IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1974/C120

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| BETWEEN | CONSOLIDATED ENGINEERS LTD. | PLAINTIFF |
| A N D | KAISER BAUXITE COMPANY | DEFENDANT |

Norman Hill, Q.C. and R. N. A. Henriques for the plaintiff

R. A. Mahfood, Q.C. and Dr. Lloyd Barnett for the defendant

April 5, 6, 7, 1976; March 4, 1977

White, J.:

This action was brought by the plaintiff, Consolidated Engineers Limited, against Kaiser Bauxite Company, on the allegation that the defendant's servant and/or agent was negligent. More specifically, in the Statement of Claim it was stated that on the 21st December, 1973, while the plaintiff's Komatsu Tractor was engaged in doing work on the defendant's premises inside a large dome, and was being used to push bauxite which had collected at the base of the said dome, and along the side of the dome towards the centre of the dome, in order that the bauxite residue could be fed into a conveyor belt at the bottom of the dome, the defendant through its servant or agent negligently turned on the conveyor belt for the loading out of bauxite from the bottom of the dome, and as a result the tractor began to go along with the bauxite, and as a consequence got stuck on the gates below.

In its Defence and Counter-claim the defendant denied that its servant or agent was negligent as alleged or at all. In addition, it set out certain grounds for contending that the plaintiff or its servant or agent materially contributed to the damage, if any, caused to the said tractor. This was alternative to the plea that the plaintiff itself

or its agent had been solely responsible for the said damage.

In more detail, the defence as pleaded insisted that this alleged negligence was constituted by the plaintiff's servant or agent: (a) driving the said tractor too far into the loading area without ensuring whether it was safe so to do; (b) operating the said tractor contrary to well-established and well-known loading rules of the defendant; (c) failing to stop, slow down, or swerve or in any other way so to drive, manage or control the said tractor so as to avoid getting stuck on the gate. These grounds of negligence were counter to the particulars of negligence catalogued by the plaintiff against the defendant, viz, (a) failing to heed or observe the presence of the plaintiff's tractor in the said dome before turning on the conveyor belt; (b) failing to take any or any steps to inform the operators of the tractor to have same removed from the dome before turning on the conveyor belt; (c) turning on the conveyor belt for the loading out of bauxite before ascertaining whether it was unsafe and dangerous so to do; (d) failing to give any or any adequate warning or his intention to turn on the conveyor belt; (e) failing to take any or any steps for the safety of the plaintiff's tractor whilst it was in the said dome.

At the hearing these vital positions were not explored because the defendant admitted negligence, and the damages set out in the Statement of Claim. Therefore, the Court was not able to ascertain what were "the established and well-known loading rules of the defendant", which to my mind would have been an invaluable factor in the Court's task of construing the Lease entered into by the parties and, in particular, the arguments flowing from the words of paragraph 5 of the Defence and Counter-claim. I set out that paragraph:

> "If, which is denied, the plaintiff suffered loss or damage the defendant states that by

> an agreement in writing dated 14th November, 1973, as extended, made between the plaintiff as lessor and the defendant as lessee in respect of the rental of the said tractor, it was agreed (inter alia) that:
>
> > 'The rental agreement herein stated includes the cost of any and all repairs to and maintenance and replacement of the equipment and any loss thereof or damage thereto arising from any cause whatsoever shall be borne by the lessor.'"

Therefore, the defendant was not responsible for the alleged damage to the said tractor. The plaintiff resisted this argument, contending that it is not liable for the repairs, consequently, it is not liable to indemnify the defendant in respect thereof to the extent of $3,927.00, which sum, admittedly, was paid by the defendant to Industrial Equipment Company.

At this stage, I shall set out the terms of the Rental Agreement (Exhibit B). As I said before it was an agreement whereby the lessor (the plaintiff) and the lessee (the defendant) agreed that the lessor shall, for the stated compensation of $20 per hour, and upon the General Conditions set forth on the reverse side thereof, furnish for use on the lessee's site a Komatsu Tractor with Ripper and Blade, Model 1551A and valued at $94,000.00. This lease, which was originally for the period November 12, 1973 to November 18, 1973, was subsequently amended to extend the period of its operation. It was provided that during this term, the tractor would be operated and maintained by the lessor. The compensation stated above "shall include the payment when due by lessor of all applicable use, sales, licence priviledge and other taxes required for the use of rental of equipment in accordance herewith."

