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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 57/78

BEFORE: The Hon. Mr. Justice Zacca - President
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Carey, J.A.

BETWEEN	HARBOUR COLD STORES LTD	DEFENDANT/APPELLANT
A N D	CHAS E. RAMSON LTD. & ORS.	PLAINTIFFS/RESPONDENTS

Dr. L.G. Barnett for Defendant/Appellant

D.M. Muirhead Q.C., Esq., & R. Ashenheim for Plaintiffs/Respondents

March 12, 13 June 29, 30 July 1
& January 22, 1982

ZACCA P.

I have had the opportunity of reading the judgment of Carey J. A. I agree with his conclusions.

KERR J.A.

I have had the benefit of reading the full and careful judgment of Carey J.A. It is enough to say that I concur in his reasoning and his conclusions.

CAREY J.A.

The appellants in this appeal are in the business of operating a cold storage for meats and other perishable products. As a result of their negligence ewe carcases delivered to them for cold storage were spoilt and thereby rendered unfit for human consumption. In the resultant actions by the several bailors the (present respondents) against them as bailees of the goods the latter relied on a limitation clause in the following terms.

> "Clause 4. The Company shall not be liable in any circumstances whatever to pay by way of compensation or damage in respect of the goods or their storage, sums of money exceeding in aggregate an amount equal to the wholesale price in Kingston of the goods at the date of their loss damage destruction or deterioration subject to a limit of $2,000.00 in any one claim."

For completeness it should be said at once that it had been put forward on their behalf as well that an exclusion clause in the following terms:

(Clause 2)

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> "The Company will store the goods as delivered and the company will not be liable for any loss, damage, destruction or deterioration of or to the goods unless the owner can show, that the same was caused by the negligence of the company or its servants."

was applicable to the circumstances and would absolve them of liability. But at the end of the day, it was tacitly accepted by them that they had been negligent. They were driven therefore to rely on clause 4 which has already been set out. The trial judge allowed the full amount claimed in his judgment. In their notice of appeal the appellants pray for an order that the court vary those awards to the amount specified in clause 4, viz $2,000.00 in respect of each respondent.

The appeal therefore raises the question of the effect of a fundamental breach of contract on exclusion or limitation clauses. Strictly speaking, it appears to me that the precise point that calls for elucidation in this appeal is its effect on a limitation clause for the reason that the appellants' liability in negligence was undoubted. Nothing however turns on the nature of the clause, be it exclusion or limiting. For the appellants, it was contended, relying on Photo Production Ltd. v. Securicor Transport Ltd. (1980) 1 All E.R. 556, that "there was no rule of law by which an exception clause in a contract could be eliminated from a consideration of the parties' position when there was a breach of contract (whether fundamental or not) or by which an exception clause could be deprived of effect regardless of the terms of the contract, because the parties were free to agree to whatever exclusion or modification of their obligations, they choose and therefore the question whether an exception clause applied when there was a fundamental breach, breach of a fundamental term or any other breach, turned on the construction of the whole of the contract." The bailors, it was said, had not repudiated the contract on discovery of the breach, but had elected to treat the contract as still subsisting with the consequence that although the primary obligations of the parties to terminate performance arose, it did not affect secondary

obligations including the obligation to pay compensation. Accordingly where a term existed which limited the compensation payable, the guilty party was entitled to the benefit of its provisions provided it covered the breach in question.

The respondents for their part submitted that this was not a case of negligence but of non-performance in which the whole substratum of the contract had been destroyed. Having regard to the nature of the contract which was one of storage and preservation of goods, and the nature of the breach, the appellants had not brought themselves within the four corners of the contract. Learned counsel on their behalf pinned his flag to the mast of Geddes Refrigeration Ltd. v. Ward (1962) 4 W.I.R. 170 and United Fresh Meat Co. Ltd v. Charterhouse Cold Storage Ltd. (1974) 2 Lloyd's Rep. 286. The clause did not apply in the circumstances. And accordingly the judgment was correct and should not be disturbed.

