39/79

IN THE PRIVY COUNCIL No. 10 of 1978

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION

BETWEEN:

SOUTH COAST BASALT PTY. LIMITED and
PIONEER CONCRETE (N.S.W.) PTY. LIMITED — Appellants (Plaintiffs)

– and –

R.W. MILLER AND CO. PTY. LIMITED — Respondent (Defendant)

AND BETWEEN:

HETHKING STEAMSHIPS PTY. LIMITED — Appellant (First Cross Defendant)

– and –

R.W. MILLER AND CO. PTY. LIMITED — Respondent (Cross Claimant)

(Consolidated by Order dated 22nd September 1977)

CASE FOR APPELLANT HETHKING STEAMSHIPS PTY. LIMITED

NORTON, ROSE, BOTTERELL & ROCHE,
Kempson House,
Camomile Street,
LONDON. EC3A 7AN.

Solicitors for the Appellant,

Hethking Steamships Pty. Limited

IN THE PRIVY COUNCIL No. 10 of 1978

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION

BETWEEN:

SOUTH COAST BASALT PTY. LTD. and
PIONEER CONCRETE (N.S.W.) PTY. LTD. Appellants
(Plaintiffs)

- and -

R.W. MILLER AND CO. PTY. LTD. Respondent
(Defendant)

AND BETWEEN:

HETHKING STEAMSHIPS PTY. LTD. Appellant
(First Cross-Defendant)

- and -

R.W. MILLER AND CO. PTY. LTD. Respondent
(Cross-Claimant)

(Consolidated by Order dated 22nd September 1977)

CASE FOR APPELLANT
HETHKING STEAMSHIPS PTY. LIMITED

Nature of Proceedings RECORD

1. This is an appeal as of right by Hethking Steamships Pty. Limited, the Cross Defendant (third party) from a judgment entered by the Supreme Court of New South Wales (Yeldham J.) 697(27)

for the Plaintiff, South Coast Basalt Pty. Limited, against the defendant, R.W. Miller & Co. Pty. Limited for $163,408.16 damages for breach of a contract of carriage by sea, and from a judgment
698(27) entered for R.W. Miller against Hethking for damages in the same amount for breach of a time charter party.

2. The appeal by Hethking raises two principal questions:-

(i) The nature of the warranty of cargo worthiness given by a sea carrier to a shipper of bulk cargo in circumstances where unknown to the carrier serious damage will result to the shipper if even a small quantity of a particular substance becomes mixed with the cargo. This question arises on the appeal in respect of the judgment entered in favour of South Coast Basalt against Miller.

(ii) Whether damage is too remote when a breach of contract by a carrier causes a small quantity of some substance to become mixed with a bulk cargo and the damage results from a chemical property of that substance which was not known to the carrier and which he could not have been expected to know. This question arises on the appeal in respect of the judgment entered in favour of South Coast Basalt against Miller and in respect of the judgment entered in favour of Miller against Hethking.

RECORD

3. On 3rd October 1974 Hethking time chartered the "M.V. Cobargo" to Miller for the carriage of bulk cargoes in voyages on the New South Wales coast, but the parties contemplated that only bulk cargoes of coal and aggregate (crushed basalt) would be carried under the charter. 535 (30-33); 384(33)-385(11)

4. Prior to this charter the vessel had carried cargoes of bulk raw sugar, and at the commencement of the charter some sugar remained in the holds adhering to exposed surfaces and behind timber cladding. 535 (40-44); 545 (9-19); 547 (15-32)

5. On voyage No. 28 under the charter the vessel carried a cargo of wet coal. Sugar mixed with fine coal and aggregate blocked the bilge lines in the afterhold, and the bilge pumps where therefore unable to pump out that hold. As a result water was lying in the bottom of that hold when the vessel proceeded on voyage no. 29 to take on a cargo of aggregate at Bass Point for carriage to Sydney. 550(43)-551(4); 555(39)-556(21); 551 (5-13)

6. Some of the aggregate loaded into the afterhold came in contact with the water in the bottom of that hold, which contained dissolved sugar. 551 (21-25); 544 (8-22)

7. The aggregate carried on that voyage was later used as an ingredient in ready mixed concrete. 544 (8-15)

RECORD

545(2-5) 8. A minute quantity of sugar in ready mixed concrete, from as little as 1 part to 10,000 parts of dry cement by weight, will retard or inhibit the chemical changes which ordinarily take place in ready mixed concrete which cause it first to set and then to harden. Ready mixed concrete

262 (12-17) ordinarily contains approximately 12½% by weight of dry cement.

