

Privy Council Appeal No. 52 of 1988

The Yien Yieh Commercial Bank Limited

Appellant

v.

Kwai Chung Cold Storage Co. Ltd.

Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
25TH JULY 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD OLIVER OF AYLMEYTON
LORD GOFF OF CHIEVELEY
MR. JUSTICE BISSON

[Majority Judgment delivered by Lord Goff of Chieveley]

This appeal has come before their Lordships from a decision of the Court of Appeal of Hong Kong, in which they affirmed (though on different grounds) a decision of Mr. Gilbert Rodway Q.C., sitting as a deputy judge of the High Court of Hong Kong. There were before the learned deputy judge two consolidated actions, in each of which the plaintiff was the Yien Yieh Commercial Bank Ltd. ("the Bank"), the appellant in the present appeal, and the defendant was the Kwai Chung Cold Storage Company Ltd. ("the Company"), the present respondent. The subject matter of both actions consists of goods stored at the Company's cold store; in the first action, the relevant goods were the property of Wallace Investment Company Ltd. ("Wallace"), and, in the second, the property of Shun Lee Company. No relevant distinction can be drawn between the two actions, and their Lordships will, like the Court of Appeal, refer only to the goods of Wallace.

Their Lordships gratefully adopt the commendably succinct statement of the background facts of the case set out in the judgment of Cons V.-P. (with which Clough J.A. and Rhind J. agreed):-

"The finance for Wallace's trading was provided by the Bank. Security was derived from an agreement made in 1976, which provided that all documents

received by the Bank in respect of credits opened or established at the request of Wallace, and the goods represented thereby, should be held by the Bank as security for moneys due thereunder.

Goods purchased in bulk by Wallace were stored with the Company pending resale. The Bank's security was then preserved by the direct delivery to the Bank of the Godown Warrant, without which, or a signed Delivery Order, the Company would not release the goods. Wallace thus had to satisfy the Bank before it could effectively resell.

All worked well for several years. However during the years 1980 to 1982, because of the dishonesty of Company staff, a considerable amount of Wallace's goods were delivered out of the godown without the Bank's being made aware. When eventually the Bank sought to realise its security the cupboard was virtually bare. Wallace's goods to the value of approximately \$4.25 million (and Shun Lee \$1.95 million) had disappeared."

The Bank commenced proceedings against the Company, claiming damages for the conversion of the goods which had disappeared. The deputy judge dismissed the Bank's claim, on the ground that the Company had not attorned to the Bank in respect of the goods. The Court of Appeal allowed the Bank's appeal on that point, but nevertheless dismissed the appeal on a second point, which had been raised before the deputy judge but had not been considered by him, which was that the Company was protected from liability by certain terms and conditions contained in the Godown Warrant. Before their Lordships, the Company did not appeal against the Court of Appeal's decision on the issue of attornment; the appeal was directed solely to the issue of the effect of the terms and conditions in the warrant.

Before their Lordships turn to the terms and conditions themselves, they think it desirable to provide a brief description of the manner in which the Company carried on its business, and of the circumstances in which the goods came to be misdelivered without the knowledge of the Bank. Two of the directors of the Company, William Miao and Albert Yeung, were respectively the manager and the assistant manager of the Company. Reporting to Miao through Yeung were Bosco Cheung, the Company's chief accountant, and Hui Nai Wah, the counter supervisor. The Company had only one cold store, situated at 403-413 Castle Peak Road, Kwai Chung, New Territories in Hong Kong. On receipt of goods at the cold store, the Company issued a Godown Warrant in respect of the goods received, on the back of which were printed English and Chinese versions of the terms and conditions of storage, it being provided that the

English version should prevail. The Company kept a copy of the warrant. Clause 4 of the terms and conditions provided that:-

"The Company will deliver the goods only on surrender of this Godown Warrant endorsed by the party who is for the time being registered in the Company's books as entitled to the goods or against a Delivery Order signed by the said party ..."

The Godown Warrant itself would be used when the whole (or the last items) of the relevant lot were to be redelivered; a Delivery Order would be used when only part of the lot was being withdrawn.