These rival contentions must now be examined, and I propose to venture some comments of my own as respects the relevant law. It is worth noting at the very outset that the contract with which we are concerned is one of bailment which means that the bailee must exercise due and reasonable care for the safety of the article entrusted to him. In the instant case the appellants were required to store the meat at a particular temperature so that it could be preserved in good condition for human consumption. They were obliged to provide proper plant and equipment in order to effect that purpose. They failed in this their primary obligation for the meat deteriorated and became unfit for human consumption. There was thus a fundamental breach. Lord Diplock in Photo Production Ltd. v. Securicor Transport Ltd (1980) 1 All E.R. 550 at p. 566 provides a useful definition of fundamental breach.

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> "Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed."

A fundamental breach is one which goes to the root of the contract, not merely to part of it or "goes so much to the root of the contract that it makes further performance impossible." Hong Kong Fir Shipping Co., Ltd, v. Kawasaki Kisen Kaisha Ltd (1962) 2 Q.B. 26 at p. 64 per UpJohn L.J.

As to a primary obligation it is the contractual obligation which must be performed according to its terms. In this case, the obligation was to keep and preserve the carcases in a state fit for human consumption. That was "the hard core of the contract, the real thing to which the contract is directed" per Lord Greene M.R. in Alderslade v. Hendon Laundry Ltd (1945) 1 All E.R. 244 at p. 256. The owners of the meat which was deposited for storage in a preserved state in the appellant's cold storage were thus deprived of the whole benefit of their contract.

Clause 2 which had been inserted excluded liability except caused by the negligence of the bailees. Since it was plain that the appellants had been guilty of negligence that clause would not have aided their cause. But that was not the basis of the judgment of the judge. He concluded:

> "The defendant was disentitled from relying on the exception and limitation clause since it is by defendant's own breach plaintiffs were enabled to bring the contracts to an end and in my view the plaintiffs are entitled to damages for the defendant's breaches."

In reaching this conclusion, the learned judge was basing himself on the "rule of law" school of thinking in respect of which it will be necessary to make some comment hereafter. It must however be said in favour of the judge that when he dealt with this matter, he did not

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have the benefit of Photo Production Ltd. v. Securicor Transport Ltd. (supra) being cited to him: it had not yet even reached the House of Lords. In that case their Lordships however reviewed Suisse Atlantique Societé D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale (1967) 1 A.C. 361 an authority which was in fact cited to and dealt with by the judge in a long and carefully considered judgment.

It is well known that the Courts in England urged on by that master of the common law Lord Denning developed the principle that:

> ".....exempting clauses of this kind, no matter how widely that are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract."

Karsales (Harrow) Ltd v. Wallis (1956) 2 All E.R. 856 at pp. 868 - 869. In Alexander v. Railway Executive (1951) 2 All E.R. which was a case of bailment involving an exemption clause, Delvin J. (as he then was) held that:

> (1) the Railway Executive were guilty of a breach of an implied term fundamental to their contract of bailment with the plaintiff in permitting 'C' (a third person) to remove articles from the plaintiff's baggage, with the result that the contract was terminated and the Executive could not thereafter rely on the terms and conditions of the contract excluding this liability in relation to the rest of the baggage,
>
> (ii) apart from any question of bailment there had been such a breach of a fundamental term, of the contract as to give the plaintiff the right to rescind it and thereafter the Railway Executive were disentitled from relying on the special conditions of the contracts.

This case is also cited as an example of "quasi deviation". In the deviation cases properly so called, it was always accepted that a deviation from the route specified in the contract, or where none is specified a deviation from the normal route renders exemption clauses

vulnerable. Lord Wilberforce at p. 433 in Suisse Atlantique v. N.V. Rottherdamsche said this:

> "A shipowner who deviates from an agreed voyage steps out of the contract, so that clauses in the contract (such as exception or limitation clauses) which are designed to apply to the contractual voyage are held to have no application to the deviation damage."

In Yeoman Credit Ltd. v. Apps (1961) 2 All E.R. 281 which concerned an exception clause in a hire purchase agreement the court were at one in holding that the plaintiff were not entitled to rely on the exception clause because there had been a breach of a fundamental condition of the agreement. This doctrine referred to as "the rule of law" theory was developed to do justice to litigants who were parties in "contracts d'ahesion". There the parties are not on equal terms: consensus ad idem is illusory. The United Kingdom Parliament recently enacted the Unfair Contract Terms Act 1977 to relieve against injustices. Be that as it may, the contract with which we are concerned, was made between non-natural persons, perfectly capable of protecting their own best interests by terms and conditions which they would have negotiated. In the circumstances I do not consider any of the three clauses in the agreement to be unfair or unreasonable.

