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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 24/77

BEFORE: THE HON. MR. JUSTICE ZACCA - PRESIDENT
THE HON. MR. JUSTICE MELVILLE, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.

BETWEEN: KAISER BAUXITE COMPANY - DEFENDANT/APPELLANT

A N D : CONSOLIDATED ENGINEERS LTD. - PLAINTIFF/RESPONDENT

Dr. Lloyd Barnett and Mrs. Angella Hudson-Phillips for the Appellant.

Mr. R. N. A. Henriques and Mr. D. Scharschmidt and Mr. H. Malcolm for the Respondent.

April 4, 5, & 6, 1979; June 14 & 15, 1979;
March 24 & 25, 1980 and March 29, 1985.

PRESIDENT:

I have had the opportunity of reading the judgment of Carberry, J.A. I agree with his reasons and conclusion that the appeal should be dismissed with costs to the respondent to be agreed or taxed.

CARBERRY, J.A.:

This was an appeal from a judgment of White, J. given on the 4th March, 1977, in which he found in favour of the plaintiff company, in the sum of $11,270.00, with costs to be taxed or agreed. He recorded that there had been no challenge to the plaintiffs on the issue of damages, and there was none before us either. We note that he made no award in respect of interest.

In a sense the case was conducted in a somewhat unusual manner: it was fought purely as an issue of law, that is whether liability was excluded by a contract in writing made between the parties. No evidence was taken on either side, apart from the contract and a few letters tendered. This has proved in some respects a handicap in fully appreciating the facts out of which the case arose, and we have been forced into conjecture where a few bits of evidence might have brought clarity.

One other comment that might be made is that so far as the presentation of law goes, both below and in this Court the respective counsel engaged have spared no effort in the presentation of their case. Unfortunately it traversed one of the most difficult areas of the law of contract, the effect of breach on the construction of exclusionary or exemption, or indemnity clauses. Further, as the argument concluded the House of Lords delivered its judgment in Photoproduction Ltd. vs. Securicor Transport Ltd. (1980) A.C. 827; (1980) 1 All E.R. 556, and the only version then available for citation was that contained in a copy of the law journal. Shortly after the panel lost the advice and assistance of Mr. Justice Melville, who went to another jurisdiction, coupled with periods of long leave to its other members.

The Facts:

The defendants/appellants, Kaiser Bauxite Company, is a limited liability company duly incorporated in the State of Nevada in the United States of America. As their name suggests, they are a company concerned with the mining, processing and export of bauxite (an aluminium ore) from Jamaica to the United States, where it is further processed into aluminium. Though the mining is "open cast" mining, it involves a very considerable plant and machinery. The Bauxite ore, here a red powder, is collected into a large dome on the sea coast, from which it is loaded on to ships by means of a conveyor belt. The dome so to speak acts as a funnel and the bauxite falls on to the conveyor belt which takes it directly into

the ship's hold. Whether because of humidity or otherwise, it appears that the bauxite in the dome has a tendency to cake, and that from time to time it becomes necessary to stir it mechanically so that it flows or falls on to the conveyor belt for movement into the ship's hold.

The plaintiffs/respondents are a limited liability company incorporated under the laws of Jamaica, and apparently as part of their business they are concerned with the hiring out of tractors and men to operate them.

On the 14th November, 1973, the respondents were engaged by the appellants under a contract headed "Rental Agreement", the terms and conditions of which are examined below. The contract was renewed twice: it originally covered the period November 12 to 18, 1973, was extended to the 3rd December, and later to the 31st December, 1983. The contract provided for the tractor to be operated and maintained by the respondents, and it was to perform its work on the site of the appellant.

It seems to have been principally engaged for the purpose of operating inside the dome where the bauxite was stored, and to be used to push the bauxite which had collected at the bottom of the dome towards the centre of the dome where it would be fed on to the conveyor belt that would take it to the loading ship.

It is not clear whether the tractor should have been actually operating in the dome at the same time that the conveyor was operating, but from the Statement of Claim (later admitted without challenge) it appears that the conveyor belt should not have been turned on while the tractor was inside the dome, and this is the gravamen of the plaintiff's complaint, that while his tractor was inside the dome doing its work, a servant or agent of the defendant negligently turned on the conveyor belt, with the result that the tractor went along with the bauxite on to the belt, and got stuck and damaged in the gate through which the belt passed from the dome

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into the area outside and thence to the ship. The particulars of negligence complain of failure to observe that the tractor was still in the dome, turning on the conveyor belt while it was still there, without any prior warning and without first making sure that it was safe to do so, and in fact it is alleged that it was unsafe and dangerous to do so when the tractor was still inside.

This accident or incident occurred on the 21st December, 1973, some three days after the last payment made for the use of the tractor; the defendants originally put in a defence denying liability which, as we understand it, blamed the tractor driver (plaintiff's servant or agent) for venturing into the loading area without ensuring that it was safe to do so, and for failing to take the necessary evasive action, that is to drive off the belt and avoid getting caught in the exit gate.