Under the agreement between the Bank and Wallace, Wallace would request the Bank to open a letter of credit in respect of any particular goods which Wallace wished to purchase. Upon the Bank doing so, it would write to the Company requesting it to store the relevant goods (usually frozen meat imported from overseas) in the name of Wallace, and to hold them to the order of the Bank, to which the Company was asked to forward the Godown Warrant. The Godown Warrant so issued by the Company would state on its face that the goods were held to the order of the Bank. The system established at the Company was that, where the documents indicated that a Bank or other party had a financial interest in the goods, Hui, the counter supervisor, would, before releasing the goods, check with the owner to see if the goods had been redeemed from the Bank, and he would demand documentary evidence from the Bank that that was so. Cons V.-P. commented that:-

"As a system it would be effective. No merchant whose trade was financed by a bank to whose order the Godown Warrant was made out, would be able to obtain delivery of the goods without the consent, and endorsement, of that Bank. Likewise, no bank, had it been inclined to be fraudulent, could have obtained delivery of the goods without the consent and endorsement of the merchant."

However, in the present case, the system broke down because of the fraudulent activities of Bosco, the chief accountant. He told Hui that he (Bosco) would be responsible for obtaining the proper release documents and that Hui need not refer questions regarding such release documents to him. Hui instructed his counter clerks accordingly, with the result that the vast majority of frozen goods bought by Wallace were delivered out on Wallace's instructions without the knowledge or authorisation of the Bank, and without any Godown Warrant or Delivery Order being presented at the cold store. After discovery of the misdelivery of the goods, Bosco confessed to having aided and abetted Wallace to withdraw the goods wrongfully and without the Bank's authority.

Their Lordships now turn to the terms and conditions on the reverse of the Company's Godown Warrant. The relevant clauses read as follows (in the English version):-

- "1. The goods received and stored by Kwai Chung Cold Storage Co. Ltd. (hereinafter called 'the Company') are recognised as per the marks and descriptions of the packages or units of cargo indicated on the front page of this Godown Warrant. The Company shall not, under any circumstances, be responsible for the real contents nor for the condition of any part or whole of the goods stored under this Warrant. ... The Company can freely remove the goods to any other suitable rooms and/or places within the cold storage without giving prior notices.
2. The Company shall not, under any circumstances, be responsible for any loss, damage, deficiency, loss of weight and/or cubage, change of, or deterioration in condition or loss of value, prior to, or whilst the goods are being stored or remain on storage, whether or not the same be caused directly or indirectly by misfeasance, error in judgment, robbery or theft, accidents, forgery of documents, mis-delivery, negligence, breakage, hookholes, tearing of covers, obliteration of marks or any visitation of providence, fraud, dishonesty or default of the Company's officers, employees, servants, agents, stevedores, labourers, surveyors, tally clerks or any other persons whether or not in any way acting or under contract with or in the employ of the Company; or by all possible causes proximately or remotely by sea or water, flood, fire, earthquake, lightning, typhoons, tempest, heat, effects of climate, explosion, deterioration, liquefaction, rust, waste, evaporation, sweating, mildew, decay, dry rot, leakage, loss or increase of weight or measurement, weevils, vermin, rats, white ants, defects or breakdown of the refrigeration plant thus effecting raising of room temperatures or electricity supply, war, hostilities, civil commotions, riots, strikes, or any emergency measures taken by or on behalf of the Hong Kong Government; the Armed Forces or any relevant authorities.
3. The Company is under no obligation to insure the goods against any risks whatsoever. The Company is under no obligation to furnish any information regarding performance of refrigeration plant and/or temperature recordings to any person, parties or insurance companies and also under no obligation to

permit any person from entering into the plant room and/or any other places of the cold storage.

4. The Company will deliver the goods only on surrender of this Godown Warrant endorsed by the party who is for the time being registered in the Company's books as entitled to the goods or against a Delivery Order signed by the said party. Such endorsement or signatures must be written either in English or in Chinese characters by the party so registered as aforesaid or by a person or persons authorised to sign on behalf of the said party and impressed with the chop or stamp of the said party.

