liberty to support the judgment of the Honourable Mr. Justice Cons given in High Court Action No. 1243 of 1975 on the 13th day of July 1976 on the grounds as stated in the proposed Respondent's Notice notwithstanding that the time limited by the Rules of the Supreme Court for serving the said Respondent's Notice has expired.

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AND FURTHER TAKE NOTICE that if the Court of Appeal should grant such leave to the Plaintiff to support the said judgment as aforesaid the Court will proceed immediately to hear such appeal and the grounds in the Respondent's Notice.

Dated the 11th day of November 1976.

*Sd. Chan and Ho*

Solicitors for the Plaintiff (Respondent) of Solar House, 7th floor, 26A-28A Des Voeux Road Central, Hong Kong.

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To: The Appellant (Defendant) and its solicitors, Messrs. Vincent Lo & Co., Hong Kong.

Note: The Respondent objected to the inclusion of this Document in this Record.

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No. 8  
Affirmation of  
Anthony Ho Yiu-wah  
with Exhibits  
AHYW-1,  
AHYW-2 and  
AHYW-3  
11th November 1976

AFFIRMATION OF ANTHONY HO YIU-WAN WITH  
EXHIBITS AHYW-1, AHYW-2 AND AHYW-3

I, Anthony Ho Yiu-wah, of 13 Perkins Road, Jardine's Lookout, Hong Kong, solicitor, do solemnly sincerely and truly affirm and say as follows:—

1. I am the solicitor having the conduct of the above action on behalf of the Plaintiff (Respondent). The facts deposed to herein are within my knowledge and are true.

2. On 13th day of July 1976, the Honourable Mr. Justice Cons gave judgment in High Court Action No. 1243 of 1975 for the Plaintiff. 10

3. On the 19th day of July 1976, the Defendant (Appellant) filed with this Honourable Court a Notice of Motion to appeal against the said judgment. A copy of the said Notice of Motion was served upon us on behalf of the Plaintiff on the same day.

4. Since receipt of a copy of the said Notice of Motion, I have tried several times to contact Mr. Yip Wai, a director of the Plaintiff on telephone in order to obtain instructions from him as to whether the Plaintiff would continue its instructions in regard to the appeal, and if so, which Counsel he would like to retain for conducting the appeal. On some of those earlier occasions I was told that Mr. Yip had gone to China on business and it was not until the end of September 1976 that Mr. Yip told me that although the Plaintiff would like to retain our firm to conduct the appeal, it is in financial difficulties and would require some time to consider the aspect about our fees and fees for Counsel for the appeal. 20

5. It was not until the 15th day of October 1976 that the Plaintiff gave me definite instructions to retain Counsel for the purposes of the appeal. On or about the 21st day of October 1976, I sent the papers of this appeal to Mr. K.H. Woo of Counsel for him to consider the matter.

6. On or about the 26th day of October 1976 Counsel sent me a copy of the proposed Respondent's Notice and advised as that the proposed Respondent's Notice should be filed and served in support of the said judgment. 30

In the Court of  
Appeal of Hong Kong

No. 8  
Affirmation of  
Anthony Ho Yiu-wah  
with Exhibits  
AHYW-1,  
AHYW-2 and  
AHYW-3  
11th November 1976  
(Cont.)

A copy of the proposed Respondent's Notice is now produced and shown to me and marked "AHYW-1".

7. On the 27th day of October 1976, I wrote to Messrs. Vincent Lo & Co., Solicitors for the Defendant enclosing the proposed Respondent's Notice and sought their consent to the grounds contained therein being heard by this Honourable Court. On the 2nd day of November 1976, I received a letter from Messrs. Vincent Lo & Co., informing us that they would oppose the said grounds being heard at the hearing of the appeal. A copy each of the said letters are now produced and shown to me and respectively marked "AHYW-2" and "AHYW-3".

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8. In the circumstances, I crave leave for the grounds contained in the proposed Respondent's Notice to be heard notwithstanding that the time for service of it on the Defendant (Appellant) has expired.

AFFIRMED at the Courts of Justice, )  
Victoria, Hong Kong, this 11th day ) (Sd.) Anthony  
of November 1976. ) Y.W. Ho

Before me,

A.M. Rumjahn

Commissioner for Oaths.

This Affirmation is filed on behalf of the Respondent (Plaintiff).

20

Note: The Respondent objected to the inclusion of this Document in this Record.