9. Miller and Hethking both knew that the

562 (13-25); 565 (2-6); 652 (8-11); 653 (26-30) aggregate would be used as an ingredient in ready mixed concrete, but at all material times neither knew of the relevant property of sugar and the effect it has on ready mixed concrete.

652 (15-21); 653 (26-30) 10. The trial judge found that this property of sugar and its effect on ready mixed concrete were not matters which should have been known to Miller. He made no express finding to this effect so far as Hethking was concerned, but there is no evidence to support such a finding, and Hethking's position in this regard is a fortiori to that of Miller.

694 (34-43) 11. The Plaintiff sold aggregate carried by the "Cobargo" on voyage no. 29 to companies which used it for the production of ready mixed concrete which they sold and delivered to their customers for use in building work.

568(38)-569(27) 12. Ready mixed concrete made from aggregate which had been in contact with dissolved sugar in the

afterhold of the "Cobargo" failed to set and harden satisfactorily and claims were made by the buyers against the suppliers, who in turn claimed against the Plaintiff.

13. On 22nd June 1973 the Plaintiff had entered into a contract with Miller whereby Miller agreed to carry cargoes of aggregate by sea from the Plaintiff's quarry at Bass Point to Sydney. Miller had chartered the "Cobargo" from Hethking inter alia to enable it to perform its obligations to the Plaintiff under the contract of 22nd June 1973. 703 and 725 384(33)-385(11)

14. The cargo of aggregate carried by the "Cobargo" on voyage no. 29 on 15th November 1974 from Bass Point to Sydney was therefore carried in performance by Hethking of its obligations to Miller under the charter party of 3rd October 1974, and Miller in turn employed the "Cobargo" for that voyage to discharge its obligations to the Plaintiff under the contract of 22nd June 1973.

15. The Plaintiff brought an action for damages against Miller suing for breach of the contract of 22nd June 1973. Miller raised a cross claim against Hethking for breach of the charter party of 3rd October 1974. 1-11 12-17

16. Yeldham J. upheld the claim by the Plaintiff against Miller for breach of contract and entered judgment for the Plaintiff for $163,408.16. 697(27)

17. His Honour's findings on the liability of Miller to the Plaintiff were as follows:-

RECORD

598(34)-599(24) (i) The contract of carriage of 22nd June 1973 contained an implied warranty that vessels to be employed under it for the carriage of aggregate would be seaworthy in the sense of being cargoworthy.

605 (24-41) (ii) Breach of the warranty because of the condition of the afterhold of the "Cobargo" on 15th November 1974.

615 (10-13); 695 (28-31) (iii) Damage to the Plaintiff caused in fact by such breach, and

620 (4-15) (iv) Such damage was not too remote.

18. In its appeal Hethking challenges the finding that Miller was in breach of the implied warranty of cargoworthiness and the further finding that the damage suffered by the Plaintiff was not too remote.

698(27) 19. His Honour further found that Hethking was in breach of the charter party of 3rd October 1974 and by virtue of that breach was bound to indemnify Miller against the damages awarded to the Plaintiff. His Honour's findings on the liability of Hethking to Miller were as follows:-

655(38)-656(1) (i) The charter party of 3rd October 1974 contained an express warranty by Hethking in the following terms:

RECORD

"The Owners to provide and pay for all provisions and wages, for insurance of the vessel, for all deck and engine-room stores and maintain her in a thoroughly efficient state in hull and machinery during service,"

(ii) Breach by Hethking of such warranty because of the state of the bilge lines from the afterhold of the "Cobargo" at the commencement of loading for the 29th voyage on 15th November 1974, — 668 (22-28)

(iii) Damage to Miller caused in fact by such breach viz. its liability to the Plaintiff, — 693 (5-10)

(iv) Such damage was not too remote. — 692(41)-693(5); 693 (10-17)

20. In its appeal against the judgment in favour of Miller Hethking challenges the finding that Miller in fact suffered damage as a result of the breach of warranty, and the further finding that such damage was not too remote.