As we said, this seems to leave it in doubt whether the tractor should have been inside the dome while the conveyor belt was operating, for it seems to suggest that the tractor could have been there and that there may have been some place of safety in which it could have stayed while the belt was moving.

No evidence was given on the point, which makes it difficult for the Court to appreciate the enormity or otherwise of the negligence alleged: should the tractor not have been there at all when the belt was on, or is it a stop and go operation, with the tractor pushing the bauxite to the belt, and withdrawing temporarily to a safe distance when it was turned on, to return later when it was switched off to push more bauxite on to the belt?

A proper understanding on this point might have had some legal significance in finding whether the negligence was such as to constitute a fundamental breach, or breach of a fundamental term, or was merely an ordinary piece of negligence inherent in the operation of the tractor and loading procedure. We shall never know, as the parties dispensed with evidence in order to go directly into the consideration of the terms of the contract, and the

allegation of an exclusion clause which not only excluded all liability from the defendants, but empowered them to recover by way of indemnity the money they spent repairing the plaintiff's tractor. This last arose because, on a without prejudice basis, the defendants/appellants paid for repairs to be done to the tractor and on completion of the repairs sent the bill (which they had paid) to the plaintiffs and sought reimbursement of that sum.

The plaintiffs claimed in negligence, for loss of hireage while the tractor was out of use, for the cost of moving the tractor to Kingston for repairs, and for costs incurred while it was being repaired, a total of $10,790.00 later increased to $11,270.00 by the addition of hireage under the contract for three days. The defendants counter-claimed for $3,927.00 spent on repairs to the tractor. To this the plaintiffs replied that they were not liable for that amount, the defendants were, and they seem to have alleged that the defendants had not paid the repairers yet. This allegation was withdrawn at trial, at the same time the defendants admitted negligence, and trial proceeded on the meaning and effect in law of certain clauses in the Rental Agreement.

The Rental Agreement:

The Rental Agreement was prepared on a letter size printed form, the front of which contained spaces for the insertion of the names of the parties, date, description of what was being rented, compensation etcetera, and a heading "Special Provisions". It recites that "Kaiser Bauxite Company (hereafter called Lessee) and the above named (hereafter called Lessor) shall for the stated compensation and upon the General Conditions set forth on the reverse side hereof, furnish the following equipment:....."

The Rental Agreement in full is set out below, but to make a few preliminary remarks as to the "front side": it is to be noted that the "General Conditions" appearing on the back of the form have been incorporated into the agreement. Further, that the form has been drafted to cover two different types of

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rental, namely the rental of machinery to be operated and maintained by the Lessor, and what is termed Non-operated and is presumably the rental of machinery simpliciter. The rental in question here fell into the former category, which as we understand it means that "Lessor" provided not only the tractor, but a driver or operator as well. The front side provided that the lessor is to pay all the relevant taxes due, that the agreed rental rate is to cover the wages of the operator (which is to be at the rate agreed between Kaiser and the National Workers Union for that type job); that Kaiser was to provide fuel and lubricants; and specifically that no rental would be paid for periods in which the machinery (or tractor) could not be used due to mechanical breakdown, or for periods in which it was not actually being used, though it was available. The "front side" so far as it goes, represents the specific terms agreed on, and recorded, and in case of conflict should presumably take precedence over the "General Conditions" on the back.

(FRONT SIDE OF RENTAL AGREEMENT)

RENTAL AGREEMENT

NO. RA-235.

Between KAISER BAUXITE COMPANY
DISCOVERY BAY, JAMAICA, W.I.

and Consolidated Engineers Ltd.,
85, Old Hope Road,
Kingston 6.

DATE: November 14, 1973
REQUISITION: X27396 (Prentice)
ACCOUNT NO: 21-425

Kaiser Bauxite Company (hereafter called LESSEE) and above named (hereafter called LESSOR) agree as of above date that LESSOR shall for the stated compensation and upon the General Conditions set forth on the reverse side hereof, furnish the following equipment:

Type of Equipment	Serial No.	Value of Equipment
Komatsu Tractor with Ripper & Blade, Model D155A	8602	J$94,000.00

PLACE OF USE: Lessee's site

TERM OF USE: From November 12, 1973 To November 18, 1973

TYPE OF USE: [x] Operated and Maintained by LESSOR [ ] Non-Operated

5.46

COMPENSATION: LESSEE agrees to pay and LESSOR agrees to accept the following amounts as rental for the equipment during the time this RENTAL AGREEMENT remains in effect, which shall include the payment when due by LESSOR of all applicable use, sales, license, priviledge and other taxes required for the use of rental of equipment in accordance herewith:

EQUIPMENT: [x] Base Rental Rate Operated [ ] Non-Operated

Hour	Day	Week	Month
J$20.00			

SPECIAL PROVISIONS: (1. Above Hourly Rental Rate includes (Operator's Rate in accordance with Labour (Agreement between K.B.Co. and the N.W.U. (effective February 1, 1973). 2. Fuel & (lubricants to be supplied by Lessee. 3. No (rental will accrue if equipment is (non-operative due to mechanical breakdown. 4. Payment will be made only for work performed. No stand-by rate applies. 5. Lessee reserves the right to operate equipment for more than one shift of 8 hours per day and Lessor to provide additional Operator for such work subject to 48 hours' notice by Lessee. 6. Moving in and out costs will be paid by Lessee at the rate of 15¢J per ton mile, and 25¢J per mile empty.