THE EXHIBITS REFERRED TO IN THE AFFIRMATION OF ANTHONY  
HO YIU-WAH FILED HEREIN ON THE 11th DAY OF NOVEMBER 1976.

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In the Court of  
Appeal of Hong Kong

No. 8  
Affirmation of  
Anthony Ho Yiu-wah  
with Exhibits  
AHYW-1,  
AHYW-2 and  
AHYW-3  
11th November 1976  
(Cont.)

Exhibit marked

Consist of sheet

“AHYW-1”	3
“AHYW-2”	1
“AHYW-3”	1

*Chan and Ho*

Exhibit AHYW-1

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Exhibit AHYW-1

RESPONDENT'S NOTICE

TAKE NOTICE that the Respondent (Plaintiff) intends upon the hearing of the Appeal under the Appellant's (Defendant's) Notice of Appeal dated the 19th day of July 1976 from the judgment of the Honourable Mr. Justice Cons given in High Court Action No. 1243 of 1975 on the 13th day of July 1976 to apply for leave of the Court of Appeal to support the judgment upon the grounds stated therein and upon the further grounds appearing below. 10

And that the costs of and incidental to this appeal may be paid by the abovenamed Appellant (Defendant).

And further take notice that the further grounds of support of the Respondent are:—

- (a) That the words “stored” and “kept” in the said Clause 9 as referred to in Ground 1 of the Notice of Appeal do not include the circumstance or case where the waste materials or goods were deposited for being disposed of as rubbish. 20
- (b) That the Warranty that “all waste materials will be kept in metal receptacles and removed from the building daily” does not apply to the waste materials deposited for disposal at the lift lobby of the said premises.

Dated the 26th day of October 1976.

*(Sd.) Woo Kwok Hing*  
*COUNSEL FOR THE RESPONDENT (PLAINTIFF)* 30

In the Court of  
Appeal of Hong Kong

Exhibit AHYW-2

No. 8  
Affirmation of  
Anthony Ho Yiu-wah  
with Exhibits  
AHYW-1,  
AHYW-2 and  
AHYW-3  
11th November 1976  
(Cont.)  
Exhibit AHYW-2

VL/390/76  
MCL/AH/6070/76 (MCL/1422/75)

27th October 1976.

Messrs. Vincent Lo & Co.,  
Solicitors, Hong Kong.

Dear Sirs,

Re: Civil Appeal No. 34 of 1976  
(On appeal from High Court  
Action No. 1243 of 1975)

We refer to the above Appeal which will be heard before the Court 10  
of Appeal on Thursday, the 25th day of November 1976 at 10.00 a.m.

We hereby give you notice that at the hearing of the said Appeal, our  
Counsel will apply for leave to file a Respondent's Notice as per copy annexed  
hereto. We trust that you will have no objection to such an application.

*Yours faithfully,*

*Chan and Ho.*

AH: 1wh

Encl.

c.c. Registrar,  
Supreme Court,  
Hong Kong

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In the Court of  
Appeal of Hong Kong

Exhibit AHYW-3

No. 8  
Affirmation of  
Anthony Ho Yiu-wah  
with Exhibits  
AHYW-1,  
AHYW-2 and  
AHYW-3  
11th November 1976  
(Cont.)  
Exhibit AHYW-3

VL/390/76  
MCL/AH/6070/76  
(MCL/1422/75)

2nd November, 1976.

Messrs. Chan and Ho,  
Solicitors,  
Solar House, 7/F.,  
Hong Kong.

Dear Sirs,

Re: Civil Appeal No. 34 of 1976  
(On appeal from High Court  
Action No. 1243 of 1975)

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We thank you for your letter of the 27th October, 1976, upon which we have taken Counsel's opinion.

We are instructed to inform you that we shall object to your application as stated in the 2nd paragraph of your said letter.

Please take note accordingly.

Yours faithfully,

Vincent Lo & Co.

VL/rf

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REASONS FOR JUDGMENT (BRIGGS, C.J.,  
PICKERING, J.A. AND MCMULLIN, ACTING J.A.)

JUDGMENT

The plaintiff is a company and at the relevant time was engaged in the manufacture of plastics at two factories which are situated in the King Wan Factory Building at No. 54 Hung To Road, Kwun Tong, Kowloon. One factory was located on the second floor of Block C and the other was located on the fifth floor of Block B of that building.