FIRST SUBMISSION:

NO BREACH BY MILLER OF IMPLIED WARRANTY OF SEAWORTHINESS

21. It is submitted that Hethking is entitled to

appeal against the judgment for the Plaintiff against Miller; see Helicopter Sales (Australia) Pty. Limited v. Rotor-Work Pty. Limited & Anor (1974) 132 C.L.R. 1, and Asphalt & Public Works Ltd. v. Indemnity Trust Ltd. (1969) 1 Q.B. 465 (C.A.). Alternatively, Hethking submits that the judgment entered in favour of Miller against Hethking should be set aside on the ground that Miller has not established its liability to the Plaintiff as an element in its claim for indemnity against Hethking.

22. There is no dispute that the contract of carriage of 22nd June 1973 contained an implied term that vessels employed under that contract would be seaworthy at the commencement of each voyage.

23. The aspect of the implied warranty of seaworthiness that is in issue in the present appeal is cargoworthiness, that is to say, the fitness of the vessel for "the reception and carriage of the particular goods in question;" per Viscount Finlay in Elder Dempster & Company Limited v. Paterson Zochonis & Company Limited (1924) A.C. 522 at 536.

24. In our submission Yeldham J. misunderstood the extent of the carrier's implied warranty of cargoworthiness. His Honour said:

605 (2-23)

> "....(Miller) has not been shown to have any actual knowledge of the likelihood that sugar, which lay primarily beneath the ceiling boards and the hopperings, would dissolve in the water and in that way possibly affect aggregate loaded into the hold. But as

seaworthiness, in the sense to which I have referred, is warranted by the carrier, its ignorance of the actual state of affairs does not afford any answer to a claim based upon breach of that warranty.

The likely effects of even small quantities of sugar upon aggregate to be used in making concrete were at all material times well known to those concerned with its manufacture and they plainly emerge from a reading of the S.A.A. Code. Notwithstanding its lack of actual knowledge as to the likely effect of sugar in solution I am of the opinion, in the light of the authorities, that this ignorance does not entitle the defendant to assert that the ship was seaworthy."

25. Hethking does not challenge His Honour's conclusion that the carrier's ignorance of the physical condition of the vessel was irrelevant. However, it is submitted that His Honour fell into error when he held that the knowledge which the carrier had or ought to have had of the cargo was not relevant in defining the nature and extent of the carrier's obligations under the implied warranty of cargo worthiness. 605 (2-12) 605 (13-23)

26. It is submitted that the law is correctly stated in Carver, Carriage by Sea, 12th edition at para. 109:

"But the duty to supply a seaworthy ship is not equivalent to a duty to provide one that is perfect and such as cannot break down except under extraordinary peril. What is

meant is that she must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it. To that extent the shipowner, as we have seen undertakes absolutely that she is fit; and ignorance is no excuse. If the defect existed, the question to be put is: would a prudent shipowner have required that it should be made good before sending his ship to sea, had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking.

The statement of the law contained in the preceding paragraph was quoted with approval by Channell J. in McFadden v. Blue Star Line (1905) 1 K.B. 697 where it was held that a defect in the packing of the valve chest existing before the goods were loaded, was sufficiently substantial to render the ship unseaworthy.

The required standard of seaworthiness is not absolute. It is "relative, among other things, to the state of knowledge and the standards prevailing at the material time;" per Lord Sumner in F.O. Bradley v. Federal Steam Navigation Company Limited."

27. A carrier's warranty that the ship is reasonably fit is absolute in the sense that his obligation is not merely to take reasonable care to provide a ship that is reasonably fit, but is to provide a ship that is in fact reasonably fit.

However there remains the question: Reasonably fit for what?