LESSOR: CONSOLIDATED ENGINEERS LTD. LESSEE: KAISER BAUXITE COMPANY

BY.../sgd/..? Williams..... BY..../sgd/..K.K..LOWE.....
K.K. LOWE,

TITLE.....Mg. Director..... TITLE.....BUYER.....

PR-05 (9/68)"

The reverse side of the Rental Agreement set out the General Conditions. The clauses were not numbered, but were grouped together under Headings. During the argument for convenience of reference an agreed numbering was set out, which appears in brackets besides the various clauses and sub-clauses. So far as it is necessary however the important fact to note is the general heading or grouping, and the use of these numbers should not mislead anyone into ignoring this. It reads thus:

" GENERAL CONDITIONS

(1) MECHANICAL WARRANTY, MAINTENANCE AND DAMAGE: 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.

(2) With respect to Equipment Operated and Maintained by 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 Lessor.

(3) With respect to Non-Operated equipment, Lessee shall return such Equipment to Lessor in the condition as when received, less normal wear and tear, but subject to the above warranty of condition.

(4) PAYMENT OF RENTAL: Rental for each preceding month during the term of the lease shall be due and payable within ten (10) days after receipt of Lessor's invoice therefor. Lessor warrants and certifies that the rental rates and charges established herein are not higher than the standard rates paid in the locality for similar equipment and service.

(5) ABATEMENT OF RENTAL AND OTHER CHARGES: No rental or other charges shall accrue respecting any unit of Equipment (a) during any period while the same is mechanically inoperable, or for any other reason not caused by Lessee, while said unit is not operating in accordance with the terms hereof, or (b) after the expiration or prior termination of the rental term respecting said unit of Equipment.

(6) DELIVERY OF EQUIPMENT: All Equipment shall be delivered by Lessor to the place of use.

(7) INSPECTION: Lessor may inspect the equipment at any time during Lessee's regular business hours.

(8) RETURN OF EQUIPMENT: Immediately upon the expiration or prior termination of the rental term for each unit of Equipment under this Rental Agreement, such unit shall be removed by Lessor from the place of use.

(9) WARRANTY OF TITLE: Lessor hereby warrants that all the above described Equipment is owned by him and that he has full power and authority to use and deal with the same in accordance herewith and to enter into this agreement.

(10) GOVERNMENTAL REGULATIONS: Lessor, its employees and agents acting under its direction or control in the performance of this Rental Agreement, shall at all times observe and comply with all applicable laws, statutes, rules and regulations of the jurisdiction in which the equipment will be used, or any subdivision or agency thereof, and shall likewise observe and comply with any and all rules and regulations of Lessee.

(11) LIABILITY: In the performance of this Agreement, Lessor shall act as an independent contractor and not as the agent or employee of Lessee.

" (12) With respect to equipment Operated and Maintained by Lessor, Lessor agrees to indemnify and save Lessee free and 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, as follows:

(13) Workman's Compensation Insurance as required by the Laws of Jamaica; Comprehensive Public Liability Insurance covering all of Lessor's operations hereunder, with limits of not less than £20,000 for injuries to or death of any one person and £40,000 for injuries to or death of two or more persons in any one accident, and £2,000 for damage to property in any one accident. Such policies shall be in such form and shall be issued by such insurance company or companies as may be satisfactory to the Lessee. Lessor shall provide Lessee with insurance certificates in quadruplicate showing the above coverage and containing the following statement:

> 'Ten (10) days notice of cancellation or change will be given to Kaiser Bauxite Company, Discovery Bay, Jamaica, W.I. before any cancellation or change of policy will be effective. The insurer waives any right to subrogation against Kaiser Bauxite Company, its agents and employees, which might arise by reason of any payment under this Policy.'

(14) 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.

(15) Lessor shall indemnify Lessee against any and all claims for infringement of patents or use of patent rights in connection with the use or operation of equipment under this agreement.

(16) UNION CONDITIONS: Lessor agrees to abide by the terms of all labour agreements to which Lessee may be a party insofar as they may be applicable to the work to be performed hereunder.

(17) TERMINATION: The rental term of any one or more units of Equipment under this Rental Agreement may be terminated by Lessee or any time upon seven days prior to written notice to Lessor.

(18) ASSIGNMENT: Neither this Rental Agreement nor any of the rights hereunder shall be assigned or transferred in whole or in any part by either party without prior written consent of the other.