...

6. (1) The Company shall not under any circumstances, be responsible for any loss of or damage to the goods resulting from any misdelivery thereof in consequence of any error of judgment, negligence or dishonesty of any of its officers, servants, employees, agents or any other persons whatsoever, in passing any of the said signatures, endorsements, chops or stamps as authentic and the production by the Company of such Godown Warrant or Delivery Order shall at all times be conclusive proof that the goods therein mentioned have been properly delivered by the Company and shall exempt the Company from all responsibilities in connection with the goods.
- (2) The Company shall be entitled to assume the person presenting the Godown Warrant or Delivery Order is the person lawfully entitled to take delivery.
- (3) The Company shall not under any circumstances, be responsible for any loss or damage to the goods resulting from any of its officers, servants, employees, agents, or any other persons whatsoever, dishonestly, negligently or through an error in judgment misdelivering the goods to any person or persons who do not surrender to the Company at the time of such delivery the requisite Godown Warrant and/or Delivery Order.
- (4) The Company reserves the right to deliver the goods on surrender of the Godown Warrant and a Delivery Order.

..."

Their Lordships have inserted in clause 6 the numbers (1) to (4) for convenience of reference to the four sentences of that clause. It was under the third sentence of clause 6 (which their Lordships will describe as clause 6(3)) that the Court of Appeal held the Company to have been exempted from liability.

Before their Lordships, Mr. Dehn, for the Bank, advanced five submissions, on the basis of which he submitted that the Court of Appeal had erred in dismissing the appeal from the deputy judge. Their Lordships will consider each of these submissions in turn. Before they do so, however, they wish to preface their observations by stating that, although they received assistance both from Mr. Dehn and from Mr. Stamler, who appeared on behalf of the Company, upon the applicable principles in cases concerned with exemption clauses, they do not consider that the present appeal raises any issue of principle, being concerned only with the particular exemption clauses contained in the Godown Warrant. Furthermore they have reached the conclusion that the Court of Appeal came to the right decision, for the right reasons. In these circumstances, they do not think it necessary to embark upon any discussion of principle, and they can deal with Mr. Dehn's submissions relatively briefly.

His first submission related to the construction to be placed upon clause 6(3). The submission was that, bearing in mind the provisions of clause 4 (which, in his submission, not only entitled the Company to refuse to deliver goods except on surrender of the relevant Godown Warrant or against a Delivery Order, but obliged them not to do so), a distinction had to be drawn between cases where a Godown Warrant or a Delivery Order was neither presented nor surrendered to the Company, and cases where the warrant or order had been presented but had not been surrendered. It was with the latter type of case that clause 6(3) was, he submitted, concerned, with the effect that this provision only exempted the Company from liability where, the document having been presented, it was not in fact surrendered to the Company; and it followed that the clause did not exempt the Company from liability where the document had not even been presented. Their Lordships however consider this contention to be artificial in the extreme. It would, in their opinion, be fanciful to imagine that clause 6(3) was intended to be restricted to so narrow and improbable a set of circumstances. They are, for that simple reason, unable to accept this submission.

The second submission was that the Company had not discharged the burden of proof which rested upon it to show that clause 6 covered the present case. The argument ran that no evidence had been called to show that any of the officers, servants, employees, agents or any other persons who misdelivered the goods, either on

paper by signing over the relevant documents, or physically, had acted dishonestly, negligently, or through an error of judgment. In particular, it was submitted, there was no evidence to show that Bosco took any part in the delivery of the goods at all. The effect of this argument would, however, be that the clause would have no application where one employee of the storage company dishonestly authorised another employee to misdeliver goods, the latter employee having been innocent of the dishonesty and having acted neither negligently nor under an error of judgment. This point does not appear to have been taken below, with the effect that there was no consideration, on the evidence, of the question whether any person who participated in the actual delivery of the goods was aware of the fraud, or had acted negligently or had committed an error of judgment. But in any event their Lordships consider the point to be misconceived. They can see no reason to read clause 6(3) in the limited sense proposed by the Bank, which once again would be highly artificial. On the natural and ordinary meaning of the words there would be a dishonest misdelivery of the goods where one employee of the Company, having authority over another, dishonestly caused that other to misdeliver the goods - as might, for example, have occurred if Hui, the counter supervisor, had dishonestly directed a coolie to do so. Their Lordships can see no good reason for departing from this sensible construction of the clause.