28. In F.O. Bradley & Sons Ltd. v. Federal Steam Navigation Co. Ltd. (1927) 27 Ll. L.R. 395, Lord Sumner at 399 stated the relative obligations of shipowner and cargo owner as follows:

> "When the common law makes the ship bear the risks of the voyage and of all that may happen to the cargo in the course of it, but excepts the act of God, the King's enemies and inherent vice, the scheme is evident. The act of God and the King's enemies neither party can wholly guard against, so the loss lies where it falls. For the rest, the carrier answers for his ship and men, the cargo owner for his cargo. The carrier has at least some means of controlling his crew and has full opportunity of making his ship seaworthy, but of the cargo he knows little or nothing and, as the shipper has the advantage over him in this respect, he must bear the risks belonging to the cargo."

29. The speeches in Albacora S.R.L. v. Westcott Laurance Line Ltd. (1966) 2 Ll.L.R.53, are to the same effect. Lord Reid said at p. 58:

> "In my opinion, the obligation is to adopt a system which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods. And if that is right, then the respondents did adopt a sound system. They had no reason to suppose that the goods required any different

> treatment from that which the goods in fact received. That is sufficient to dispose of the appellants' case on breach of contract."

Lord Upjohn said at 62:

> "They neither knew nor ought to have known of any further special requirements as to the safe carriage of the consignment."

Lord Pearson said at 64:

> "In the circumstances of this case, as the respondents had no reason to know of or suspect the special risks attending the carriage of this fish in warm weather, they were entitled to carry it in the ordinary way, as they did."

30. These two cases concerned a carrier's obligations to a cargo owner under contracts of carriage evidenced by bills of lading but in our submission the principles stated are fully applicable to the contract of carriage between the Plaintiff and Miller of 22nd June 1973.

31. It is submitted that the correct answer to the question posed in paragraph 27 is that the vessel should be in a condition which a reasonably prudent carrier would regard as fit to receive and carry the particular cargo under the contract having regard to the risks of damage to that cargo which were known or ought to have been known to the carrier.

32. Yeldham J.'s findings that Miller did not

know and could not reasonably have known of the effect of sugar on concrete, are stated in the following passage:

"It is clear from the evidence that whilst the seriousness of the consequences which would probably flow from the presence of even quite small quantities of sugar in concrete, or in aggregate to be used in the making of concrete, would and should be known to engineers and chemists with experience in that industry, and probably also to some non-technical personnel similarly so engaged, it would not, in general, be knowledge possessed by others and certainly was not known to any-one called either by the defendant or the cross-defendant in the present case." 564(37)-565(6)

"It is apparent that any person of reasonable common sense would be aware that sugar was not a normal ingredient of concrete. But in my opinion no such person of common sense, with knowledge of the presence of sugar in the quantities and the places where it exist-ed in the afterhold of the "Cobargo", would anticipate or expect that it might deleter-iously affect concrete or that it would be likely, by reason of the presence of water, to ultimately find its way at all into the concrete mix." 652 (39-49)

"The defendant did not know that sugar would be likely to have any deleterious effect upon concrete and in my opinion this was not knowledge which it was required to possess or ascertain." 653 (26-30)

RECORD

33. In our submission the trial judge correctly stated the question on the breach issue as follows:-

602(37) 603(7)

> "The question for determination in the present case is whether the presence of water and of sugar in the afterhold, either separately or as a solution rendered the vessel, in the relevant sense as defined by the authorities to which I have referred, "unseaworthy". As the warranty is an absolute one, ignorance on the part of R.W. Miller of the presence of water or of the sugar or of both does not absolve it from liability. But the principal question is whether, in the state of knowledge then existing, a prudent carrier by sea, assuming he knew of the presence of the matters to which I have referred would have required that they should be removed before permitting the cargo of aggregate to be loaded."

34. It is submitted that in view of his findings referred to in paragraph 32 hereof His Honour ought to have found that there had been no breach of the implied warranty of cargoworthiness.

