12/85

IN THE PRIVY COUNCIL No. 13 of 1982

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN:

GEORGE KALLIS (MANUFACTURERS) LIMITED — Appellant (Plaintiff)

- and -

SUCCESS INSURANCE LIMITED — Respondent (First Named Defendant)

CASE FOR THE APPELLANT

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INTRODUCTION

1. The Appellant ("Kallis") is a company which manufactures jeans in Cyprus. In 1976 Kallis agreed to buy a quantity of denim from a Hong Kong supplier known as Wantex Traders ("Wantex") on CIF terms. Wantex shipped four consignments of denim to Kallis on the same vessel and procured four policies of insurance in respect of these, which were assigned to Kallis with the other CIF documents. These Policies insured the denim against all risks during carriage from warehouse in Hong Kong to warehouse in Limassol. The carrying vessel was named in the Policies as the "TA SHUN". In the event the carrier did not ship the denim in the "TA SHUN" but arranged for carriage to be effected via Keelung in Taiwan, with the denim being carried to Keelung in the "TA HUNG" and there discharged into warehouses for transhipment into another vessel for on-carriage to Limassol. These arrangements did not run smoothly, for the denim remained warehoused at Keelung for over two months, before being loaded aboard the "INTELLECT" for on-carriage to Limassol. When traversing the Malacca Straits the "INTELLECT" took fire, and the denim was rendered a total loss.

2. Underwriters resisted Kallis' claim on many grounds. At first instance, before Mr. Commissioner Mills-Owens Q.C., none succeeded and Kallis obtained judgment. The First

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Defendants ("Success"), who had insured three of the four consignments, appealed to the Court of Appeal. The Second Defendants, who had insured the fourth consignment, did not appeal. The three Members of the Court of Appeal were unanimous in allowing Success' appeal. Leonard J.A. gave no reasons. Sir Alan Huggins, V-P, and Cons J.A. allowed the appeal essentially on the ground that the adventure insured was a voyage from Hong Kong to Limassol and that to set sail for Keelung could not be considered as the first stage of such a voyage. Huggins V-P based his decision upon a finding that a voyage to Limassol via Keelung was so indirect that it could not be brought within the liberties to deviate and to tranship granted by the contract of carriage. Accordingly the destination covered by the Policy, Limassol, was changed to a different destination, Keelung, and the cover did not attach. Cons J.A. held :

p.112.

p.119

> "In the present instance the cargo was taken from Hong Kong by a ship different from that named in the Policies and in a direction almost completely opposed to what one would have expected from the destination specified, with intention to reship on a yet further vessel. In my judgment that is more than a variation of the adventure originally contemplated. It is a completely different adventure."

3. The distance from Hong Kong to Limassol is approximately 6715 nautical miles. The distance from Hong Kong to Keelung is approximately 471 nautical miles. Thus the addition to the distance of the voyage consequent upon proceeding via Keelung amounted to, at most, about 14%. Kallis will submit that the grounds for the decision of the Court of Appeal are plainly unsound and does not expect Success to seek to support the decision of the Court of Appeal solely upon those grounds. Accordingly in this Case Kallis will deal with all the issues that were raised by way of defence before the Court of Appeal.

THE FACTS

4. Pursuant to the Contract of Sale, the letters of credit issued for Kallis' account expressly required that insurance cover should be from "warehouse to Buyer's warehouse in Nicosia against Marine and War Risks, all risks as per Institute Cargo Clauses." The Policies procured and now sued upon were accordingly on warehouse to warehouse terms and bore a stamped indorsement

pp.126,129

incorporating the Institute Cargo Clauses (All Risks) 1/1/63. RECORD

5. Wantex contracted for the carriage of the denim with Blue Sky Shipping Company Limited ("Blue Sky") through Blue Sky's agents, Seawise Shipping Company ("Seawise"). The contracts were concluded by the completion by Wantex of shipping orders which were addressed to the Commanding Officer of m.s. "TA SHUN" and were indorsed with receipts by Seawise. These delivery orders stated : pp.242-5

> "Terms and conditions as per Carrier's Bill of Lading."