(19) ENTIRE AGREEMENT: This Rental Agreement shall constitute the entire agreement between the parties and shall supersede all prior negotiations, proposals and representations whether written or oral."

We make some preliminary comments on these "General Conditions". They start off with a section headed "Mechanical Warranty, Maintenance and Damage." The objective of this section is to secure to Kaiser a warranty that the machinery rented is at the inception in good condition and fit for its intended use (though this use is not set out on the front). It then has so to speak two sub-sections: one dealing with machinery rented with an operator, and the other with machinery rented simpliciter. These clauses have been numbered 2 and 3. It is Clause 2 which creates the problem in this case, and it will be examined in some detail later on. It is sufficient to say for the moment that it is aimed at securing that the owner-operated machinery is maintained in good working condition, by the owner. To anticipate slightly, counsel for Kaiser argues that this obligation includes an obligation on the owner-lessor to make good any damage to the machinery due to the negligence of Kaiser or its servants or agents! The plaintiffs dispute that.

The next section deals with "Payment of rental," and is unremarkable. It is followed by a section "Abatement of rental and other charges." It carries further the theme that rental does not accrue when the machinery has broken down, but it contains a significant reservation in the words "or for any other reason not caused by the Lessee." Prima facie this conflicts with the assertion that Kaiser is not responsible for negligence resulting in the breakdown of the machinery hired, and will be considered in greater depth with Clause 2.

There follow sections dealing with and headed Delivery of equipment, Inspection, Return of equipment, Warranty of title, and Governmental regulations.

There then follows a very long section headed "Liability" and embracing four long clauses which will be examined in greater depth below. It is sufficient for the moment to say that in our opinion they are designed to deal with the situation created by the

fact that the person operating the rented machinery is an employee of the owner-lessor rather than of Kaiser, and that Kaiser is anxious to see that it does not incur any liability through the acts or negligence of such persons, and that where it does incur such liability, it is to be indemnified by the owner-lessor, who is to carry appropriate insurance for that purpose. Counsel for Kaiser argues that this section supports their contention that the owner-lessor is to bear the loss, or indemnify Kaiser against loss that may arise due to the negligence of Kaiser's own servants. No suggestion is made by them as to the limits to which that indemnity extends. The plaintiffs on the other hand argue that this section supports their contention that Kaiser is liable for the negligence of its own servants, and they for theirs.

The remaining headings call for no special comment. They include Union conditions, termination, assignment, and entire agreement - a provision aimed at seeing that the written agreement is not superceded by alleged oral collateral agreements not recorded in it.

The Law as to construction of exemption, exclusion, limitations of liability, or indemnity clauses in such contracts now falls to be considered, and will be follow d by a construction of the disputed clauses in the context of this agreeent.

We were referred to a great many cases by counsel for both sides, and it is proposed to look briefly at some of them and to collect where possible suggested tests that courts should follow in dealing with this type of situation.

Two early cases may be noted en passant:

In Lilley v Doubleday (1881) 7 Q.B.D. 510, a Divisional Court consisting of Grove and Lindley, JJ. held liable for loss due to no fault of his own a warehouseman who had in breach of his contract warehoused the plaintiff's goods at point A instead of the agreed place at point B. He had broken his contract by dealing with the subject matter in a manner different from that in which

he contracted to deal with it. Consequently he was not able to successfully set up that the goods had been damaged without his fault. This case is an early forerunner of a difficult line of cases described as cases of deviation or quasi deviation where the breach of contract has been held to amount altogether to complete non-performance of the contract.

Glynn v. Margetson (1893) A.C. 351 was a shipping case of this type: in the shipping cases deviation from the agreed route is treated as non-performance of the agreed contract, and as resulting in an inability to rely on exemption clauses inserted to protect the ship owner. The shipping deviation cases survive still today, untouched, and regarded perhaps as being sui generis. The case hasa more general relevance because of observations by Lord Herschell to the effect that in contruing instruments containing such exempting clauses one must have proper regard to the main intent and object of the contract, and limit the words used in the exempting clauses having in view that object and intent.

Rutter v. Palmer (1922) 2 K.B. 87; (1922) All E. R. 367 (C.A.) was relied on by both sides, with special reference to the test suggested by Scrutton, L.J. at page 92. It reads:

> "In contruing an exemption clause certain general rules may be applied. First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him."

Atkin L.J. added:

> "I accept the proposition that if a party to a contract would exempt himself from liability he must express himself in plain words....."

We were then invited to consider Beaumont Thomas v. Blue Star Line (1939) 3 All E.R. 127. In this case a ship's passenger had slipped on a section of corridor being cleaned and had been injured. His ticket contained a clause that neither the ship, the master or its agents should be held liable for loss or damage arising in certain specifically enumerated circumstances or from any cause whatsoever. Did this clause exclude liability for negligence in washing the corridor? In the Court of Appeal Scott, L.J. seems to have adopted the approach indicated by Scrutton, L.J. in Rutter v. Palmer (supra). He noted that:

> "In each interpretation they had two principles to guide them, (i) the rule of construction contra proferentem, and (ii) their natural reluctance to read into a contract a release from the duty of skill and care, unless quite unambiguous language made that construction unavoidable."