35. In our submission His Honour proceeded further into error in the following passage:

605 (24-40)

> "Upon a consideration of the evidence as a whole I conclude that at the time of receipt of the cargo in question into the afterhold of the "Cobargo" the vessel was not fit for cargo of any kind by reason of the presence of sugar dissolved in water, this being

foreign matter not normally found in a ship's hold, and hence it was unseaworthy. Certainly the standards prevailing at the time did not permit a carrier, whose ship had in its hold the quantity of sugar mixed in water which could not be removed which was in the "Cobargo", to rely upon ignorance of its actual effect on cargo, whether basalt or otherwise, in answer to an allegation of unseaworthiness. Consequently I find that the defendant was in breach of the implied warranty of seaworthiness ...."

36. The finding that the presence of water containing dissolved sugar in the afterhold rendered the ship "not fit to carry a cargo of any kind" is not supported by the evidence. There was evidence which His Honour accepted that sugar has no harmful effect on coal. Moreover there is no evidence that aggregate which has been in contact with water containing dissolved sugar is unfit for other uses such as for road base or as back-fill for trenches, or that bulk cargoes such as iron ore would have been affected either. 566(36)-567(14)

37. The finding that the sugar and water present in the afterhold of the "Cobargo" infringed "the standards prevailing at the time" is irrelevant if it refers to the standards governing the carriage of cargo other than bulk aggregate and if it refers to the carriage of bulk aggregate the finding is wholly unsupported by evidence. There is no evidence that at the time of the voyage in question there was any special standard which determined the manner in which cargoes of bulk 605 (31-38)

aggregate should be carried.

38. In our submission therefore His Honour's finding that Miller was in breach of their implied warranty of cargoworthiness should be set aside.

SECOND SUBMISSION : DAMAGE SUFFERED BY PLAINTIFF TOO REMOTE

39. In our submission the trial judge also fell into error in holding that the damage suffered by the Plaintiff was not too remote.

40. A basic principle in this branch of the law was stated by Asquith L.J., in the Victoria Laundry case (1949) 2 K.B. 526 at 539 where he said that although the purpose of an award of damages for breach of contract was to place the injured party in the same position, so far as money can do, as if his rights had been observed "this purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable" and that in contract this was recognised as being too harsh a rule.

41. The scope of protection afforded by the law was summarised by Lord Reid in Koufos v. Czarnikow (1969) 1 A.C. 350 at 385 as follows:

> "In cases like Hadley v. Baxendale; .... or the present case it is not enough that in fact the plaintiff's loss was directly caused by the defendant's breach of contract. It clearly was so caused in both. The crucial

question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."
Emphasis supplied)

42. The second and third propositions of Asquith L.J. in the Victoria Laundry case (1949) 2 K.B. 528 at 539 as modified by the House in Koufos v. Czarnikow (1969) 1 A.C. 350 are also relevant:

"(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract (in the contemplation of the parties as not unlikely) to result from the breach.

(3) What was at that time (in the contemplation of the parties as not unlikely to result) depends on the knowledge then possessed by the parties or, at all events by the party who later commits the breach."

43. MacGregor on Damages, 13th Ed. (1972), page 123, states that "The scope of protection (conferred by an award of damages for breach of contract) is marked out by what was in the contemplation of the parties".

RECORD

44. Under these principles a finding that the damage suffered by the Plaintiff was too remote was, in our submissions, compelled by the trial judge's findings that Miller did not know the effect which a very small quantity of sugar was likely to have on ready mixed concrete, and that this was not knowledge which should have been known to a reasonable carrier in the position of Miller.

653 (26-30)

45. In our submission the errors of principle of the trial judge are revealed in the following passage from His Honour's reasons for judgment:

> "At all material times the defendant was aware that the "Cobargo" was required .... to carry aggregate; that such aggregate would be used for the manufacture of concrete ... and it should reasonably have contemplated that if the vessel was unseaworthy, in the sense of not being fit for the reception of the aggregate, contamination could occur which would affect the final product and involve the ... plaintiff in liability at the suit of those who purchased the aggregate from it. For present purposes questions of foreseeability or contemplation of the actual or general effect of a solution of sugar and water upon aggregate are not relevant. I have held that the defendant was in breach of the implied warranty of seaworthiness and that such breach is causally related to the damage suffered by the ... plaintiff. The defendant with knowledge of the use to which the aggregate was to be put ... should reasonably have contemplated that, in the

620 (15-46)

event of the vessel being unseaworthy in the manner to which I have referred, it was not unlikely ... that the concrete ultimately manufactured would contain foreign matter and hence would be defective and involve the ... plaintiff in liability." (Emphasis supplied)

46. In this passage the trial judge held, in our submission erroneously, that his finding of breach of the implied warranty of cargoworthiness foreclosed all enquiry on the issue of remoteness.