Turning to the General Conditions, the first clause is headed "Mechanical Warranty, Maintenance and Damage". Here it is spelled out in the first paragraph that the "Lessor hereby warrants that all equipment at the time of delivery

to Lessee is in good, safe and serviceable operating condition fit for the uses intended." The second paragraph contains the disputed clause and: "With respect to Equipment Operated and Maintained by the Lessor ..... The rental rate herein stated includes the cost of any and all repairs to and maintenance and replacement of the Equipment and any loss thereof or damage thereto arising from any cause whatsoever shall be borne by the lessor." Under the rubric "Liability" there is this provision: "In the performance of this Agreement, Lessor shall act as an independent contractor and not as the agent or employee of the lessee." It continues: "With respect to equipment operated and maintained by lessor, lessor agrees to indemnify and save lessee harmless from all liens, claims, losses, damages, injuries, and/or liabilities howsoever same may be caused arising directly or indirectly from the breach of warranty acts or omissions of lessor, its agents or employees, in relation to the equipment or the operation and/or use of the equipment under this Rental Agreement and lessor further agrees to procure, carry, maintain and pay for insurance covering all of its operations under this Rental Agreement."

The type and extent of insurance is next stipulated, with the specific understanding that: "The obligation to carry insurance as herein provided shall not limit or modify in any way any other obligations assumed by lessor under this Rental Agreement, which 'shall constitute the entire agreement between the parties and shall supersede all prior negotiations, proposals and representations whether written or oral'."

In his submissions on what he described as a comprehensive agreement, Mr. Mahfood for the defendant submitted as follows: Whatever principle of interpretation is applied to paragraph 2, whether one looks at it as imposing a contractual obligation on the plaintiff to bear the cost of

repairs or reinstatement, or whether one looks at it from the point of view of relieving the defendant from the obligation to bear the cost of loss or reinstatement, paragraph 2 covers the allegations in the Statement of Claim. This is so because the allegations rely on the failure of the defendant to use reasonable care in connection with the use of the tractor, considering that paragraph 2 uses the widest possible words extending to any loss from any cause whatever.

He further submitted that paragraph 2 operates to determine liability as between lessor and lessee, when there is a factual situation in which the defendant has failed to exercise reasonable care. Once there is that factual situation one must then consider whether any appropriate exception clause applies, so that two questions arise for determination by the Court. Firstly, is the clause wide enough to cover loss arising from negligence? Secondly, is the ordinary standard of care required of the defendant a duty to exercise reasonable care? The duty of care imposed on the lessee is not that of an insurer; therefore, a failure to exercise reasonable care, which is negligence, and which results in loss, is covered, provided the clause is wide enough to cover loss resulting from negligent causes.

On the basis that paragraph 2 in clear language regulates the obligations on the lessor that he should be responsible for repairs or replacement for damage arising from any cause whatsoever, Mr. Mahfood went on to submit that when one looks at the cases in which the clauses exempting a party from liability for loss due to his negligence, when interpreted, they do not establish principles which can be used against the lessee. However, even if that submission be wrong, and one applies the principles clearly established by the exemption cases, the language used in paragraph 2 is sufficiently clear and unambiguous to relieve the lessee from liability

for failure to exercise reasonable care as alleged in the statement of claim. Mr. Mahfood reinforced the foregoing argument by pointing out that paragraph 2 when contrasted with paragraph 3 (with respect to non-operated equipment) provides in clear and unambiguous language that the rental rates paid by the lessee is the consideration for the lessor assuming the responsibility to repair or replace the vehicle due to any loss or damage from any cause whatsoever.

Elaborating on the point that the only liability of the defendant - lessee is one for negligence, it was strongly urged on its behalf that save for exceptional cases, such as carriage of goods by sea, the basis of liability of a person who has custody of goods pursuant to a contract is the liability to exercise reasonable care, and that exception is applicable even when the words used are more limited than those in the instant case. Further, the exception applies not only to negligence in the ordinary performance of the contract but, it also applies to negligence in ancillary matters. A fortiori, where as in the instant case, there is, firstly, a specific contractual obligation imposed on the lessor for a stated consideration; and secondly, the relevant words are of the widest possible import; thirdly, a loss or damage arises out of the ordinary use of the tractor in the performance of the contract, and not a matter that is ancillary.

The cases reveal that the Courts from time to time have to deal with the applicability of an exception clause in a contract and certain well-known rules of construction have been laid down. In this regard I was referred to several cases which illustrate the way in which the rules have been applied.

The first was Rutter v Palmer [1922] 2 KB. 87; [1922] All E.R. Rep. 367. In this case the plaintiff claimed to recover damages for damage to a motor car while in the

custody for sale of the defendant, a motor car dealer. His claim was opposed on the basis of an exemption clause in the garage proprietor's contract which explicitly stated that "Customers' cars are driven by your staff at customers' sole risk." Scrutton L.J., set out the applicable principles as follows (/1922/ All E.R. at p. 370):

> "In construing an exemption clause certain general rules may be applied; the first of which is that the defendant ought not to be relieved from liability for the negligence of his servants unless clear and unambiguous words to that effect are used. In the second place, the liability of the defendant has to be ascertained quite apart from the exempting words in the contract. Then again, the particular clause in the contract has to be construed and considered, and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to discharge him."