The third submission was that clause 6(3) should be rejected as repugnant to clause 4. As their Lordships have already observed, it was submitted that clause 4 imposed a positive obligation on the Company not to deliver goods otherwise than on surrender of a Godown Warrant or against a Delivery Order; and, on that basis, it was argued that to give effect to clause 6(3) in circumstances where no Godown Warrant or Delivery Order had been surrendered was to deprive clause 4 of all effect, and the proper course in those circumstances was to ignore clause 6(3) and to give unqualified effect to clause 4. Again, the point does not appear to have been taken before the Court of Appeal. Be that as it may, their Lordships are unable to accept this submission.

Let it be assumed that clause 4 was not intended merely to be regulatory in the sense of identifying the matters which the Company required to be complied with before it was prepared to redeliver goods stored with it, but was intended to be a source of an obligation imposed upon the Company. On this basis the Company would be bound to redeliver in terms of clause 4; but it could nevertheless rely on clause 6(3) where that provision was applicable. True, the exemption in clause 6(3) is sweeping in its terms, but it is not all embracing. In circumstances where the contractual exemptions did not apply, the Company

would be bound to redeliver in accordance with clause 4 - for example, where the goods were present in the cold store, having neither been lost in the circumstances specified in clause 2, nor having been lost or misdelivered in the circumstances specified in clause 6(3).

But the matter does not stop there. Their Lordships wish to stress that to reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified in circumstances where the two clauses are in truth irreconcilable. In point of fact, this is likely to occur only where there has been some defect of draftsmanship. The usual case is where a standard form is taken and then adapted for a special need, as is frequently done in, for example, the case of standard forms of charterparty adapted by brokers for particular contracts. From time to time, it is discovered that the typed additions cannot live with part of the printed form, in which event the typed addition will be held to prevail as more likely to represent the intentions of the parties. But where the document has been drafted as a coherent whole, repugnancy is extremely unlikely to occur. The contract has, after all, to be read as a whole; and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction. Such, in their Lordships' opinion, is the situation in the present case. Here there are two clauses. Clause 6(3) is in clear and unequivocal terms; and it is said that clause 4 is inconsistent with it. Yet clause 4 is at the very least open to the interpretation that its function is no more than to indicate the document which the Company requires to be presented before goods stored with the Company will be redelivered. So construed, any apparent inconsistency between clauses 4 and 6(3) disappears. Their Lordships consider that such a construction not only flows from the principle that contracts must be construed as a whole; it is also consistent with the fact that the relevant terms and conditions are those governing the contract of storage entered into between bailor and bailee, as between whom clause 4 can sensibly be read as doing no more than indicate the requisite document to be presented by the bailor when requesting redelivery. Such a construction is, in their Lordships' opinion, preferable to a construction of clause 4 which produces a direct conflict with another clause, in itself clear and unequivocal, where both clauses form part of a document drafted as a coherent whole.

For these reasons, their Lordships are unable to accept the argument that clause 6(3) should be rejected as repugnant to clause 4.

Their Lordships turn to the fourth submission advanced on behalf of the Bank. This was to the effect