6. Subsequently, on payment of freight by Wantex, Bills of Lading were issued. The Bills of Lading acknowledged that the goods had been received for shipment aboard the "TA SHUN", but each one bore a stamp "Shipped on board". Each Bill of Lading bore the heading "Blue Sky Shipping Co. Limited" and was signed by Seawise Shipping Co. for and on behalf of the Master. pp.135, 162, 174

7. In or about the second week of August Wantex presented the CIF documents and obtained payment under the letters of credit.

8. The statements in the "TA SHUN" Bills of Lading that the goods had been shipped on board were false. In the event the "TA SHUN" did not call at Hong Kong and the goods were loaded on board the "TA HUNG", a more modern vessel in the same ultimate beneficial ownership as the "TA SHUN". A single Bill of Lading was issued on the 16th August 1976 in respect of all four consignments. The shipper was named as Seawise Agency Limited and the consignee as Blue Sky Shipping Co. Limited. The description of goods was headed : p.181

> "Transhipment from Hong Kong to Mediterranean Sea via Taiwan"

and stated :

> "Cargo to be transit to Mediterranean Sea at Taiwan by consignee themselves at their own risks and expenses."

9. The goods were discharged at Keelung on about 20th August 1976 and reshipped aboard the "INTELLECT" on or about 10th November 1976. The "INTELLECT" sailed from Taiwan on 16th November 1976, called at Hong Kong, and on 19th

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November 1976 sailed for the Mediterranean via the Suez Canal. On 27th November 1976, while in the Malacca Straits, the "INTELLECT" took fire. Although Kallis' goods were not affected by the fire, they were so saturated with sea water and fuel oil as to be rendered a total loss.

10. Success contended that Blue Sky improperly sent the goods to Keelung in order to hold them to ransom for additional freight. The Commissioner rejected this contention and found that Blue Sky intended that the goods should be transhipped for on-carrying at Keelung and the Court of Appeal upheld this finding.

11. The major issues that arise in this case involve consideration of the interelation of sections 44 and 45 of the Marine Insurance Ordinance Cap. 329, the provisions of which are the same as the English Marine Insurance Act 1906, and clauses 1, 2 and 4 of the Institute Cargo Clauses 1/1/63. For convenience these are now set out.

Marine Insurance Ordinance

S.44. "SAILING FOR DIFFERENT DESTINATION -

> Where the destination is specified in the Policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach."

S.45. "CHANGE OF VOYAGE -

> (1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the Policy, there is said to be a change of voyage.
>
> (2) Unless the Policy otherwise provides, where there is a change of voyage the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested ....."

Institute Cargo Clauses

> "1. This insurance attaches from the time the goods leave the warehouse or place of storage at the place named in the Policy for

the commencement of the transit, continues during the ordinary course of transit and terminates either on delivery (a) to the Consignee's or other final warehouse or place of storage at the destination named in the Policy, (b) to any other warehouse or place of storage, whether prior to or at the destination named in the Policy, which the Assured elect to use either :

(i) for storage other than in the ordinary course of transit or

(ii) for allocation or distribution or

(c) on the expiry of 60 days after completion of discharge overside of the goods hereby insured from the oversea vessel at the final port of discharge, whichever shall first occur ... This insurance shall remain in force (subject to termination as provided for above and to the provisions of Clause 2 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to Shipowners or Charterers under the Contract of Affreightment, but shall in no case be deemed to extend to cover loss, damage or expenses proximately caused by delay or inherent vice or nature of the subject matter insured.

2. If owing to circumstances beyond the control of the Assured either the Contract of Affreightment is terminated at a port or place other than the destination named therein or the adventure is otherwise terminated before delivery of the goods as provided for in Clause 1 above, then subject to prompt notice being given to Underwriters and to an additional premium if required, this insurance shall remain in force .....