It is not, however, necessary that the word "negligence" should be specifically used in the exempting clause. This is shown by Rutter v Palmer (supra) and by Alderslade v Hendon Laundry Ltd. /1945/ 1 A.E.R. 244. In the Alderslade case the subject matter for consideration was the meaning and efficacy of a clause limiting the liability of a laundry for lost or damaged articles. The Court of Appeal in its exposition of the common law duty of a laundry company stated the primary duty to be to launder. Accordingly, the limitation clause was to be construed as applying only to the case of loss through negligence. Consequently, the customer could not recover in excess of the limited amount.

The Rutter v Palmer and Alderslade cases were considered and explained by Salmon L.J. in Hollier v Rambler Motors Ltd. /1972/ 2 W.L.R. 401 at p. 429. I quote from his judgment:

> "In those two cases any ordinary man or woman reading the conditions would have known that all that was being excluded was negligence of the laundry in one case (Alderslade) and the garage in the other (Rutter v Palmer)."

And he contrasted those two cases with the one with which he was then dealing. In Hollier v Rambler Motors Ltd. plaintiff's claim was for damages for breach of contract causing loss in

value of his car in a fire at the defendant's garage. The plaintiff alleged that this was due to the negligence of the defendants, who relied on the terms of a condition which they contended excluded liability for their negligence.

In construing the clause "The company is not responsible for damage caused by fire to customer's cars on the premises," Salmon L.J., at page 406 warned that:

> "It is well settled that a clause excluding liability for negligence should make its meaning plain on its face to any ordinary literate and sensible person. The easiest way of doing that, of course, is to state expressly that the garage, trades-man or merchant, as the case may be, will not be responsible for any damage caused by their own negligence. No doubt merchants, tradesman, garage proprietors and the like are a little shy of writing in an exclusion clause quite so bluntly as that. ..... ..... I am not saying that an exclusion clause cannot be effective to exclude negligence unless it does so expressly, but in order for the clause to be effective the language should be so plain that it clearly bears that meaning. I do not think that defendants should be allowed to shelter behind language which might lull the customer into a false sense of security by letting him think - unless perhaps he happens to be a lawyer - that he would have redress against the man with whom he was dealing for any damage which he, the customer, might suffer by the negligence of that person."

Commenting on the facts of Hollier v Rambler Motors Ltd., Salmon L.J. at page 409 thought that:

> "The ordinary man or woman reading the conditions would be equally surprised and horrified to learn that if the garage was so negligent that a fire was caused which damaged their car, they would be without remedy because of the words in the condition. I can quite understand that the ordinary man or woman would consider that because of these words the mere fact that there was a fire would not make the garage proprietor liable. Fires can occur from a large variety of causes, only one of which is negligence on the part of the occupier of the premises, and that is by no means the most frequent cause. The ordinary man would I think say to himself: 'Well what they are telling me is that if there is a fire due to any cause other than their own negligence they are not responsible for it.' To my mind, if the defendants were seeking to exclude their responsibility for a fire caused by their own negligence, they ought to have done so in far plainer language than the language here used."

I next look at the remarks of Buckley L.J. in Gillespie

Bros. v Roy Bowles Ltd. /1973/ 1 Q.B. 400 at 419:

> "It is clearly settled that liability for negligence can be effectively excluded by contracts or (which has the same effect) the risks of such damages may be thrown by contract exclusively upon the party damaged, provided that the language of the circumstances are such as to make it perfectly clear that this was the intention of the parties. See Chitty on Contracts 23rd Edition (1968) paragraphs 728-730. It is, however, a fundamental consideration in the construction of contracts of this kind that it is inherently impossible that one party to the contract should intend to absolve the other party from the consequences of the latter's own negligence. The intention to do so must therefore be made perfectly clear, for otherwise the Court will conclude that the exempted party was only intended to be free from liability in respect of damage occasioned by causes other than negligence for which he is liable."

Gillespie Bros. v Roy Bowles Ltd. was a case in which a trader contracted to indemnify a carrier against "all claims or demands whatsoever ....." in excess of the liability of the carrier under conditions which were set out in the Road Haulage Association Conditions of Carriage 1967 (Rev.) cll. 3 and 4 (England). Buckley L.J. described the contract as not being a contract of carriage in an accurate sense; but "more in the nature a contract for a service than a contract of hiring, but the service to be provided was the provision of a vehicle rather than the carriage of goods." While the driver was signing for a parcel of watches in a bonded warehouse in London, the watches were stolen. The goods owner was awarded damages against the carrier, who brought third party proceedings against the trader. The Court of Appeal allowed the carrier's appeal on the ground that the words all "claims or demand" fortified by the addition of the word "whatsoever" in Clause 3(4) constituted an agreement in express terms that the trader would indemnify

the carrier against all claims without exception, including a claim arising from the negligence of the carrier or his servant.