that clause 6(3) should be rejected as inconsistent with the main object and intention of the contract, or alternatively that, if the construction of clause 6(3) for which the Company contended should be accepted, clause 6(3) should nevertheless be rejected because it would have the effect that the transaction would lack the legal characteristics of a contract, being no more than a mere declaration of intent. Mr. Dehn defined the main object and intention of the present contract in terms of bailment, i.e. that the goods delivered to the Company would be kept by it, and only redelivered by it to a party who had a right to possession of them. But the difficulty with this proposition is that it ignores altogether the terms upon which the goods were bailed to the Company. Their Lordships do not consider that, for this purpose, the "main object or intention" of a contract can be ascertained without any reference to its terms. Of course, there may be cases where, having regard to the main purpose of a contract, it would be proper to construe a particular exemptions clause in a restricted sense. Such a case was *Glynn v. Margetson & Co.* [1893] A.C. 351, in which, in a bill of lading contract relating to the carriage of oranges from Malaga to Liverpool, a very wide clause giving a liberty to the ship owner to deviate for any purpose was construed as restricted to deviation to ports which were in the course of the voyage. But it does not follow that exemptions clauses should be rejected or cut down merely because they are in sweeping terms. It may well be that a storage company is only prepared to contract on such terms, making only a modest charge and perhaps requiring the owner of the goods to obtain his own insurance. If it is made plain to owners of goods wishing to avail themselves of its services that the liability of the storage company is to be of a very limited nature, as set out in the terms and conditions of the contract, then there is no impediment at common law to a contract being made on those terms. True, exemption clauses will be scrutinized with some stringency, with the effect (for example) that, in accordance with established principle, a party will not be held to have contracted out of liability for negligence except upon clear terms; but principles such as these are designed to do no more than to assist in ascertaining the intention of the parties from the contractual documents. Where the contractual intention is plain it should, in their Lordships' opinion, be given effect to, even though this may result in a very restricted obligation resting upon the party relying upon the exemptions in the contract. Such, in their Lordships' opinion, is the present case. Furthermore, for reasons already given, there is no question of the present transaction lacking the legal requirements of a contract, or being a mere declaration of intention. They accordingly reject this submission.

Finally it was submitted that clause 6(3) was not effective to exempt the Company from negligence when

the relevant person was acting as the alter ego of the Company, with the effect that (for example) his dishonest act was the act of the Company itself. This, it was submitted, was the position in the present case, because the person guilty of fraud was Bosco, who was acting as the alter ego of the Company. Alternatively, it was submitted that it was for the Company to prove that the loss occurred without its own wrongdoing, and it had failed to discharge that onus of proof since it had failed to prove that Bosco was not acting as the alter ego of the Company.

This point only surfaced to a limited extent before the learned judge. As Cons V.-P. pointed out in the Court of Appeal, the judge came to no definite conclusion as to Bosco's status in the Company, being under the impression that the point was no longer being pursued. The Court of Appeal concluded that the evidence came nowhere near persuading them that Bosco was allowed to act, or could have been taken to have acted, in the operation of the cold store Godown as the Company itself in the sense envisaged by Lord Reid in *Tesco Supermarkets Ltd. v. Natrass* [1972] A.C. 153. Cons V.-P. said:-

"In no way do I find that the Board of Directors, by-passing the Manager and the Assistant Manager, 'delegated some part of their functions of management, giving (to Bosco) as their delegate, full discretion to act independently of instructions from them'. Such delegation as there was went no further than to the Manager and the Assistant Manager, and is contained in an undated document apparently signed by some nine of the Company's directors to the effect that -

'We hereby give consent that with effect from Jan. 1, 1973, Mr. William Miao, Manager, and Mr. Albert Yeung, Assistant Manager, will take full power in executing all management and personnel employment matters.'

On the basis of this finding of fact, the Court of Appeal rejected the argument. They further rejected an argument, advanced before them, that the misdelivery was the result of the Company's own act in failing to provide an effective system to control the delivery. Cons V.-P. said:-

"... the contention to my mind is untenable. The Company did provide a system, and a system which, if properly adhered to, would have been effective. It does not cease to be a system because a dishonest servant circumvents it with regard to two only of its many customers, even if he manages to do so successfully for a considerable period of time."

The findings of fact so made by the Court of Appeal were findings which they were entitled to reach upon the evidence before them. Their Lordships can see no ground for interfering with these findings; and accordingly, no other negligence on the part of the Company itself having been adumbrated by the Bank, they can see no basis for departing from the conclusion of the Court of Appeal that this submission advanced on behalf of the Bank must also fail.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellant must pay the respondent's costs.