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4. Held covered at a premium to be arranged in case of change of voyage, or of any omission or error in the description of the interest vessel or voyage."

THE ISSUES

12. The following issues are likely to arise on this appeal :

(i) Did the goods come on risk and the insured transit begin? If so :

(ii) Did the cover cease because the goods were not shipped on the "TA SHUN"?

(iii) Did the cover cease because of any of the events that occurred between the sailing of the "TA HUNG" and the loss of the goods?

(iv) Were the goods held covered under clause 4 of the Institute Cargo Clauses?

(v) Was there material non-disclosure entitling Success to avoid the Policies of Insurance?

Did the goods come on risk?

13. Success argued that the ship sailed for a destination other than that specified in the Policy and that, in consequence, the risk did not attach by virtue of S.44 of the Ordinance. The Commissioner rejected this contention. He held that the commencement of the risk was governed by Clause 1 of the Institute Cargo Clauses and that section 44 of the Ordinance was not relevant. The purpose of the clause was to ensure that cargo owners' interests were covered from the moment of despatch for shipment. In this case the goods were despatched for shipment by the intended carrying vessel to the named destination. In these circumstances the risk attached when the goods left the warehouse for the docks.

p.75

p.111-112 14. Sir Alan Huggins V-P disagreed. He held that clause 1 dealt with the time at which the risk attached, if it attached at all. If the ship sailed for a destination other than that specified in the Policy, the risk would never attach. The warehouse to warehouse clause was incidental to the Marine Policy. Although this posed difficulties for an assured, it would be wrong that the warehouse to warehouse clause should bind the Insurer to cover the goods on a

voyage wholly different from that contemplated. RECORD

15. Cons J.A. held that door to door coverage was not the adventure contemplated by the Policies. The adventure was basically a marine transaction and the inclusion of the warehouse to warehouse clause, described as an "additional frill" did not change the basic nature of the transaction. It necessarily followed that if a loss occurred during land carriage of goods booked upon a ship which ultimately did not call, the loss would not be covered by the policy. It was for exporters to guard against such circumstances separately. p.119 p.120

16. Kallis submits that the approach of the Commissioner is to be preferred to that of the Court of Appeal for the following reasons :

(i) There is a conceptual difficulty in postulating that the assurance attaches from the time the goods leave the inland warehouse but that the risk does not attach at all if, subsequently, the vessel sails for a different destination.

(ii) The lacuna in cover that would follow if the Court of Appeal is correct is contrary to the commercial objects underlying "All Risks" cover. Mustill J. correctly summarised the position when he stated in Shell Petroleum Ltd. v. Gibbs [1982] 2 Q.B.946 at p.959B:

> "If the assured wishes to have a seamless cover, insuring against all forms of fortuitous losses in transit, he can obtain it by insuring on the terms of the Institute Cargo Clauses (All Risks)."

(iii) The Marine Insurance Act 1906, and the Ordinance, codified the existing common law by means of a single code, designed to cover marine insurance of ship, cargo and freight. Clauses 42 to 49, which deal with the voyage, are appropriate in a case where the assured is in control of the voyage, i.e. where he is the shipowner, as was usually the position in the early days of insurance. They are inappropriate to meet the needs of the cargo owner, which are catered for by the Institute

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Cargo Clauses. Where these Clauses conflict with the provisions in the Ordinance which relate to the voyage, they (the Clauses) should be given precedence.

17. For the above reasons Kallis submits that the goods came on risk when despatched by Wantex from the warehouse to the Seawise godown for carriage to Limassol on the "TA SHUN". The issue raised by the unusual facts of this case is not whether cover commenced but whether it terminated before the casualty.

Did the cover cease because the goods were not shipped on the "TA SHUN"?