In the Suisse Atlantique case, the noble and learned Lords who made speeches were generally in agreement that the "rule of law theory" articulated by Lord Denning was not the law. I am not unmindful of the fact that the discussion in the House in this regard was obiter. That view was set forth earlier by Pearson L.J. in U.G.S. Finance Ltd. v. National Mortgage Bank of Greece S.A. (1964) 1 Lloyd's Rep. 446 at p. 453 thus:

> "I think there is a rule of construction that normally an exception or an exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract. This is not an independent rule of law imposed by the court on the parties willy nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the presumed intention of the parties."

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(underlining mine)

The basis of the "four corners" theory is not far to seek. In Alderslade v. Hendon Laundry Ltd.(1945) 1 All E.R. 244, where the appellant laundry company lost certain articles received by it from the respondent for laundering, one of the terms upon which the company accepted the goods, to wit, some handkerchiefs, was as follows:

> "The maximum amount allowed for lost or damaged articles is 20 times the charge made for laundry."

Lord Greene M.R. there said:

> "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 contracting party who goes outside his contract cannot rely upon the clause if the loss occurs during operations outside the contract as distinct from operations which the contract contemplates."

In allowing the appeal, it was held (i) that the primary obligation of the laundry company being to launder, it must be performed according to its terms and no question of taking due care entered into it. There were however certain ancillary obligations which only imposed on the laundry company the duty of taking reasonable care of the goods while in the company's possession or while being delivered to the respondent customer, and (ii) the necessity for limiting liability for goods lost could arise only in a case where the goods were lost by negligence and therefore the limitation clause applied to the claim of the respondent.

Mr. Muirhead in the course of his argument suggested that neither the limiting nor exempting clauses applied because the respondents the cold storage operators had not brought themselves within the "four corners of the contract." They had stepped outside the contract: they had not preserved the meat. For that proposition in my view he was undoubtedly relying on Alderslade v. Hendon Laundry Ltd. The company had plainly

stepped outside the contract for they had not laundered the handkerchiefs: They had misplaced them. Yet, it is of fundamental importance to bear in mind that the court held that the clause applied to protect the laundry company. Learned counsel for the respondents argued however that the clauses in the instant case had no effect because of the fundamental breach in the departure from the contract. If the true rule were as he contends, the court could hardly have arrived at the conclusion it did. What the court did was to construe the clause to ascertain whether in the circumstances that came about, the clause was apposite. I venture to think that his argument rather supports the "construction theory" as regards exempting or limiting clauses. This case is also illustrative of the rule that ambiguities in an exception clause will be construed against the party inserting the clause. Thus in construing exception clauses, the court will consider their terms to ascertain that they are apt to cover the eventuality. This approach is especially relevant in cases of bailment where liability may exist under different heads, for example in negligence or for breach of contract. In the event that the language of the term is applicable in either situation, the party inserting the claim will be taken to have excluded his contractual duty. In Alderslade v. Hendon Laundry Ltd.(supra) the court held that the words were apt to exclude negligence.

Mr. Muirhead in pressing the argument that the bailees had not brought themselves within the four corners of the contract and that their act amounted to a non-performance of the contract plainly had in mind as well cases such as Lilley v. Doubleday (1881) 7 Q.B.D. 510. It was there held that no condition could apply to assist a bailee, where he acts in breach of his bailment: the conditions are intended to protect him when he is performing his function as a bailee. Thus learned counsel was inspired to argue that this was not a case of "negligent performance, but of refusal altogether to perform it." It was in my view an exaggeration to suggest in the circumstances of this case, that the negligence of the bailees in failing to preserve the meat is analagous to the defendant's conduct for example, in Lilley v. Doubleday (supra) where having contracted to wharehouse goods