*Dissenting Judgment delivered by
Lord Brandon of Oakbrook and
Mr. Justice Bisson*

While we agree with the majority of the Board on all other matters we differ from them with great respect on the issue of repugnance between clause 4 and the third sentence of clause 6 (referred to as clause 6(3)) of the terms and conditions contained in the Godown Warrant. The former clause is as follows:-

"4. The Company will delivery (sic) the goods only on surrender of this Godown Warrant endorsed by the party who is for the time being registered in the Company's books as entitled to the goods or against a Delivery Order signed by the said party. Such endorsement or signatures must be written either in English or in Chinese characters by the party so registered as aforesaid or by a person or persons authorised to sign on behalf of the said party and impressed with the chop or stamp of the said party."

That clause is not only one of the terms and conditions of the bailment as between Wallace as bailor and the respondent ("the Company") as bailee, but also of the bailment by attornment between the Company and the appellant ("the Bank"). The purpose of the attornment between the Company and the Bank was to give the Bank security over the goods in respect of its advances to Wallace for the purchase of the goods. While clause 4 might be regarded as regulatory as between the Company and Wallace, it has an added significance for the Bank as its terms give the Bank protection from the Company delivering the goods to Wallace, whose goods they were, without the surrender of the Godown Warrant, held by the Bank, duly endorsed by the Bank, or without a Delivery Order signed by the Bank. This term of the contract is binding on both parties, can be regarded as for their mutual protection and imposes an obligation on the company to deliver the goods "only" on those stated conditions being met.

We turn to clause 6(3) which is as follows:-

"6(3) The Company shall not under any circumstances, be responsible for any loss or damage to the goods resulting from any of its officers, servants, employees, agents, or any other persons whatsoever, dishonestly, negligently or through an error in judgment misdelivering the goods to any person or persons who do not surrender to the Company of (sic) the time of such delivery the requisite Godown Warrant and or Delivery Order.

The Company reserves the right to deliver the goods on surrender of the Godown Warrant and a Delivery Order."

Under clause 4, the Company is obliged to deliver the goods only on the surrender of a Godown Warrant or Delivery Order, respectively endorsed or signed by the Bank to whose order the goods are held. By clause 6(3) the Company is not responsible for delivery of the goods without the surrender to it of the requisite Godown Warrant or Delivery Order. A "requisite" Godown Warrant or Delivery Order is one, in terms of clause 4, either endorsed or signed by the bank as the case may be. It can be seen that clause 6(3) is inconsistent with clause 4 as the former relieves the Company of responsibility for a breach of its obligation under the latter clause. Clause 6(3) is therefore repugnant to clause 4 and must be rejected when these clauses are considered in the light of the facts of this case.

This is not a case in which the goods were in storage and were simply not delivered or were misdelivered in circumstances to which clause 6(3) has no application. There was a misdelivery which fell within the express provisions of clause 6(3) as the following passage from the evidence of Hi Nai Wai, the Counter Supervisor reveals:-

"Q. Bank here is complaining about a release to Wallace without their authority? Can you tell us - did you handle the deliveries made to Wallace?

A. At beginning when I was handling deliveries, the boys in common with other customers telephoned us and asked us to take delivery of goods. There were certain lots of goods held to order of bank. I therefore telephoned Wallace to make enquiries to make sure whether Wallace would be able to supply me with bank release documents on same day. I therefore did not let Wallace take delivery.

Q. But what was Wallace's response to your telecall?

- A. It is because at beginning Wallace promised to supply me with bank release documents to me, so I released goods, nevertheless there was an incident where Wallace did not keep their word, so I did not authorise any further release of goods in such way.
- Q. So - Can you tell us how it came about how further goods were released?
- A. Since I did not release the goods held to the Bank's order, Wallace then telephoned Bosco. Bosco came to me and told me to release goods held to Bank's order both of Wallace and Shun Lee. He said he would be responsible for chasing Wallace and Shun Lee for bank release documents.
- Q. Was this in relation to customers other than Wallace and Shun Lee as well?
- A. No, only these two.
- Q. So what then happened to deliveries of these two?
- A. He told me to release the goods to Wallace and Shun Lee first and he would assume responsibility for getting bank documents later. He would make calculations to see how many packages had been released every day and would be responsible for getting the necessary document back. He also told me in relation to Wallace and Shun Lee I need not refer the matter to him first.
- Q. Did you in fact then do that?
- A. Yes. I told counter clerk that in relation to those two companies that the goods could be released to them. If they had any queries in relation to those companies they could ask Bosco."