Lord Justice Scott went on to find that the only liability to which the exemption clause in the contract could refer was one for negligence, and that as (i) some meaning must be given, and (ii) that no other meaning than an exception of liability for negligence was left. This is an echo of Scrutton L.J.'s observation that if the party putting forward the exemption was liable only for negligence, then the clause would more readily be held to cover negligence and operate to exempt him.

We were then invited to consider the words of Lord Greene M.R. in the case of Alderslade v. Hendon Laundry Ltd. (1945) 1 K.B. 189; (1945) 1 All E.R. 244. In a passage which has since become probably the most cited passage in this area, Lord Greene said at page 192:

> "Where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because it would otherwise lack subject-matter. Where, on the other hand, the head of damage may be based on some other ground than that of negligence, the

> "general principle is that the clause must be confined in its application to loss occurring through that other cause to the exclusion of loss arising through negligence. The reason is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence."

Less often cited perhaps is another quotation from Lord Greene's judgment, on the same page:

> "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."

(This of course happened in Davies v. Collins (1945) 1 All E.R. 247 (C.A.) where the dry cleaner subcontracted out the missing laundry and Lord Greene, M.R. had little difficulty in distinguishing the Alderslade case, and finding that the defendant relying on the exemption clause had "deviated" from the contract and was not entitled to rely on the exemption clause. The deviation had never been contemplated by the contract at all. See also Alexander v. Railway Executive (1951) 2 All E.R. 442).

We were then referred to the Privy Council case of Canada Steamship Lines v. The King (1952) A.C. 192, (1952) 1 All E.R. 305, and in particular to the tests laid down in that case by Lord Morton of Henryton. After citing the passage set out earlier from Lord Greene's judgment in the Alderslade case, Lord Morton said at page 208:

> "Their Lordships think that the duty of a Court in approaching the consideration of such clauses may be summarized as follows:
>
> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the proferens') from the consequence of the negligence of his own servants, effect must be given to that provision.....

"(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 a doubt arises at this point, it must be resolved against the proferens.....

(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 that of negligence,' to quote again Lord Greene in the Alderslade case. 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'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."

The three tests suggested by Lord Morton have been adopted and applied by the House of Lords in Smith v. U.M.B. Chrysler (Scotland) Ltd. & South Wales Switchgear Co. Ltd. (1978) 1 W.L.R. 165; (1978) 1 All E.R. 18; (1978) S.C. (H.L.) 1 (which sets out the argument), and also by the same Court in Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd. & Securicor (Scotland) Ltd. (1983) 1 W.L.R. 964; (1983) 1 All E.R. 101 (sometimes called the second Securicor case) and in both the Court of Appeal and the House of Lords in George Mitchell (Chesterhall) Ltd. v. Finey Lock Seeds Ltd. (1983) 2 A.C. 803 (and (1983) Q.B. 284) Lord Morton's suggested tests have thus survived the "storm" in Photo Production Ltd. v. Securicor Transport Ltd. (1980) A.C. 827 (1980) 1 All E.R. 556. (Now called Securicor No. 1).

The dicta and tests that we have been discussing deal with exclusion and exemption clauses. There are however two other types of clause, the indemnity clause and the limitation of liability clause. The latter is not in issue in this case, but was considered recently by this Court in Harbour Cold Stores Ltd. v.

Chas E. Ramson Ltd. et al. (Supreme Court Civil Appeal 57/78: Judgment 22nd January, 1982). As to limitation of liability clauses it is only necessary to say that in the Ailsa Craig Fishing Co. Case (1983) 1 W.L.R. 964 Lord Wilberforce remarked at p. 966H:

> "Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remunerating which he receives, and possibly also the opportunity of the other party to insure....."

As to the normal, if there is such a thing, exclusion of liability clause, Lord Wilberforce said at the same page;

> "Whether a clause limiting liability is effective or not is a question of construction of that clause in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly and unambiguously expressed, and in such a contract as this, must be construed contra preferentem."

The significance of this remark lies of course in the fact that this was said subsequent to Securicor no 1, which clearly established that in all cases (except the deviation cases) the Courts are concerned with the construction of the clauses in the light of the contract as a whole. See too Lord Fraser of Tullybelton in the same case at page 970, where he cites the Canada Steamship Lines case and Smith v. U.M.B. Chrysler (Scotland) Ltd.

Turning to the indemnity clause cases, as distinct from the exclusion or exemption clause cases, we have a situation in which the "proferens" as Lord Morton conveniently terms the person seeking to rely on the clause excluding liability, is not merely arguing that his liability for the negligence of his servants has been excluded, but is seeking positively to make the other party pay for such liability, and to indemnify him against a liability that is primarily his own!