for the plaintiff at a particular place, the defendant wharehoused part of them at another place, or the launderer in Alderslade v. Hendon Laundry, where the launderers lost the handkerchiefs deposited with them for laundering. In the instant case the appellants with whom the carcases were deposited for storage, failed to maintain the appropriate temperature in their cold room, so that the meat was rendered unfit for human consumption. The Courts have dealt with cases involving the "four corners rule" typified by Lilley v. Doubleday and Alexander v. Railway Executive, in the same way as the deviation cases, hence the reference to them as "quasi deviation" cases, by text book writers. See for example Cheshire and Fifoot Law of Contract (8th Edition) p. 136. However that may be, the failure nevertheless constituted a fundamental breach of contract. Willkie J. found support for his approach in the judgment of Wien J. in United Fresh Meat v. Charterhouse (1974) 2 Lloyd's Rep. 286 at 296 where the latter said:-

> "So that where there is a fundamental breach of contract, the innocent party may treat the contract as at an end. Once he does so, then the guilty party the defendants in this case - cannot rely on the clause exempting liability."

I take the law to be correctly stated in Photo Production Ltd. v. Securicor Transport Ltd. and I quote from the headnote:

> "There was no rule of law by which an exception clause in a contract could be eliminated from a consideration of the parties' position when there was a breach of contract (whether fundamental or not) or by which an exception clause could be deprived of effect regardless of the terms of the contract, because the parties were free to agree to whatever exclusions or modification of their obligations they choose and therefore the question whether an exception clause applied when there was a fundamental breach, breach of a fundamental term or any other breach turned on the construction of the whole of the contract including any exception clause, and because per Lord Diplock the parties were free to reject or modify by express words both their primary obligations to do that which they had promise and also any secondary obligations to pay damages arising on breach of a primary obligation."

In the earlier case of Suisse Atlantique (supra) (1967) 1 A.C. 36 Viscount Dilhorne at p. 392 said:

> "There are judicial observations to the effect that exempting clauses no matter how widely are drawn, only avail a party when he is carrying out the contract in its essential respects. In my view it is not right to say that the law prohibits and nullifies a clause exempting or limiting liability for a fundamental breach or breach of a fundamental term. Such a rule of law would involve a restriction on freedom of contract and in the older cases I can find no trace of it."

Lord Reid made the same point in his speech and pointed out that any support for the "rule of law theory" emanated from deviation cases i.e. deviation from the contractual voyage or similar breaches of contract of carriage by land: He put it this way at p. 399:

> "Any deviation has always been regarded as a breach going to the root of the contract, and it was held in these earlier cases, that if the consigner's goods were lost after there had been a deviation, the shipowner could not rely on clauses excluding or limiting his liability."

and again at p. 400 he said this:

> "Among the reasons given in the earlier cases, I do not find any reliance or any rule of law that a party guilty of a breach going to the root of the contract can never rely on clauses excluding his liability."

Since the House of Lords in Photo Production Ltd. v. Securicor Transport Ltd (supra) expressly overruled Charterhouse Credit Co Ltd v. Tolly (1963) 2 All E.R. 432 and Harbutt's Plasticine Ltd. v. Wayne Tank & Pump Co, Ltd., (1970) 1 All E.R. 225 among others, all cases which relied on the principle of "a rule of law" theory are now of doubtful authority. Thus where Wein J. in United Fresh Meat v. Charterhouse (1874) 2 Lloyd's Rep. at p. 296 said:

> "So that where there is a fundamental breach of a contract, the innocent party may treat the contract as at an end. Once he does so, then the guilty party - the defendants in this case - cannot rely on the clause exempting his liability."