The Judicial Committee of the Privy Council in Canada Steamship Lines v R /1952/ 1 A.E.R. 305 considered the terms of a lease containing clauses exempting the lessor from liability for damage to property leased or goods therein, and providing indemnity against claims by third parties. In holding that there was need of express language to exempt from liability for negligence, Lord Morton of Henryton stated the following propositions in the judgment (p. 310):

> "Their Lordships think that the duty of a Court in approaching the consideration of exemption clauses may be summarised as follows:
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> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called the proferens) from the consequences of the negligence of his own servants, effect must be given to that provision. Any doubts which existed whether this was the law in the province of Quebec was removed by the decision of the Supreme Court of Canada in the Glengoil Steamship Company v Pilkington /1891/28 SCH (Can) 146.
>
> (2) If there is no express reference to negligence, the Court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If doubt arises at this point, it must be resolved against the proferens in accordance with article 1019 of the Civil Code of Lower Canada: In cases of doubt the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation.
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> (3) If the words used are wide enough for the above purpose the Court must then consider whether 'the head of damage may be based on some ground other than negligence,' to quote again Lord Greene M.R. in the Alderslade case /1945/ K.B. 189, 192. The other ground must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it, but subject to this qualification, which is no doubt to be implied from Lord Greene M.R.'s words the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants."

Mr. Mahfood rightly pointed to the ground of distinction between Rutter v Palmer and Alderslade case on the one hand,

and that of the Canadian Steamship case on the other; that is, that while in those two cases the words of exemption were held to be appropriate in the particular circumstances of each case, in the last named case the vagueness of the words alleged to formulate the exemption was the noticeable feature. I note here that one outstanding aspect of all these cases is that the exempting words are specifically stated to be applied on the basis of the contractual relationship between the parties. It is clear from the cases that the exclusion clause is always considered in the context of the reciprocal obligations contracted by the parties. The Court must have regard to the contract in its entirety, in construing the alleged exemption clause. In the instant case, one observes that the format of the lease stresses that the obligations are all undertaken by the lessor, and are hedged around by stipulations favourable to the lessee. So that the first consideration is whether there is an exemption clause.

Is there in this case any formulation of words which could lead the Court to say that the defendant's plea should be upheld? Mr. Mahfood forcefully argued that the word "whatsoever" in paragraph 2 is the solution to this intractable problem. On this point, it is well to bear in mind the remarks of Buckley L.J. in Gillespie Bros. v Roy Bowles [1973] 1 Q.B. 400, at pages 421 to 422. That learned judge explained the connotation of the word "whatsoever" in these words:

> "Paragraph 728 of Chitty contains several forms of expression which have been held to amount to clear indications that clauses of exemption were intended to comprehend claims arising from negligence, including 'howsoever arising,' and 'from any cause whatsoever.' In the present case the indemnity is in respect of 'all claims and demands whatsoever by whomsoever made in excess of the liability of the carrier under these conditions.' The contention of the respondent has been that those words relate to the nature of the claim, not to its cause, and so are insufficient to demonstrate that the

> "indemnity is to extend to claims howsoever caused. I cannot accept this distinction. Where the expression used is 'any loss' or 'all claims and demands,' it is legitimate, and having regard to the inherent improbability which I have mentioned, rational to construe it as subject to a silent and implied exception of losses, claims or demands due to the negligence of the party occasioning the loss, claim or demand, but if the word 'whatsoever' be added the proper interpretation may very well be different. 'Whatsoever' is a word which is prima facie inconsistent with any exception from the class of subjects referred to. It is true that one might say colloquially 'any claim whatsoever except, one due to negligence;' but here the use of 'Whatsoever,' would be tautologous for it adds nothing to the meaning of 'any claim except one due to negligence.' One must suppose the word 'whatsoever' was inserted in clause 3(4) for some purpose, and it should, if reasonably possible, be given some effect. In my judgment it signifies that the indemnity is intended to extend to all claims and demands of whatsoever kind, that is to say, without exception, in excess of the liability accepted by the defendant company under clauses 11 and 12. The nature of any claim is essentially linked with, and dependent on, the cause from which it arises, and any indemnity extending in express terms to all claims and demands of whatsoever kind must, in my opinion, extend to all claims and demands however caused, including claims for negligence. The expression is one which cannot sensibly be construed subject to an implied qualification."