18. Success argued that it was a condition of the contracts of insurance that the goods should be shipped in the named vessel. Kallis challenge this contention on two grounds :

(i) The Policies permitted shipment in a substitute vessel by virtue of Clause 1 of the Institute Cargo Clauses;

(ii) In any event, shipment aboard the named vessel was not a condition of the Policies.

p.81 The Commissioner accepted the first argument and thus found it unnecessary to deal with the second argument, although expressing the view that there
p.81 seemed to be considerable substance in it.
p.114 Sir Alan Huggins V-P did not consider the identity of the vessel alone to be vital. Cons J.A. held that shipment in a vessel other than the one named in the Policies was one of the factors which took the goods outside the cover of the Policies.

Clause 1

19. Clause 1 of the Institute Cargo Clauses provides that the insurance shall remain in force "during any variation of the adventure arising from the exercise of a liberty granted to shipowners or charterers under the Contract of Affreightment". The terms of the Blue Sky Bill of Lading, which terms govern the Contract of Affreightment, included the following :

> "13. The Carrier shall have liberty to forward any or all the goods described herein to their destination by the above or any other vessel, by rail or any other conveyances belonging either to it or any other company or individual, by any route

> direct or indirect, and at vessel's option, to tranship at any place or places to any other vessel, vessels or means of transportation, or to land or store, or to discharge the goods at any other port or place, or to put into hulk, craft or lighter, to reship in the same or other vessel proceedings by any route, or to forward by lighter, rail or any other conveyance, whether departing or arriving or scheduled to depart or arrive before or after the vessel named herein and always subject to the conditions and exception of the forwarding conveyance and at the risk of the shipper, consignee and/or owner of the goods, and the vessel and/or carrier shall not be liable for the risk of transhipment, landing, storing, discharging or reshipment, and also the carrier shall have liberty to retain the goods on board until the vessel's return or other voyage, to proceed to any other ports or places with full liberty to return, call, deviate, delay or stay as elsewhere in this Bill of Lading provided, at any place or places even though outside the scope of the voyage or the route to or beyond the port of destination."

20. Shipping in a substitute vessel fell within the liberties granted under the above clause and consequently could not, of itself, bring the cover afforded by the Policies to an end.

Shipment in the named ship not a condition of the Policy

21. It is submitted that, where goods are insured, shipment in the named vessel is not automatically a condition of the policy. Clause 1 of the Institute Cargo Clauses permits transhipment so that the goods insured may in any event be carried in a vessel the identity of which Underwriters are unaware. Underwriters could only establish that shipment in the named vessel was a significant element in the contract by calling evidence to establish this. They did not do so.

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Events after shipment

22. The Commissioner accepted Kallis' contention that everything which occurred to the goods prior to their loss fell within the liberties afforded by the Contract of Affreightment and thus within the cover by virtue of clause 1 of the Institute Cargo Clauses. On appeal Success challenged the Commissioner's conclusions on the following grounds :

(i) The liberties granted by Clause 13 of the Blue Sky Bill of Lading were not granted to "Shipowners or Charterers under the Contract of Affreightment" and thus did not fall within Clause 1 of the Institute Cargo Clauses.

(ii) The deviation to and transhipment at Keelung did not fall within the liberties granted by Clause 13;

(iii) The insured adventure terminated at Keelung.

Liberties not granted to Shipowners or Charterers

23. Cons J.A. said that this was a point of
p.121 considerable difficulty and did not decide it. It is submitted that the point is neither difficult nor valid. The contract of carriage gave liberties to the carrier. The carrier was Blue Sky. The facts before the Commissioner raised the implication that Blue Sky were, at least, disponent owners of the "TA SHUN" under a charter. The "TA HUNG" was in the same beneficial ownership. The liberties granted by Clause 13 of the Blue Sky Bill of Lading were plainly granted to shipowners or charterers under the Contract of Affreightment.