he was invoking the "rule of law" principle which should now be confined to the deviation cases. The effect of Suisse Atlantique and Photo Production v. Securicor I would suggest is that 'deviation cases' are sui generis and this not only for historical reasons but as a by-product of the law of marine insurance. See Windeyer J. in Thomas National Transport Ltd. v. May & Baker Ltd., (1966) 2 Lloyd's Rep. 347 at p. 360. The deviation cases fall into a special category to which the "rule of law" principle has traditionally been applied. The general law of contract in regard to exception clauses and their effect of fundamental breach remains untrammelled therefore, by any imposition of a 'rule of law" doctrine. Parties such as those in the instant case are at liberty to include such clauses exempting liability or limiting their liability as they are able to negotiate. The function of the court will be pl inly to construe the contract including the particular clause. If, as I conceive it, the true rule is that a fundamental breach does not put an end to the contract so that terms therein are deprived of all efficacy, but rather that "it takes two to end it by repudiation on the one side and acceptance of the repudiation on the other" (per Viscount Simon L.C. Heyman v. Darwins Ltd (1942) 1 All E.R. 337 at p. 341)) then the approach of [illegible] J. was misconceived. The effect of a fundamental breach is that it relieves the other party of any further obligation to perform what he for his part has undertaken. And perhaps more precisely "the contract is not put out of existence though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claim arising out of the breach."

Where one speaks now of non performance of a contract, it should perhaps be confined to cases where for example a person contracts to deliver or do one thing and he delivers something quite different or does something else. Charter v. Popkins (1838) 4 M & W 399 at p. 404. If a man offers to buy peas of another and he sends him beans, he does not perform his contract:.....The contract is to send peas and if he sends anything else in its stead, it is a non-performance of it. It is in respect of such acts of non-performance that this quotation from

Suisse Atlantique per Lord Wilberforce at p. 435 is I think applicable:

> "Since the contracting party could hardly have been supposed to contemplate such mis-performance or to have provided against it without destroying the whole contractual substratum, there is no difficulty here in holding exception clauses to be inapplicable."

But if the freedom to contract exists, it is not that a rule of law exists to nullify such clauses, but that it is difficult to conceive any other result in construing the effect of such a fundamental breach on a exception clause. In other words, it would be absurd to construe the particular clause as applicable to a situation that was clearly never in contemplation.

In my judgment therefore, on the true construction of the contract in this case including the clauses 2,3,4, which all survived the fundamental breach, the bailors were not protected by clause 2 because they were guilty of negligence but their liability was limited by clauses 3 & 4.

It was further contended on behalf of the appellants that the respondents had not terminated the agreement but continued to make orders in pursuance of the agreement and therefore to treat the agreement as still subsisting. For the respondents it was urged that the 'res' had became worthless as unfit for human consumption, so that performance had become impossible. Termination was automatic. No act on the part of the respondents was capable of being an act in performance of the contract. The claims made subsequent to the discovery that the meat had seriously deteriorated was in the nature of a salvage operation designed to minimize loss.

I take the view that the respondents' argument is wholly untenable. The contract does not come to an end. Performance is impossible but the breach gives rise to substituted secondary obligations on the part of the party in default. I am sustained in this view by the following dicta:

> "Every failure to perform primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach."

per Lord Diplock at p. 566 Photo Production Ltd. v. Securicor Transport Ltd. These secondary obligations are susceptible to modification by the parties in the same way that primary obligations are Clause 4 embraces such a modification. For another reason I also consider the respondents' arguments unfounded. As Lord Diplock at p. 567 pointed out in Photo Production Ltd. v. Securicor Transport Ltd. (supra)

> "The bringing to an end of all primary obligations under the contract may also leave the parties in a relationship, typically that of bailor and bailees, in which they owe to one another by operation of law fresh primary obligations of which the contract is not the source."

I take this to mean that (in so far as this case is concerned) the performance of the contract was impossible i.e. "the preservation of the meat as delivered, but the bailees were obliged nonetheless to return the meat or deliver it in accordance with instructions to do so. If this be correct, then the act of making further deliveries, cannot in point of law affect the modified secondary obligation to pay compensation.

Clause 4 does itself create a problem of construction. The appellants urge that the total amount due on the claim was $2,000.00 and no more because the respondents were claiming damages as a result of the breach. It appears to me that the clause is somewhat ambiguous, in which event, the clause is to be construed "contra profentem": Since clause 4 cannot properly be understood, without mentioning Clause 3, the latter is now set out:

Clause 3: "All claims for loss, damage, destruction or deterioration of the goods must be made in writing within seven days after the goods have been re-delivered to the owner or his agents and all claims not so made within the time stated shall be deemed to have been waived.