Such a case was that of The Carlton (1931) P. 186. In this case the plaintiff's ship was being towed through a cutting

by tugs operated by the defendant, the Port Authority, under a contract which contained a clause by which the owners of towed ships agreed to undertake to indemnify and hold harmless the Port Authority (which supplied the tugs) against all claims for or in respect of ... loss or damage of any kind whatsoever and howsoever and wheresoever arising in the course of and in connection with the towage ... and whether such loss, injury or damage be caused or contributed to by any negligence, default or error in judgment on the part of any officers or servants whatever of the Port Authority. A more sweeping and all embracing clause is hard to imagine! In the course of the towage other servants of the Port Authority who controlled the passage of ships through the cutting, negligently allowed another ship to come through from the other end, before the plaintiff's ship had completed its crossing. Caught midway in a passage not wide enough to allow both ships to pass one another, plaintiff's ship trying to avoid the other struck the side of the cutting and was injured. When sued, the defendant relied on the indemnity clause and denied any liability to plaintiff. They also counter-claimed for damage to the cutting when it was struck by plaintiff's ship. Bateson, J. found for the plaintiffs. He held that that the clause did not prevent the plaintiff recovering for damage to his own ship, it amounted to an indemnity to protect the Port Authority from third party claims, not claims made by the hirer of the tugs. The claim did not arise out of the towage but out of the quite separate acts of negligence by other staff who had negligently allowed the other boat in from the other end. The words used by the Port Authority did not protect them from the type of negligence that had here occurred. Bateson J. had regard to the aim of the clause and the context in which it occurred, despite the sweeping nature of the wording.

A similar situation arose in The Canada Steamship Line case in which the tests propounded by Lord Morton have been noted above. Here the Crown leased a freight shed to the plaintiffs under a lease which provided that the lessee should not have any claim against the lessor for damage to his goods in the said shed, together with an indemnity clause under which the lessee shall at all times indemnify the lessor from and against all claims by whomsoever made in any manner based upon or attributable to the lease, or any action taken or things done by virtue of it.

Here three employees of the Crown were repairing the shed at the request of the plaintiff lessees, when due to their negligence in using an oxy-acetylene torch to drill a hole (instead of using a drill) sparks fell on to material stored in the shed which caught fire and burned it down with all its contents. These contents included goods being stored by the plaintiffs for other persons. Plaintiff sued the Crown, by a petition of right, for the damage to his own goods, to which the Crown replied by relying not only on the clauses said to exclude their liability, but also claimed an indemnity, that is required the plaintiffs to pay to the other persons who had stored goods in the warehouse the value of the goods which the Crown's servants had destroyed by their negligence. The result contended for was that the plaintiffs would not only have received no compensation for their own goods lost, but were to pay for the goods of others which had been destroyed due to the negligence of the Crown's own servants. Lord Morton observed at page 211:

> "... if the Crown's contention as to this clause is correct, it imposes 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 (to repair) the whole of the damage must be paid for by the company ....
>
> Such a liability for the negligence of others must surely be imposed by very clear words, if it is to be imposed at all."

Lord Morton applying the tests he had propounded found that the words used were not apt to exclude liability: the words used even if wide enough to include negligence could cover other heads of liability, and the indemnity clause also failed to impose in clear terms the burdensome obligation already described.

So far as these indemnity clauses go we were also referred to the House of Lords decision in Smith v. U.M.B. Chrysler (Scotland) Ltd. and South Wales Switchgear Co. Ltd. referred to earlier. In this case the plaintiff was a workman who was an employee of The South Wales Switchgear Coy and brought an action against the defendant U.M.B. Chrysler (Scotland) Ltd. for personal injury arising out of their negligence and breach of statutory duty. The defendant joined as Third Party the Switchgear Company. They had employed that company to do certain electrical work for them at their plant, under a contract which contained a clause in which the Third Party had undertaken to indemnify Chrysler against (a) all losses and costs incurred by reason of Switchgear's breach of any statute etc. (b) any liability, loss, claim or proceedings whatsoever under any statute or common law (i) in respect of personal injury to or death of any person whomsoever, (ii) in respect of any injury or damage whatsoever to any property real or personal arising out of or in the execution of this order. The supplier (Switchgear) will insure against and cause all subcontractors to insure against their liability hereunder. The House of Lords rejected Chrysler's claim to be indemnified against the claim made by Smith in respect of negligence on the part of Chrysler's own servants. Their Lordships applied to this indemnity clause the three tests suggested by Lord Morton in the Canada Steamship Lines case for construing of exclusion or exemption clauses generally. Viscount Dilhorne observing however that a heavier burden lay on the proferens seeking to establish that the other party to an agreement had agreed to indemnify him against liability for his negligence and that of his servants than when he is merely seeking

to establish exemption from liability for his negligence. He cited with approval the observation of Buckley, L.J. in Gillespie Bros. & Co. Ltd. v. Roy Bowles Transport Ltd. (1973)1Q.B. 400 at 419:

> "It is however, a fundamental consideration in the construction of contracts of this kind that it is inherently improbable 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 to be free from liability in respect of damage occasioned by causes other than negligence for which he is answerable."