On this reasoning, the Court held that the words "all claims or demands whatsoever" constituted for the purposes of the first head of Lord Morton of Henryton's proposition an express agreement to indemnify against claims including those based on negligence. This connotation of "whatsoever" in an exemption clause was used by Mr. Mahfood to support his argument that if one applies the reasoning in Hollier v Rambler Motors Limited to the facts of the case before me, one does not find merely a type of loss which is exempted, but one finds any loss or damage resulting from any cause whatsoever.

Mr. Hill's approach was firstly, to deny that paragraph 2 is an exemption clause. Secondly, in any event it is capable of more than one construction and should be construed against the defendant. A liability, other than in respect of negligence, is capable of arising and in view of the wide general words used such an interpretation is fatal to a

contention favouring negligence. The Court should also conclude that the act which constituted the breach is an independent act not connected to the contract and therefore not within the ambit of the exemption.

In asking the Court to come to the foregoing conclusions, Mr. Hill submitted that the Rental Agreement is a standard form of contract which the Court should look at as a whole in order to see what the parties intended by their agreement. This is so notwithstanding that in the final analysis the Court will have to determine what the parties indended by paragraph 2 of the General Conditions. The result of this inquiry should be that it was within the conterplation of the parties that for the stated period of the lease, and for the stated consideration, there was a warranty by the lessor of this equipment that, provided the tractor is maintained and operated by the lessor, certain obligations are imposed on him. If the contention of the defendant was correct, clauses 3 and 4 of the Special Provisions which appear on page 1 of the Rental Agreement, Exhibit 1, would be entirely superfluous and of no legal effect. Those typed special provisions are as follows: "3. No rental will accrue if equipment is non-operative due to mechanical breakdown. 4. Payment will be made only for work done."

Mr. Hill stressed that the Court must consider these Special Provisions relevant. This is in marked contrast to the submission for the defendant expressing the strong view that, these Special Provisions had no direct relationship to paragraph 2 of the General Conditions. The Special

Provisions, according to this view, deal with contractual provisions about payment, time of use, and with circumstances in which the hourly rate is payable. The terms in the Special Provisions are what one would expect to find in calculating the amount payable on the hourly rate. The General Conditions on the back must be interpreted by reference to the language used, and the subject-matter dealt with. A perusal will show that the General Conditions deal with a slightly different subject-matter from the Special Provisions. In the interpretation of paragraph 2 the scope of that paragraph will in no way be qualified by the rental rate stated, because the rental rate stated is only referred to in paragraph 2 as the consideration for the obligation undertaken by the lessor under paragraph 2 of the General Conditions. One should determine the extent and scope of that obligation not by reference to the consideration for the obligation, but by reference to the fact that the extent and scope of that obligation have been expressed in language which must be interpreted. Once there is this interpretation, according to the scope and extent of the obligation, the question for the Court is whether the loss or damage that was incurred comes within the meaning and scope of the language used in paragraph 2 when read along with the rest of the conditions.

Mr. Hill submitted that looking at paragraph 2 of the first clause in the General Conditions, if there was a mechanical breakdown due to any cause whatsoever the loss of rental would be subsumed by the words "any loss arising therefrom shall be borne by the lessor." And clause 4 would involve the same exercise. According to him, the argument for the defendant that the Special Provisions were not relevant, was an inconsistency because Mr. Mahfood was in fact unwilling to state that on his interpretation the Special Provisions 3 and 4 in effect evidenced an agreement

by the parties that the plaintiff would not get the consideration agreed due to the negligence and/or wilful default on the part of the defendant company. This then, said Mr. Hill, raises the question whether the parties were bringing their minds to bear on the question that if Kaiser Bauxite Company was negligent in producing a mechanical breakdown, or if due to the wilful neglect or default of the Kaiser Bauxite Company, there was a mechanical breakdown, the plaintiff would bear the resulting loss.

Developing his argument, Mr. Hill raised a second question. By reason of the different phraseology of the Special Provision 4, was it in the contemplation of the parties, and therefore agreed by them, that if by reason of the negligence or wilful default no work was performed then the resulting loss would be borne by the plaintiff? The answer to either of the foregoing questions cannot be given without taking into account not only the basic fact of the contract viz, the hireage of equipment, but also that the only consideration that the parties contemplated as moving from the defendant to the plaintiff was the money to be paid for the operation of the tractor. Therefore, if no work could be performed, although the plaintiff was in a position to do so, but for the negligence, or wilful default or neglect of the defendant, this state of affairs would go to the very root of the contract.