The learned trial judge on this aspect of the case said this at p. 51 - 52 of the record.

> "I am of the view that Clause 4 cannot be read in isolation and must be read together with clause 3. The relationship between the parties is a continuous one. The evidence discloses a system whereby the goods are lodged in bulk and kept at the cold storage over a considerable period of time while periodic drawdowns are made and delivered. The consideration for such storage is the payment of storage fees which fall due in different amounts at different periods, no doubt depending on the quantity of goods stored and the period of time. It seems reasonable that spoilage might occur at different times and I am of the opinion that each time such spoilage occur, it was in the contemplation of the parties, that a claim could be made within the time and manner prescribed. To hold otherwise would create the absurd situation described by Mr. Hill where if when a drawdown is made and there is spoilage the claimant would have to put it aside and wait until all the goods have been delivered then total his spoilage and it is only then he could make his claim. In the context in which 'claim' is used in clause 4, I agree with Mr. Mill's submission that it does not mean 'cause of action' but demand for delivery whether partial or total. When the demand for delivery of goods in the same condition as when received cannot be met or when the claimant is fully aware of spoilage and can quantify same a claim arose in the context of clause 4 and I so hold. Each of such claims is however limited to $2,000.00".

In my view the approach of the learned judge cannot be faulted. Clause 3 is unambiguous: it prescribed a time limit for notice of claim in the event of spoilage or deterioration of the carcases and the sanction for a failure to comply with the limitation period constituted by the bailors, was a waiver of any such claim. Plainly therefore, the clause contemplated that claims would be made from time to time as and when there was spoilage. The effect of this construction is that the appellants would be required to pay up to a maximum of $2,000.00 per claim provided the claim was made within the prescribed period.

The respondents, notwithstanding that by August 18, 1975, they were fully aware of the unsuitability of the ewe carcases for sale, submitted a number of claims thereafter. The learned judge found that "the claims were made in the form presented as a convenient device to come within the limitation clause of $2,000.00 in respect of each claim." He further held "that all claims from and after 18th August, 1975 must be of a dubious nature." The evidence discloses that after the respondents were satisfied that the carcases had deteriorated so that they were unfit for human consumption, they submitted claims covering on the average 80 carcases, which would bring the claim up to approximately $2,000.00. Indeed in the case of the 2nd respondent, Loram Limited, claims in respect of the total number of carcases delivered for cold storage, were made altogether on one day viz. 23rd September, 1975. (See Exhibit 153-166). With respect to the 1st respondent some 15 claims were made prior to 18th August, (See Exhibits 30,31,44, to 56) They are itemized hereunder: a number of claims were made after 18th August and these the judge characterized as dubious.

Ex. 30 :	50	carcases	$1193.47
31 :	5	"	111.60
44 :	43	"	108.84
45 :	80	"	2026.40
46 :	80	"	1962.26
47 :	80	"	1982.30
48 :	80	"	2011.60
49 :	80	"	2094.41
50 :	80	"	2026.40
51 :	80	"	1962.26
52 :	80	"	1982.30
53 :	80	"	2011.10
54 :	80	"	2094.41
55 :	80	"	2026.40
56 :	25	"	633.40

In the result, the respondents would be entitled to be paid the full amount of the claim, where the amount is under $2,000.00 and no more than that figure. Where the claim exceeds $2,000.00 then $2,000.00 would be payable and no more. In respect of those claims made after 18th August, 1975, the respondent will be treated as having made one claim not exceeding $2,000.00. In the final result therefor I would allow the appeal in which the respondent is Chas. E. Ramson Ltd. and vary the amount of the judgment in the court below to a judgment of $26,911.71.

As to the appeal against the judgment in favour of the second respondent, I would also allow the appeal and vary the amount of the judgment in the Court below to a judgment in the sum of $2,000.00.

The appeal as respects the judgment in favour of the 3rd respondent I would dismiss, the judge having found (and in the event Mr. Barnett did not pursue it) that the impugned clauses were "never incorporated with nor formed part of the contract of bailment between the respondent and the appellants."

The successful appeallant is entitled to his costs of appeal. The respondent in the Fong Yee matter is of course to have his costs in this Court.

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