Lord Dilhorne further observed:

> ".....when considering the meaning of such a clause one must, I think, regard it as even more inherently improbable that one party should agree to discharge the liability of the other party for acts for which he is responsible. In my opinion it is the case that the imposition by the proferens on the other party of liability to indemnify him against the consequences of his own negligence must be imposed by very clear words...."

Lord Dilhorne found the clause here inadequate to meet that test. Further he found that the language used was intended to make it clear that the respondents were to be indemnified against liability to third parties in respect of acts or omissions of the appellants and their servants. In other words that the clause was meant to give indemnity to Chrysler in case of any liability to third parties imposed on them by reason of Switchgear's acts or omissions, and was not designed to cover indemnity for their own negligence.

Lord Fraser's speech, which was approved by all their Lordships was to like effect. He observed that the word "whatsoever" was no more than a word of emphasis and could not be read as an express reference to negligence. This accounted for the first test propounded by Lord Morton. Applying the second test he came to the conclusion that the words were meant to cover cases in which

the actions of Switchgear's employees had involved Chrysler in liability, and not cases in which Chrysler's own employees had involved it in liability.

Lord Keith came to the same conclusion.

In the result then what is involved in these cases is the construction to be given to the clauses, bearing in mind the unlikelihood of parties agreeing to releasing in advance their claims to recover in negligence, if any, arising out of acts or omissions committed against them by the parties with whom they have contracted, and bearing in mind that it still more unlikely that they would undertake to answer for the liability for faults of the other contracting party injuring third parties.

Applying the three tests suggested by Lord Morton and the considerations expressed in cases like the South Wales Switchgear case, it is abundantly clear that so far as the clauses in the instant case falling under the caption "Liability" are concerned, clauses 11 to 14, what is being dealt with is the possibility of Kaiser incurring liability to third parties arising out of breaches committed by the lessors. Indeed the clause most concerned, clause 12, speaks of indemnifying Kaiser against liabilities "arising directly or indirectly from the breach of warranty, acts or omissions of Lessor (Consolidated Engineers Ltd.) its agents or employees." Nothing could be clearer. There is no mention or even suspicion of a mention of Kaiser being indemnified in respect of its own negligence or that of Kaiser employees, whether to third parties or to the lessor.

In order to protect the indemnity to Kaiser the lessor is required to insure. One can certainly insure against one's own acts of negligence, or that of one's staff, but it would be well nigh impossible for a relatively small local enterprise to insure against liabilities that Kaiser might incur. Further one should ask against what liabilities of Kaiser? Where would one draw the line? It is to be noted that the clause requires the Lessors "to

procure, carry, maintain and pay for insurance covering all of its operations under this rental agreement." This has nothing to do with Kaiser's operations, whether under this rental agreement or otherwise. The furthest that can be said is that in the event of Kaiser being at fault, jointly with the lessors, the insurance company is to waive any right to subrogation against Kaiser. Further be it noted that the insurance is not "comprehensive" insurance relating to the tractor itself, what is envisaged is insurance in respect of workmen's compensation, covering the lessors' own employees, and insurance against injuries to third persons caused by the operation of the tractor.

Turning to consider the effect of Clause 2, as modified by Clause 5, what does Clause 2 provide? It falls under a section headed "Mechanical warranty, maintenance and damage," and on the face of it is concerned with seeing that the lessor maintains his equipment in good order. It states "any loss thereof or damage thereto arising from any cause whatsoever shall be borne by the lessor." Had it been desired to show that "any loss or damage" to the equipment included loss or damage inflicted by the lessee Kaiser, or its servants or agents, nothing would have been simpler than to say so.

It is clear that exclusion for the negligence of Kaiser or its servants has not been expressly mentioned. We were referred to the judgment of Buckley, L.J. in Gillespie Brothers & Co. Ltd. v. Roy Bowles Transport Ltd. (1973) 1 Q.B. 400 where at page 420 in applying the three tests laid down by Lord Morton to a case in which the indemnity clause read "The trader shall save harmless and keep the carrier indemnified against all claims or demands whatsoever by whomsoever made...." Buckley, L.J. held that the addition of the word "whatsoever" signified that the indemnity was intended to extend to all claims and demands, without exception and that this meant that claims including claims for negligence could be said to have been expressly mentioned and so satisfied the first

of Lord Morton's tests. This finding was however expressly overruled by their Lordships in the South Wales Switchgear case. See Viscount Dilhorne at page 169: "To satisfy that (test), there must be clear and unmistakable reference to negligence." See also Lord Fraser at pages 172-173: "I am unable to agree with the learned Lord Justices's conclusion that the clause contained "an agreement in express terms" to indemnify the proferens. I do not see how a clause can "expressly" exempt or indemnify the proferens against his negligence unless it contains the word "negligence" or some synonym for it..." He went on to add that the word "whatsoever" was "no more than a word of emphasis and it cannot be read as equivalent to an express reference to negligence." In our view the words in Clause 2 do not satisfy the first test proposed by Lord Morton. And this was later conceded by Miss Hudson-Phillips for Kaiser. She relied on satisfying the second and third tests.