Accordingly, it was said, the mere use of the word "whatsoever" upon which Mr. Mahfood laid great stress does not envisage exemption from liability for negligence. To properly construe paragraph 2, paramountcy should be given to the initial words: "With respect to the equipment operated and maintained by lessor." These are controlling words. So that all that follows refers exclusively to those words. So that the clause as a whole refers to any loss or damage caused by the lessor's operation, and maintenance of the

tractor. Accordingly, the word "whatsoever" is limited to such causes which arise from the lessor's operation and maintenance of the equipment, The relationship created by the lease and the question of liability it was argued, can be contrasted with the results of the use which results in damage to third parties. Positioned as it is between the first rubric "Mechanical warranty etc." and the second head of contract, "Payment of Rental," paragraph 2 was directed to making it quite clear that in the event of any damage to the equipment while it was being used and operated, or any claim in respect of the use and operation, by the lessor, the lessor would not be in any doubt as to the fact that he should bear such loss. A factor flowing from paragraph 2 is that the lessor is in effect agreeing to keep the equipment in good working order, and condition, during the currency of the contract. What the lessor is in fact saying is "If from whatsoever cause loss or damage occurs by virtue of my not keeping the equipment in good condition I will bear the same." He is not saying that he will bear any loss or damage caused by the negligence of the defendant. I add that on this interpretation, the clause in question merely stated a fact and the existing legal position.

Bearing in mind that I heard no evidence as to the details of the negotiations, any decision whether this paragraph 2 is a clause of exemption must consider the context in which that paragraph appears. This also is dependent on the rule that the onus of proving that the words formulate an exemption rests upon the proferens. In this regard the cases to which I was referred, and others which I looked at of my own accord, show that the Court's enquiry encompassed the explicit way in which the terms of exclusion or exemption were framed; including specific reference to the parties in the terms of exclusion. Resultantly, the question would be answered by considering whether there was

a primary obligation under the contract. Also is there an exclusion clause? The ultimate position on this point must be conditioned by the constant reminder that "however wide the language the parties may use, a clause, particularly if it is an exemption clause, must always be construed in relation to the subject-matter with which the parties are dealing. It is like the eiusdem generis rule, but applied to a wider field: "per Devlin L.J. in Akerib v Booth /1961/ 1 A.E.R, 380 at page 382.

I comment that although the document which I have to construe used the word "whatsoever" in the statement of what the payment of rental entails, I am not moved by the arguments on behalf of the defendant to accept that that word by itself is the determinant whether there is an exclusion clause.

For one thing, I am not satisfied on the balance of probabilities that the clause in this case is expressed in words of sufficient clarity to enable me to say that the parties intended it as an exemption. The more I have considered the matter, in the light of the principles of interpretation reiterated from time to time by the cases, the more I am led inevitably to the conclusion that it is not an exemption clause favourable to the defendant.

There is nothing on the document to indicate exemplicity that there is any "Limitation of the lessee's liability." Not even an introductory phrase to show that the liability of the lessee is being adverted to. No words at all to show, even impliedly, that the words of paragraph 2 referred to the question of the lessee's liability. I find that there is no agreement in express and unambiguous terms excluding liability for the negligence of the defendant or any default of this defendant at all.

It seems to me that were I to hold that the words of paragraph 2 constitute an exemption clause, the mere admission of negligence by the defendant would lead to the situation where the plaintiff would never be able to recover for any

damage by the defendant whether it resulted in partial damage (as here) or complete loss of the tractor. The plaintiff would not only lose his tractor, or the equivalent cost of replacement, if the loss was the destruction of the tractor, but he would lose the benefit of the contract, which had thereby been occasioned.

During the argument I enquired of Mr. Mahfood whether his stand was that if the negligence of the defendant's servants or agents had resulted in the destruction of the plaintiff's tractor, the plaintiff should bear the entire loss. This question arose because the trend and force of Mr. Mahfood's argument ineluctably led to this undeviating stand. I must confess, however, that I am unable to accept such a consequence. To accept such an argument would be to give precedence to unreasonableness. The standard of reasonableness is eminently propounded by Lord Denning M.R. in Gillespie Bros. v Roy Bowles Ltd. (supra). At p. 416 he discusses the need to consider whether the clause in that case when given its ordinary meaning was perfectly fair and reasonable. He said:

> "When a clause is reasonable, and is reasonably applied, it should be given effect according to its terms. I know that judges hitherto have never confessed openly to the test of reasonableness. But it has been the driving force behind many of the decisions ..... I venture to suggest that the words of such a clause be it an exemption clause, or a limitation clause, or an indemnity clause should be construed in the same way as any other clause. It should be given its ordinary meaning, that is the meaning which the parties understood by the clause and must be presumed to have intended. The courts should give effect to the clause, according to the meaning, provided (and this is new), that it is reasonable as between the parties and is applied reasonably in the circumstances of the particular case."