47. There was no evidence to support the trial judge's conclusion that the presence of any "foreign matter" in ready mixed concrete would cause or was likely to cause the concrete to be defective. Moreover no finding was made and there was no evidence to support any finding that this was known or should have been known to Miller. In fact the opposite was the case, Miller, Hethking and the Plaintiff's Quarry Manager at Bass Point knew of the presence of sugar and coal dust in the holds of the "Cobargo" and believed that those "foreign matters" were harmless. 620(44); 730(35)-731(2); 545 (12-19); 568 (27-39)

48. In the result, it is submitted that the trial judge treated Miller as an insurer of the Plaintiff against any damage resulting from the carriage of aggregate under the contract, although Miller had assumed no such obligation. The error arises, in our submission, from a failure on the part of the trial judge to apply to his own findings of fact the settled law relating to remoteness of damage.

49. For these reasons it is submitted that His

Honour's finding that the damage suffered by the Plaintiff was not too remote should be set aside.

THIRD SUBMISSION : DAMAGE RESULTING FROM BREACH BY HETHKING OF CLAUSE 3 OF CHARTERPARTY TOO REMOTE

50. Hethking does not challenge the findings that it was in breach of Clause 3 of the charter (owner to maintain the vessel in a thoroughly efficient state in hull and machinery during service) by reason of the blockage of the bilge lines by sugar and coal dust and that the damage suffered by Miller resulted from such breach.

51. However Hethking submits that the damage suffered by Miller was too remote.

52. Yeldham J. dealt with this question in the following passage:

692(41) - 693(5)

> "In my opinion the question to be answered on this aspect of the case is whether those involved in the management of Hethking should reasonably have contemplated that R.W. Miller might be liable in damages to the shipper of the basalt at least for breach of the implied undertaking of seaworthiness, if, by reason of a breach by it of Clause 3 of the charter-party, sugar in a solution of water lying in the bottom of the hold affected at least part of the aggregate. That question I should answer by saying that in the circumstances which I have briefly outlined Hethking should have contemplated that R.W. Miller would

incur a liability to South Coast Basalt."

53. It is submitted, with respect, that this passage discloses a complete failure on the part of the trial judge to apply his mind to the question of remoteness of damage.

54. The appellant relies upon the authorities referred to in paragraphs 40 - 43 hereof in support of its present submission, and further submits that the findings of fact of the trial judge were such as to compel the further finding that the damage suffered by Miller was too remote.

55. Both Miller and Hethking were carriers and as such they would ordinarily neither know nor be expected to know a great deal about the production of aggregate or the manufacture of ready mixed concrete. This was recognised by Lord Upjohn in Koufos v. Czarnikow (above) who said at p.424:

> "... it must be remembered when dealing with the case of a carrier of goods by land, sea, or air, he is not carrying on the same trade as the consignor ... and his knowledge of the practices and exigencies of the other's trade may be limited and less than between buyer and seller who probably knew far more about one another's business."

56. Moreover while Miller was in a direct contractural relationship with the Plaintiff, Hethking was not. Its contract was with another carrier.

RECORD

57. On 3rd October, 1974, being the date the time charter of the "Cobargo" was entered into, the following matters were in the joint contemplation of Miller and Hethking:

319(42)-320(2) (i) The "Cobargo" had been employed in the carriage of bulk sugar for the previous 12 months,

319 (12-15) (ii) The holds of the "Cobargo" were lined with timber,

730(36)-731(2); 598(5-9) (iii) Sugar was present in the holds adhering to exposed surfaces and beneath and behind the timbers,

384(26)-385(11) (iv) The "Cobargo" would be employed under the charter in the carriage of bulk cargoes of coal or aggregate,

(v) Miller bargained for an express contractural promise by Hethking (Cl. 1) that the holds would be "swept clean",

547 (15-24) (vi) The sweeping clean of the holds could not be expected to remove all sugar from the holds.