The plaintiff company took out two insurance policies against fire with the defendant company, one in respect of each of the two factories. 10

On January 1st, 1975, while the two policies were in force, a fire broke out in the factory building at No. 54 Hung To Road and damaged the plaintiff company's stock and goods in both factories. Consequently, the plaintiff company claimed a sum in respect of each of the two factories representing their loss. The amounts of damage were not in dispute. They are \$33,758.50 in respect of the factory at Block C and \$170,873.13 in respect of the factory at Block B.

The trial judge dismissed the claim of the plaintiff company as regards the factory at Block C but found in the plaintiff company's favour on their other claim. And he gave judgment to the plaintiff company for the sum of \$170,873.13. 20

The defendant company appeals against this judgment. We are not here concerned with the other claim, the claim in respect of the factory at Block C.

There is only one point in the appeal. It is the contention of the defendant company that the judge was wrong to give judgment for the plaintiff company because at the time of the fire the plaintiff company was in breach of a warranty which formed part of the policy under which they sought to recover. This warranty reads as follows:— 30

“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.”

A plan of the relevant part of the fifth floor of Block B was put in evidence. This shows the space outside the entrance of Flat B, the plaintiff company’s factory. Flat B opens on to a space, which was referred to in court by the plaintiff company as the ‘lift lobby’. The court was told that from the space there are doors entering each of four factory flats including that of the plaintiff company, a door leading to the staircase and the doors to two lifts.

A person wishing to pass from one of the four factories to another, 10  
or from a factory to a lift or the staircase must make use of this space.

It was in evidence that the plaintiff company used to leave their PVC waste materials in this space at the end of each day and that it would be removed by cleaners before the next morning.

On the date of the fire the plaintiff company had placed some PVC waste and some discarded iron machinery in this space ready for the cleaners to collect and remove. The PVC waste was not contained in metal receptacles, it was placed in gunny sacks.

The trial judge had the task of interpreting the warranty contained 20  
in the policy of insurance and which is set out above. He held that though the PVC waste and the machinery was ‘stored’ within the terms of the warranty, the space or place where that waste was stored was not a “staircase, landing or passageway” within the terms of the warranty and that therefore the plaintiff company was not in breach of the warranty to that extent. He also held that the reference in the warranty to the removal of the waste materials from ‘the building’ meant the removal of the waste materials from the plaintiff company’s factory or leased premises and not from the factory building, i.e. the King Wan Factory Building, 54 Hung To Road. So, again, he held that the plaintiff company was not to this extent in breach of the warranty. He therefore gave 30  
judgment to the plaintiff company on this part of their claim. It should, perhaps, be mentioned that the insurance policy which covered the other premises, i.e. the second floor of Block C of the factory building, contained a further warranty which was not contained in the policy with which we are concerned in this appeal. And the trial judge found that the plaintiff company was in breach of that other warranty and on that account could not succeed in that claim.

In construing a document such as the insurance policy in the present appeal the golden rule is that the words used are to be given their natural and ordinary meaning in the absence of any evidence as to their secondary meaning. And it is proper, when construing an insurance policy, to pay regard to the 40

object of such a policy. (See *Lao Rapp Ltd. v. McClure*<sup>(1)</sup>).

The words used here are “on any staircase or landing or in any passageway within or in common use with the” policy premises. The trial judge thought that the place where the waste was ‘stored’ did not come within those words. He pondered whether the space could properly be described as a ‘landing’ but discarded this suggestion.

The trial judge had the plan of the space in question before him and, of course, that plan is before us in this appeal. Looking at the plan and giving the words of the warranty their natural and ordinary meaning we think that a proper description of the space in question is that it is a ‘passageway’. It was called a ‘lift lobby’ by counsel for the plaintiff company. And we have no quarrel with such a description. But with respect to the judge and to counsel for the plaintiff company that does not matter. It is also a ‘passageway’. A person who wishes to reach any of the four factory flats, the two lifts or the staircase must pass through this space or lift lobby and to that extent that person is using a passageway, a passageway which, in the words of the warranty, is “in common use with” the plaintiff company’s factory. 10

It was suggested that the fact that the word ‘any’ does not appear before the word ‘Landing’ was material. The suggestion was that the warranty should be read as meaning (1) any staircase or landing; and (2) any passageway, i.e. that the terms ‘landing’ and ‘staircase’ were bound up together and were quite exclusive of the term ‘passageway’ which must mean something in the nature of a corridor. We do not think that there is anything in this argument. The reason that the word ‘any’ appears before ‘passageway’ and not before ‘landing’ is grammatical. The storing of the waste refers to being ‘on’ any staircase or landing and ‘in’ any passageway. To insert a third ‘any’ before the word ‘landing’ is quite unnecessary. 20