After dealing with a line of authority which he said supports the proposition, Lord Denning posited that the justification for upholding such a clause as was the subject-matter in the case before him was:

> "That such a clause when given its ordianry meaning, is in the words of Scrutton L.J. 'an eminently reasonable clause' - see Gibaud v Great Eastern Railway Co. [1921] 2K.B., 426, 436, 437. When such a clause is agreed upon and is reasonable, it should be given effect according to its terms."

This eminently sensible approach does not lose its strength from the reservation of Buckley L.J. who saw the matter from a slightly different point of view. Having stated the reasons for his judgment he continued:

> "For these reasons I reach the same conclusion as Lord Denning M.R. but partly, it seems, by a different route. It is not in my view the function of a court of construction to fashion a contract in such a way as to produce a result which the court considers that it would have been fair or reasonable for the parties to have tended. The court must attempt to discover what in fact they did intend. In choosing between two or more equally available interpretations of the language used it is of course right that the court should consider which will be likely to produce the more reasonable result, for the parties are more likely to have intended this than a less reasonable result. This seems to me to be precisely the reasoning followed in Lord Morton of Henryton's formulation in Canada Steamship Lines Ltd. v The King ..... which does not in my opinion and with deference to my Lord enunciate a rule of law but an approach to the problem of interpretation."

That reasonableness of the outcome of a contention may be a guide to the decision of the court is in my view underlined by dicta in some other cases. In Canada Stemship Lines Ltd. v The King, (supra) Lord Morton of Henryton dealt with the competing arguments for and against exemption of the Crown (the lessor) from liability. Under clause 8 of the contract, the Crown undertook to repair the shed. It was clauses 7 and 17 which contained the exempting and indemnifying provisions under which the Crown sought refuge. The Judicial Committee of the Privy Council agreed with the view of the Supreme Court of Canada that clauses 7 and 17 were interrelated, and also pointed out that clauses 7 and 8 had to be read together according to the ordinary principles of construction. They eschewed any strained and artificial construction. Reading clauses 7 and 8 together, the

Judicial Committee thought it "most unlikely that clause 7 was intended to protect the Crown from claims for damage resulting from the negligence of its servants in carrying out the very obligations which were imposed on the Crown by clause 8." Turning to clause 7, the Judicial Committee of the Privy Council opined (pp 311H - 312A):

> "if the Crown's contention as to this clause is correct, it implies a very remarkable and burdensome obligation on the company. However widespread may be the destruction caused by the negligence of the Crown's servants in carrying out the Crown's obligations under clause 8, the whole of the damage must be paid for by the company. In the present case the claims are heavy, and it is obvious that the damage caused by a fire such as this might be even greater. Such a liability for the negligence of others must surely be imposed by very clear words if it is to be imposed at all."

In the same vein were the remarks of Denning L.J. in John Lee and Son v Railway Executive /1949/ 2 A.E.R. at p. 584 I quote:

> "I would only like to give one illustration of the extraordinary consequences to which the interpretation of counsel for the defendants would lead if it were right. So far as I can see, it would mean that if the defendants negligently or recklessly set fire to goods in the warehouse so that, not only the goods in it but also the warehouse itself and adjoining property was destroyed, then not only would the first plaintiffs be unable to recover the damage to their own goods, but they would also be bound to indemnify the defendants against the cost of rebuilding their own warehouse and against their liability to any other persons whose property had been destroyed by their fault. I need hardly say that a construction which leads to those consequences ought not be adopted unless the words are so plain that there is no doubt about their meaning. This clause is not so plain as that ..... If the wide construction contended for were correct, there would be a serious question whether a contract in such wide terms would be enforced by the courts."

This practical illustration accords with the characterisation by Devlin L.J. of the exemption clause in the same case as one which:

> "has a scope which I regard as too vague and too extravagant to be supported if a narrower construction presents itself and can be adopted with equal justice to the language."

It seems to me that all these quotations can be applied mutatis mutandis to the facts of this case, with the result that I hold that the defendant is not entitled to recover the money spent for repairs occasioned by the negligence of its servant and/or agent. This is so because the plaintiff is not under any obligation to repair the tractor in the circumstances of this case, and not to be reimbursed by the defendant.

For what it is worth, I have to point out that the court had no evidence to the effect that when the rental rates was fixed it was within the contemplation of the parties that that rate was sufficient to cover insurance premiums, and damage to the tractor, bearing in mind that insurance coverage is normally based on the assumption that there will be some negligence, and generally, insurance coverage is not excluded by negligence, whether it be of the plaintiff's employees or third parties. But surely the plaintiff was obliged to carry insurance not because it was contemplated that defendant might be negligent, but specifically to save the defendant harmless from claims of whatever nature and such as have been referred to earlier in this judgment. Insurance coverage according to the rental agreement is therefore a protection for the lessor as much as for the lessee where claims of third parties are concerned. The provision should not be interpreted beneficially for the lessee, on the basis of the arguments which have been addressed to me.