(vii) Representatives of Miller were present when the last cargo of sugar was unloaded and the holds were swept out in circumstances where it could be inferred that they knew that sugar remained in the holds, or at least Hethking could reasonably think that they knew this.

434(41)-436(43)

RECORD

(viii) The sweeping out of the holds was accepted without objection as a sufficient performance of Hethking's obligations under Cl. 1 of the charter. 434(41)-436(43)

(ix) The vessel was accepted under the charter and went on hire after a survey carried out by a surveyor employed by both parties and in the condition in which she had been surveyed. The surveyor noticed the presence of sugar in the holds. 730(36)-731(2)

58. The following events which occurred after the charter had been entered into also throw light on the matters which could reasonably have been expected to be in the contemplation of Hethking at that time:

(i) The parties received the joint survey report on or about 9th October. The report clearly disclosed the presence of sugar in the holds, but Miller made no complaint and did not require the removal of the sugar. 545 (13-19)

(ii) After a considerable number of voyages carrying cargoes of coal Miller employed the vessel to carry aggregate for the Plaintiff without any further survey or enquiry as to the condition of the holds. 535(44)-536(12)

RECORD

551 (25-38); 653 (10-17)

(iii) The Plaintiff's Quarry Master at Bass Point knew of the presence of sugar in the afterhold of the "Cobargo" while she was being loaded for the voyage in question, and being unaware of any risk to the Plaintiff did not stop the loading or report the presence of the sugar to the Plaintiff.

720 (39-44)

59. Although Miller was under an obligation to the Plaintiff under the contract of carriage to prevent contamination of aggregate except by sea water (cl. 21(c)), it did not seek or obtain a corresponding warranty from Hethking, or even disclose to Hethking the existence of this warranty it had given to the Plaintiff.

60. In these circumstances Hethking's position is clearly a fortiori to that of Miller. His Honour having found that Miller could not reasonably have known of the relevant properties of sugar, a finding that Hethking could not reasonably have known of them was unavoidable.

696 (3 and 15)

61. His Honour found that Clause 3 of the charter had been breached by Hethking and that such breach had in fact caused the damage suffered by Miller. However Cl. 3 on its face is directed to the safety and efficiency of the ship and has nothing to do with the protection of the cargo from contamination.

62. In fact Cl. 3 formed part of the standard Baltime charter used by the parties.

63. In our submission the only loss that Hethking should have contemplated might flow naturally from the blockage of the bilge lines was loss resulting from the inability of the ship to pump out the afterhold in the event of collision or stranding. There was no reason why Hethking should have contemplated that loss would occur as a result of this breach of Cl. 3 after the safe and timely arrival of the ship.

64. When Mr. Deane, a director of Hethking said in evidence that he would not have permitted the "Cobargo" to go to sea on the morning of 15th November if he had known of the condition of her bilge lines, he was not directing his mind (and his mind was not directed by Miller's Counsel) to the risk of contamination of the cargo by the sugar (which Hethking and Miller knew had been in the holds since the commencement of the charter), but to the risk that the safety of the vessel might be affected by that condition. 393 (19-39)

65. In our submission the remoteness of the damage from the breach of Cl. 3 can be demonstrated by the following illustrations:

(i) If in the absence of sugar, the bilge pumps had broken down or the bilge lines had become blocked, leaving 9" - 12" of water in the afterhold, Hethking would have been in breach of Clause 3, but Miller would not have suffered the damage.

(ii) If the afterhold had been dry but the

bilge pumps had broken down or the bilge lines had become blocked, there would have been a breach of Clause 3, but Miller would not have suffered the damage.