The Deputy Judge in the High Court referred to Wallace having undoubtedly conspired with Bosco who aided and abetted his friend, Lam Chung Sam, the owner and sole director of Wallace, wrongfully to obtain possession of the majority of the goods held to the order of the Bank. This fraudulent conspiracy resulted in 800 tons of goods in 42,000 cartons in 15,000 separate incidents over a period of two years being removed from storage without compliance with clause 4. There could not have been more blatant and persistent breaches of the express terms of clause 4 than were committed by the Company through the collusion of Bosco, its Accountant, with the owners of the goods so as to deprive the Bank of its security over the goods.

As the Company can only act through living persons any delivery of goods held by it would be made in terms of clause 4 by or on the authority of its officers or employees. If those same officers or employees misdeliver any goods in terms of clause 6(3), that is, by misdelivering the goods to any person or persons who do not surrender to the Company at the time of such delivery the requisite Godown Warrant and or Delivery Order, the Company is relieved of responsibility for a breach of clause 4 which requires such surrender. These provisions cannot stand together; they cannot be reconciled; they are inconsistent. Where different parts of any instrument, such as these printed terms and conditions, are inconsistent:-

"effect must be given to that part which is calculated to carry into effect the real intention of the parties as gathered from the instrument as a whole, and that part which would defeat it must be rejected."

(See *Chitty on Contracts* 25th Edn. para. 784 p. 429). This principle was stated by Lord Wrenbury delivering the judgment of the Judicial Committee of the Privy Council in *Forbes v. Git and Others* [1922] 1 A.C. 256 at p. 259:-

"The principle of law to be applied may be stated in few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed prevails over the later. Thus if A covenants to pay £100 and the deed subsequently provides that he shall not be liable under his covenant, that later provision is to be rejected as repugnant and void, for it altogether destroys the covenant. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole. Thus if A covenants to pay £100 and the deed subsequently provides that he shall be liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute covenant to pay is controlled by the words qualifying the obligation in manner described.

Furnivall v. Coombes (1843) 5 Man. & G. 736 is an illustration of the former case: *Williams v. Hathaway* (1877) 6 Ch.D. 544 is an illustration of the latter.

In the latter case there could be no question if the later provision of the deed were introduced by the word 'but' or the words 'provided always nevertheless,' or the like. But there is no necessity

to find any such words. If a later clause says in so many words or as matter of construction that an earlier clause is to be qualified in a certain way, effect can be given and must be given to both clauses."

The reference to the document being a deed was not material to the principle there stated. Applying that principle to this contract, clause 6(3) as a matter of construction is not a qualification in a certain way of clause 4. Clause 6(3) states that the Company shall not "under any circumstances" be responsible for misdelivery of goods without surrender of the requisite Godown Warrant or Delivery Order. That which is given in clause 4 is taken away in clause 6(3). As the later clause (6(3)) of the terms and conditions "destroys altogether the obligation created by the earlier clause (4) (on which the Bank relied for its security), the later clause is to be rejected as repugnant and the earlier clause prevails". The loss suffered by the Bank was due to breaches by the Company of clause 4 for which, without clause 6(3), the Company is plainly liable.

Although this issue of repugnancy was not raised in the Court of Appeal, it is germane to the issue which was raised there, namely, whether the exclusion clause 6(3) applied. It was raised by the appellant in the appellant's printed case and does not involve a factual situation not in evidence. Subject to counsel for the respondent objecting to the new point of law being raised, it was fully argued. As was said by their Lordships in *Connecticut Fire Insurance Company v. Kavanagh* [1892] A.C. 473 at p. 480:-

"When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea."

Applying that principle we would permit this new point to be raised and for the reasons stated would advise that the appeal should be allowed.