We think therefore that the space outside the entrance to the factory flat of the plaintiff company as shown in the plan was a ‘passageway’ and so within the terms of the warranty. It follows that by – use the judge’s expression – ‘storing’ the waste in the passageway, the plaintiff company was in breach of the warranty. 30

It was not disputed that the PVC waste material which was left in the passageway by the plaintiff company was not – in the words of the warranty – “kept in metal receptacles”, it was in gunny sacks. It was argued that this only imposed a duty on the plaintiff company to keep their waste in metal receptacles when that waste remained in the plaintiff company’s factory premises. Counsel for the plaintiff company put four alternative interpretations of this part of the warranty forward for the court’s consideration, but urged the court to adopt the interpretation given above since that was the most favourable to the plaintiff company. 40

(1) (1955) 1 Lloyd’s List R. 292.

We think that these words in their ordinary meaning mean that the plaintiff company's waste which was left in the passageway should have been contained in metal receptacles. It was not. Therefore the plaintiff company was in breach of the warranty.

The trial judge held that the words "removed from the building" which are contained in the final sentence of the warranty mean to be removed from the factory premises of the plaintiff company.

With respect to the judge, we think he was wrong here. The word 'building' in its ordinary and normal meaning means in the context of this case, the King Wan Factory Building. We can find nothing in the terms of the insurance policy to restrict the meaning so as only to include the factory of the plaintiff company. If that had been the intention of the parties one would have expected that the phrase "insured's premises" or something similar would have been used; and not the word 'building'.

10

Again, it is proper to look at the object of the policy. The warranty is surely intended to reduce the risk of fire. This part of the warranty deals with the removal of waste and it is removal from the building and not from an individual factory, for example, on to a passageway or staircase within the building which is so important. Hence, all waste must be kept in metal containers and removed from the King Wan Factory Building daily.

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It follows from the above that the plaintiff company was in breach of the warranty, and that this appeal must be allowed. The defendant company are to have their costs here and in the court below. The defendants are also to have the costs of the unsuccessful application of the plaintiff company for an order to extend the time for the filing of a Respondent's Notice.

Geoffrey Briggs  
President.  
25th November, 1976.

Ching, Q.C. & Bokhary (Vincent Lo & Co.) for Appellant.  
K.H. Woo (Chan & Ho) for Respondent.

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FORMAL JUDGMENT

the 4th day  
of December, 1976.

BEFORE THE HONOURABLE SIR GEOFFREY BRIGGS,  
CHIEF JUSTICE, MR. JUSTICE PICKERING AND  
MR. JUSTICE MCMULLIN IN COURT

ORDER

Dated the 25th day of November 1976

UPON MOTION by way of appeal from the judgment dated the 13th 10  
day of July 1976 made unto this Court by Counsel for the Defendant  
(Appellant).

AND UPON HEARING Counsel for the Defendant (Appellant) and  
for the Plaintiff (Respondent).

AND UPON READING the said Judgment dated the 13th day of July  
1976.

THIS COURT DOTH ORDER that this Appeal be allowed and that  
the Judgment of the Honourable Mr. Justice Cons dated the 13th day of July  
1976 for the said Plaintiff (Respondent) be set aside and judgment entered  
for the said Defendant (Appellant) and costs to be taxed. 20

AND IT IS ORDERED that the Plaintiff (Respondent) do pay to the  
Defendant (Appellant) its costs occasioned by the said appeal such costs to  
be taxed.

*(Sd.) S.H. Mayo (L.S.)  
Registrar.*

In the Court of  
Appeal of Hong Kong

No. 11

No. 11  
Formal Order granting  
final leave to appeal to  
Her Majesty in Council  
28th February 1977

**FORMAL ORDER GRANTING FINAL LEAVE TO APPEAL  
TO HER MAJESTY IN COUNCIL**

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**BEFORE THE HONOURABLE SIR GEOFFREY BRIGGS,  
CHIEF JUSTICE AND MR. JUSTICE PICKERING IN COURT**

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**ORDER**

Upon hearing Counsel for the Plaintiff (Respondent) and Counsel for the Defendant (Applicant) and upon reading the Affidavit of ROBERT WEI-HAN WANG filed herein on the 16th day of February 1977.