(iii) If the pumps and the bilge lines had been in working order, but the Master had decided not to pump out the after-hold before taking on the carge of aggregate, believing that the presence of 9" - 12" of water and the sugar in the hold posed no threat to the ship, there would have been no breach of Cl. 3, but Miller would still have suffered the damage.

66. The mere presence of sugar in the hold, dissolved in water or otherwise, was not a breach of Clause 3, and the mere presence of water in the hold to the depth in question with or without dissolved sugar was not a breach of Clause 3 either.

67. In other words the damage suffered by Miller was extraneous to the breach, and the causal link between the breach and the damage was provided by the presence and chemical properties of sugar when mixed with cement, which had nothing to do with the breach.

68. Had Miller told Hethking of the special risks associated with the contamination of aggregate by sugar prior to the execution of the charter, Hethking could have bargained to protect itself against such risks. It could have declined to

accept any obligation to carry bulk aggregate, it could have declined the charter altogether or, if it had been asked to give a warranty against any contamination or against contamination by sugar, it could have bargained for compensation for the substantial time and expense involved in removing the timbers and completely cleaning out the holds. 567(15)-568(6)

69. The significance of the loss of the opportunity to bargain for protection against a special risk involved in the performance of a contract was emphasized by Alderson B. in Hadley v. Baxendale itself in the following passage (1854) 9 Ex. 341 at 355

> "... had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to damages in that case, and of this advantage it would be very unjust to deprive them."

70. Hethking's only express contractual duty with regard to the removal of sugar from the holds of the "Cobargo" is that contained in Clause 1 of the charter, being a duty to sweep the cargo spaces clean. The practical effect of the judgment in favour of Miller under challenge in this appeal is to retrospectively impose on Hethking a higher contractual duty to clean out the holds than that imposed on it by the express terms of Cl. 1 of the charter. This consideration would also be material if Miller were to attempt to support the judgment below in its favour by reliance on breaches or alleged breaches

of the implied warranty by Hethking that the "Cobargo" would be a seaworthy and cargoworthy ship.

71. For these reasons it is submitted that the judgment in favour of Miller for $163,408.16 in the Supreme Court should be set aside.

FOURTH SUBMISSION : PLAINTIFFS NOT ENTITLED TO SUCCEED IN THEIR APPEAL

72. Hethking submits that the Plaintiffs' appeal should be dismissed for the reasons given by the trial judge and for the reasons appearing in Miller's printed case.

73. Hethking therefore submits that the Plaintiffs' appeals should be dismissed and that Hethking's appeal should be allowed for the following (amongst other)

REASONS

(1) The Plaintiff Pioneer N.S.W. is not entitled to succeed in its appeal because it has no cause of action in tort against Miller.

(2) The Plaintiff South Coast Basalt is not entitled to an increase in the damages awarded by the trial judge.

(3) The judgment for South Coast Basalt should be set aside because there was no breach by Miller of the implied

warranty of seaworthiness and because the damage resulting from any such breach was too remote.

(4) Alternatively, the judgment for Miller against Hethking in the cross claim should be set aside for the reasons mentioned in (3) above and for the further reason that the damage suffered by Miller as a result of the breach by Hethking of Clause 3 of the Charter party was too remote.

K.R. HANDLEY

H.D. SPERLING

IN THE PRIVY COUNCIL No. 10 of 1978

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION

BETWEEN:

SOUTH COAST BASALT PTY. LIMITED and
PIONEER CONCRETE (N.S.W.) PTY. LIMITED — Appellants (Plaintiffs)

- and -

R.W. MILLER AND CO. PTY. LIMITED — Respondent (Defendant)

AND BETWEEN:

HETHKING STEAMSHIPS PTY. LIMITED — Appellant (First Cross Defendant)

- and -

R.W. MILLER AND CO. PTY. LIMITED — Respondent (Cross Claimant)

(Consolidated by Order dated 22nd September 1977)

CASE FOR APPELLANT HETHKING STEAMSHIPS PTY. LIMITED

NORTON, ROSE, BOTTERELL & ROCHE,
Kempson House,
Camomile Street,
LONDON. EC3A 7AN.

Solicitors for the Appellant,

Hethking Steamships Pty. Limited