Deviation and transhipment not within the liberties

24. Success contended that the liberties granted by the Contract of Affreightment must be construed having regard to the overall commercial adventure provided for under the contract of carriage. A deviation to and transhipment at Keelung could not be brought within the commercial adventure of carriage from Hong Kong to Limassol. In consequence, applying the principle in Glynn v. Margetson [1893] A.C. 351 what was done to the goods did not fall within the liberties granted by Clause 13.

25. Sir Alan Huggins V-P accepted Success' argument. He held that Clause 13 "could not be

construed as permitting forwarding by a route so indirect as that taken by the "TA HUNG". Cons J.A. took a somewhat different approach. He held that it was unnecessary to decide whether or not the carriage arranged for the goods fell within the liberties granted by Clause 13. He held that, even if one assumed that they did, what happened to the goods could not properly be described as a "variation of the adventure". Therefore, so he reasoned, Clause 1 of the Institute Cargo Clauses did not apply.

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26. Kallis submits that the Court of Appeal were wrong to consider that carriage which involved transhipment at Keelung fell outside the scope either of the commercial adventure contemplated by the Contract of Affreightment or of the adventure contemplated by the Policies of Insurance. Sir Alan Huggins V-P spoke of "forcing upon the Insurer a risk out of all proportion to that which was originally contemplated by the parties". Cons J.A. spoke of carriage via transhipment at Keelung as constituting "a completely different adventure". No reasoning is given for these conclusions nor any reference made to the authorities which cover this area of the law. Kallis submits that the careful reasoning of the Commissioner is to be preferred. There were no valid grounds upon which the Court of Appeal could upset the finding of the Commissioner :

p.113 p.119 pp.85-90 p.88

> "The cargo was not a cargo of perishable goods. On the evidence there were relatively few sailings direct from Hong Kong to Limassol and in my view the purpose of carriage to Keelung was not inimical to the Contract of Affreightment but was rather for the purpose of transhipment and on-carriage to Limassol."

The adventure terminated at Keelung

27. Success argued that the Contract of Affreightment and thus the insured adventure terminated at Keelung for one or more of the following reasons :

(i) The adventure was frustrated;

(ii) The contract terminated by virtue of repudiatory breach by the carrier;

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(iii) By virtue of Clauses 13 and 14 of the Bill of Lading the Contract of Affreightment terminated upon transhipment to another vessel.

28. It is submitted that the Commissioner rightly rejected the arguments based upon
pp.98, 99 frustration and repudiation. The argument based upon Clauses 13 and 14 of the Bill of Lading was only advanced on appeal and the Court of Appeal found it unnecessary to deal with it. 10

29. Clause 13 of the Bill of Lading after dealing with the liberty to tranship, provides :

> "When the goods leave the vessel's tackle, or deck, as herein provided, the delivery thereof and any performance under this contract shall be considered complete and the vessel and/or carrier shall be considered free from any further responsibility in respect thereof." 20

Clause 14 provides :

> "The liability of the vessel and/or carrier for any alleged loss of or damage to any goods shall be confined to its own route, and the vessel and/or carrier shall not be liable jointly or to any extent for any loss or damage occurring upon the route of any other connecting carriers, even though the freight for the whole transport has 30 been collected by this company. A delivery at the port of transhipment from the vessel's tackle, or deck, of the goods, enumerated in this Bill of Lading according to the terms hereof to the connecting carrier shall absolve the vessel and/or carrier from all claims or liabilities of every description. The carrier in making arrangements for any transhipping or forwarding vessel or 40 means of transportation not operated by this carrier shall be considered solely the forwarding agent of the shipper consignee and/or owner of the goods and without any other responsibility whatsoever."

Kallis submits that this provision did not result in the termination of the insured adventure at Keelung, for the reasons that appear below.

30. Insofar as the provision set out above 50 purported to absolve the carrier from all liability

for carriage of the goods to their destination it was rendered null, void and of no effect pursuant to Article III, Rule 6 of the Hague Rules (incorporated by clause 1 of the Bill of Lading and by the Carriage of Goods by Sea Ordinance).