IT IS ORDERED THAT the Plaintiff (Respondent) do have final leave 10  
to appeal to Her Majesty in Council.

AND IT IS ORDERED that the costs of this application be costs in  
the appeal.

Dated the 28th day of February 1977.

*S.H. MAYO*  
*Registrar*

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**EXHIBITS**

**EXHIBIT MARK – 2**

**GRAND UNION INSURANCE COMPANY LTD.  
'FIRE POLICY' NO. 003F14512**

**Grand Union Insurance Company, Limited 1205 Melbourne  
Plaza, 33 Queen's Road C., Hong Kong.**

**FIRE POLICY**

Exhibit Mark  
2  
Grand Union Insurance  
Co. Ltd.  
'Fire Policy'  
No. 003F14512  
8th August 1974

IN CONSIDERATION of the Insured named in the Schedule hereto paying to the Company named above (hereinafter called "the Company") the Premium mentioned in the Schedule.

10

THE COMPANY AGREES subject to the Terms and Conditions contained herein or endorsed hereon that if after payment of the Premium the Property Insured described in the said Schedule or any part of such Property Insured be destroyed or damaged by Fire or Lightning whether accompanied by Fire or not at any time during the Period of Insurance stated in the Schedule or during any further period for which the Company may accept payment for the renewal of this Policy, the Company will pay or make good to the Insured the value of the Property Insured at the time of the happening of its destruction or the amount of such damage PROVIDED THAT the liability of the Company shall in no case exceed in respect of each item the sum stated in the Schedule to be insured thereon or in the whole the Total Sum Insured hereby or such other sum or sums as may be substituted therefore by endorsement hereon or attached hereto signed by or on behalf of the Company.

20

PROVIDED ALWAYS that the due observance and fulfilment of the terms conditions and endorsements of this Policy in so far 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**

Exhibit Mark  
2  
Grand Union Insurance  
Co. Ltd.  
'Fire Policy'  
No. 003F14512  
8th August 1974  
(Cont.)

21. Any 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.

1. ELECTRICAL CLAUSE – A
2. NON-OCCUPYING LANDORD CLAUSE
3. OCCUPANCY WARRANTY – A
4. RENT CLAUSE 10
5. STORAGE WARRANTY
6. MORTGAGE CLAUSE
7. LIEN CLAUSE
8. LEGAL REQUIREMENTS WARRANTY
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. 20

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

**THE SCHEDULE**

The Insured:  M/s. FAR EAST HAIR GOODS MFG., Co., LTD.	Place of Issue HONGKONG	Policy No. 003F14512
	Date of Issue 8/8/74	Due Date 5/8/75

Period of Insurance: From 5/8/74 to 5/8/75 at 4 p.m.

Construction: Class 1

Insured's Occupation: "P.V.C. Handbags & Sewing Works"

30

Exhibit Mark  
 2  
 Grand Union Insurance  
 Co. Ltd.  
 'Fire Policy'  
 No. 003F14512  
 8th August 1974  
 (Cont.)

Insured Premises:  No. 54, Hung To Road, "King Wan Fty., Bldg.," 5th floor, Block "B", Kwun Tong, Kowloon.	Total Sum Insured HK\$220,000.00	
	Rate: @ 12% Plus 30% IRS	Premium HK\$2,640.00 792.00
	Total Due HK\$3,432.00	

Item No.	THE PROPERTY INSURED	Sum Insured
3.	ON MACHINERY, UTENSILS AND TOOLS OF TRADE EXCLUDING MOULDS OF ANY KIND.	\$40,000.00
5.	ON STOCK IN TRADE AND/OR MERCHANDISE MANUFACTURED, UNMANUFACTURED OR IN THE PROCESS OF MANUFACTURE.	150,000.00
6.	ON BUSINESS AND OFFICE FURNITURE, FIXTURES AND FITTINGS AND ALL OTHER CONTENTS NOT OTHERWISE INSURED. (Including 2 Units Air-conditioner)	30,000.00
NOT EXCEEDING IN ALL THE SUM OF HONG KONG \$ DOLLARS Two Hundred Twenty Thousand Only.		\$220,000.00

GRAND UNION INSURANCE CO.,

*Authorized Signature*



Exhibit Mark  
5  
Sketch Map of 5th  
floor of King Wan  
Factory Building