If I am wrong in my finding that paragraph 2 is not an exemption clause, I go on to deal with paragraph 2 assuming that it is an exemption clause. This introduces the second approach of Mr. Hill that paragraph 2 is capable of more than one construction in that a liability other than in respect of negligence is capable of arising i.e. wilful neglect or default. Allied with this is the argument that that which constituted the breach is an independent act not

connected with the contract.

In this last regard I am reminded of the words of Lord M.R. in Alderslade v Hendon Laundry Ltd. (supre) at page 192:

> "It must be remembered that a limitation clause of this kind only applies where the damage, in respect of which the limitation clause is operative, takes place within the four corners of the contract."

A view which was later repeated by Lord Denning M.R. in J. Spurling v Bradshaw /1956/ 2 A.E.R. 121 at page 124:

> "All these exempting clauses are held nowadays to be subject to the overiding proviso, that they avail to exempt a party only when he is carrying out his contract, not when he is deviating from it, or is guilty of a breach which goes to the root of it. Just as a party, who is guilty of a radical breach is disentitled from insisting on the further performance by the other, so also he is disentitled from relying on an exempting clause."

The plaintiff contended that in this case it was never or could never have been contemplated by the parties that the tractor would be driven on a conveyor belt. It could not be said that it was necessary for the conveyor belt to be started, while the tractor was at the base of the dome. Mr. Hill argued that this being so, and the conveyor belt having been negligently started resulting in damage to the tractor, the Court must of necessity test this incident against the question whether paragraph 2 is an exempting clause. He suggested therefore that paragraph 2 as worded would have to be transcribed to read "the defendant shall not be liable for any negligence on the part of its servants or agents which results in loss or damage to the equipment while it is operated by the lessor." This reading is the only possible reading if the defendant is to succeed.

What is clear from a careful reading of the lease is that there is no specific provision of what work the tractor

in question was required to do, and where. Of course, it is broadly stated that the tractor is to be delivered by the lessee to the place of use, which is identified as the lessee's site. While one can envisage that a Komatsu Tractor with ripper and blade would possibly be involved in the levelling as well as mounding of mineral soil, I hold that the contract was not so specific in its terms as to make me say that the act which caused the damage was an act connected with the use and operation contemplated by the parties, or some ancillary use.

It was said that the defendant should be exempt because he had custody of the tractor, and his only liability was therefore to use reasonable care. What I have to be especially careful about is not to equate the circumstances of this case with that of a bailment. Although there was a hire of equipment whereunder the lessor should deliver the equipment to the site of the lessee, for use on that site, there are the following factors of great importance. The lessor, is by the lease an independent contractor in the operation and maintenance of the tractor, This is a specific obligation admittedly placed on the plaintiff by the contract. True it is that the "lessor may inspect the equipment at any time during lessee's regular business hour." This concession is, surely, in pursuance of his obligation to maintain and repair in terms of the warranty of good condition. In my view this does not by itself give custody as understood in the law of bailment. The primary obligation in bailment is that possession

must be acquired by the person to be charged as bailee. This possession must be by delivery of the chattel by the bailor to the bailee. Possession can pass only if there is a common intention that possession must pass. I point also the difference in obligation regarding the "Owner operated" compared to that where there is "non-operated," equipment. In this last situation "lessee shall return such equipment to lessor in the condition as where received, less normal wear and tear, but subject to the above warranty or condition;" "which provision clearly evokes a bailment for reward as was indeed argued by Mr. Mahfood. There is no such provision regarding the owner-operated equipment and of which the owner retains possession, although the equipment in this case is by licence left on the site of the lessees when the equipment is not in use. I accept the submission of Mr. Hill that the starting of the conveyor belt while the tractor was in operation and the consequent damage by negligence had nothing to do with the operation and maintenance of the tractor. It was therefore not within the four corners of the contract, and the exempting clause does not apply. In coming to this conclusion I have taken careful note of the defendant's argument that the statement of Claim indicates the close connection between the conveyor belt and the tractor and that therefore there is a connection between the contract and the negligent act. But it all comes back to what did the parties contemplate? It is true to say that the cause of what happened was not due to the fault

of the plaintiff's servants or agents in the operation of the tractor.

Turning now to the question of damages, I record the fact that there was no discussion of whether the sums for transportation of the tractor from Kaiser Bauxite to Kingston; loss of hire during the period 21st December, 1973, to 10th March, 1974, cost to take unit out of service to fit new parts, were reasonable. There being no contest on this point I give judgment for the plaintiff for those amounts claimed, together with the sum of $480.00 for three days hierage of the tractor. So that the entire judgment awarded to the plaintiff is $~~15,670~~ 11,270. Costs to be agreed or taxed.