31. If, contrary to the above submission, the carrier was entitled to arrange a substitute contract of carriage in respect of part of the voyage that he had undertaken to effect, such substitution did not terminate the adventure insured.

Were the goods held covered?

32. This question only arises if, contrary to Kallis' primary submission, there was a "change of voyage" as a result of committing the goods for carriage to Limassol via Keelung. The material facts in relation to this issue can be shortly summarised as follows :

(i) Wantex became aware of the fact that the goods had been shipped to Keelung for transhipment to Limassol after property in the goods had passed to and the contracts of insurance been assigned to Kallis but before the goods were lost. Wantex did not give notice of the facts that they had discovered to Underwriters.

(ii) Kallis only discovered of the shipment via Keelung at or about the time that the goods were lost.

33. A note to the Institute Cargo Clauses provides :

> "It is necessary for the Assured when they become aware of an event which is "held covered" under this insurance to give prompt notice to Underwriters and the right to such cover is dependent upon compliance with this obligation."

If Wantex remained under an obligation to give such notice after the assignment of the Policies, Kallis could not claim to be held covered as a result of the change of voyage. If, on the other hand, the obligation to give prompt notice passed from Wantex to Kallis with the assignment of the Policies, Success could not refuse to hold Kallis covered on the ground that prompt notice had not been given of the change of voyage.

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34. No authority exists as to whether the obligation to give prompt notice in a held covered situation passes from the assignor to the assignee of a policy of insurance. It is submitted that, on principle, it must. Under Clause 4 of the Institute Cargo Clauses goods are held covered "at a premium to be arranged". It is submitted that, after assignment of the Policy, the arrangement will be made with the assignee who will be liable to pay the additional premium. Similarly it is the assignee who must give prompt notice that he requires to be covered.

Non-disclosure

35. The disclosure which it is alleged ought to have been made was that the goods were never shipped on "TA SHUN" at all. The Commissioner found that the agents of Wantex believed the statement of the vessel's agents that the goods had been shipped on board, and were entitled to accept that statement at its
p.94 face value. This was so despite evidence that larger organisations would have checked the Shipping Lists. Sir Alan Huggins V-P agreed. Cons J.A. also agreed, but stated that the Commissioner was not entitled to draw a distinction between a large and small organisation.

36. Kallis adopts the reasoning of the learned Commissioner and Huggins V-P. Kallis further submits that the matters which the assured ought to know in the ordinary course of business pursuant to section 18 of the Ordinance must depend, in part, upon the size of that business.

CONCLUSION

37. Kallis therefore submits that the Order of the Court of Appeal of Hong Kong was wrong and that the Appellant's appeal should be allowed with costs for the following among other

R E A S O N S

(1) BECAUSE the goods came on risk and the insured transit commenced when they were despatched for carriage on the "TA SHUN".

(2) BECAUSE carriage on the "TA HUNG" was covered by the Policy.

(3) BECAUSE the goods remained covered notwithstanding carriage to Keelung, discharge to warehouse at Keelung and transhipment to the "INTELLECT" for on-carriage.

(4) ALTERNATIVELY BECAUSE the goods were held covered under Clause 4 of the Institute Cargo Clauses.

(5) BECAUSE there was no material non-disclosure.

(6) BECAUSE the Judgment of Mr. Commissioner Mills-Owen Q.C. in the Supreme Court of Hong Kong was correct, and the Judgment of the Court of Appeal of Hong Kong was wrong.

NICHOLAS PHILLIPS Q.C.

PAUL WALKER

IN THE PRIVY COUNCIL No. 13 of 1982

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O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

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B E T W E E N :

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| GEORGE KALLIS (MANUFACTURERS) LIMITED | Appellant (Plaintiff) |
| - and - | |
| SUCCESS INSURANCE LIMITED | Respondent (First Named Defendant) |

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# CASE FOR THE APPELLANT

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