As to the second test, can it be said that though there is no express reference in the clause covering negligence, the words used are (a) sufficiently wide to embrace it, and (b) to refer to the third test that there is no other liability other than negligence to which they could refer?

We think that the clause fails both the second and third tests; read in the context of Clause 5, what is the situation? If the machinery is not kept in condition fit for doing its work, both Clause 3 on the front page and Clause 5 on the back page provide that no rental shall accrue, but Clause 5 adds "or for any other reason not caused by the lessee."

This can only mean that rental will accrue if the machine is inoperable due to the fault of the lessee, and if that is so then what happens to the suggestion that Clause 2 is so wide that the lessor is obliged to remedy at his own expense and without recourse damage rendering the machine inoperable due to the negligence of the lessee?

It should be remembered that the machine may be rendered inoperable due to the fault of Kaiser for reasons other than negligence in the ordinary sense. By Clause 2 on the front page the lessee undertakes the responsibility of supplying fuel and lubricants. If these are not supplied the machine cannot operate.

Further it is clear that apart from a duty of care owed to the lessor in tort by Kaiser, Kaiser owed to the lessor duties under the contract. The exclusion clause, if it were to be considered such, can therefore apply to duties other than that in negligence. On this score the remarks by Scrutton, L.J. in Rutter v. Palmer, Lord Greene in the Alderslade case and Lord Morton in the third test would become applicable. This is clearly illustrated by a case, not cited to us, but which is referred to in all the testbooks dealing with this topic, White v. John Warwick & Co. Ltd. (1953) 2 All E.R. 1021. The case is a converse to the instant case, but the principle is clear. There the defendant hired to the plaintiff, a news-agent, a tricycle used by him and his staff for delivery of newspapers. There it was the owner or lessor of the vehicle that produced the contract form for the news-agent to sign. That form, the contract of hire, provided: "Nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machine hired." It was held that the clause relieved the owners of the tricycle only from liability under the contract, but not from liability in tort, and they would be liable in negligence if it were established. The case was a Court of Appeal decision given shortly after the Alderslade case, and Lord Greene's observations were duly cited. The Court noted that there were two possible liabilities involved, a liability in contract, and separate and apart from that a liability in tort, in negligence, applying the principles in Donoghue v. Stevenson. Accordingly in construing the exemption clause, the Court held that it relieved against the liability in contract, and that the words used were not sufficiently clear to relieve against liability in negligence.

The accident had occurred because the saddle of the tricycle came loose and threw the rider. Singleton, L.J. observed:

> "In the circumstances of the present case the primary object of the clause, one would think, is to relieve the owners from liability for breach of contract or for breach of warranty. Unless, then, there be clear words which would also exempt from liability for negligence, the clause ought not to be construed as giving absolution to the owners if negligence is proved against them."

Denning, L.J. (as he then was) said:

> "In the present case there are two possible heads of liability on the owners, one for negligence, the other for breach of contract. The liability for breach of contract is more strict than the liability for negligence. The owners may be liable in contract for supplying a defective machine, even though they were not negligent. In these circumstances, the exemption clause must, I think, be construed as exempting the owners only from their liability in contract, and not from their liability in negligence."

In the result we do not think that Clause 2 can be read as exempting the lessees (Kaiser) from liability in negligence, particularly when the words "not caused by the Lessee" appearing in Clause 5 are taken into account. In our opinion White, J. was perfectly correct in finding that this was not an exemption clause favourable to the defendant, and that there was nothing in the document to indicate explicitly that the liability of the lessee was being adverted to or being excluded.

It has not been necessary to consider whether the act of negligence alleged in starting the conveyor belt while the tractor was still inside the dome was such as to amount to a departure from the contract, or to use the phrase which at one time gained considerable support in this area of the law a fundamental breach, or breach of a fundamental term. That line of argument was pressed or canvassed before White, J. in the Court below, but was tacitly abandoned in view of the House of Lords' decision in Securicor No. 1,

It may perhaps be of interest to notice that despite that decision the Parliament of the United Kingdom has recently introduced a number of pieces of legislation relating to attempts to exclude basic liabilities by unfair exemption clauses, see for example the Unfair Contract Terms Act, 1977, discussed in Cheshire and Fifoot on Contract, 10th Edn. (1981) at pages 158 et seq. See also the judgment of Lord Denning, M.R. in the Court of Appeal in George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd. (1983) Q.B. 284 at pages 294 et seq.

The appeal will be dismissed, the judgment of the Court below affirmed, with costs to the respondent to be taxed or agreed.