

10, 1971

No. 6 of 1969

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 7 APR 1972
25 RUSSELL SQUARE
LONDON, W.C.1.

BETWEEN

- 1. CHAN CHENG KUM,
- 2. HUA SIANG STEAMSHIP CO. LTD. Appellants

AND

- 1. WAH TAT BANK LIMITED,
- 2. OVERSEA-CHINESE BANKING CORPORATION LIMITED. Respondents

CASE FOR THE RESPONDENTS

Record

- 1. The Appellants have brought this appeal with the leave of the Federal Court of Malaysia (hereinafter called the Federal Court) from the order of the Federal Court dated 7th July, 1967 whereby the Federal Court (Wee Chong Jin, C.J., Tan Ah Tah, F.J. and Chua, J.) allowed the appeal of the Respondents from the judgment of the High Court of the State of Singapore (Kulasekaram, J.) dated 30th December, 1965.
 - Vol.1 p.401
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- 20 2. The Respondents were the Plaintiffs in the action and the Appellants were the Defendants. There were also third party proceedings by the Respondents against Tiang Seng Chan (Singapore) Limited, Lee Chin Tian, Lee Teow Keng and Lee Peng Koon, but those proceedings were settled on 15th June, 1964.
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3. The Respondents' claim in the action was for delivery up of 20 consignments of rubber and pepper and/or for M. \$623,186.66 their value and/or for damages for conversion and/or wrongful detention and/or breach of duty as bailees and/or carriers. The said consignments had been carried on board two motor vessels, the "Hua Heng" and "Hua Li", belonging to the first Appellant from Sibü (in Sarawak) to Singapore. The said consignments were carried under mates' receipts which acknowledged receipt of the consignments in apparent good order and condition for shipment to Singapore and named the second Respondents as the consignees of the consignments. The Appellants did not deliver them to the second Respondents. 10

4. The first Respondents are and were at all material times a bank incorporated under the laws of Sarawak having their head office at Sibü. The second Respondents are and were at all material times a Singapore bank acting as the agents of the first Respondents. Tiang Seng Chan (Singapore) Ltd. (the above mentioned Third Party, hereinafter called the shippers) were customers of the first Respondents at Sibü. The first Respondents granted the shippers overdraft facilities and financed the shipment of the shippers' goods from Sarawak to Singapore. The shippers pledged the goods so shipped as security for the advances made. At the material time the shippers were heavily indebted to the first Respondents and were unable to meet their obligations. 20 30

5. In accordance with the custom and practice of the trade between Sarawak and Singapore, no bills of lading were issued in respect of the said consignments, but the mates' receipts were taken naming the second Respondents as the consignees. The mates' receipts were handed by the shippers to the first Respondents, who sent them to the second Respondents. The Respondents claim that as the pledgees of the goods and the holders of the mates' receipts and the consignees named therein they were entitled to the possession of the goods at Singapore. The Appellants delivered the goods to the shippers 40

at Singapore without production or surrender of the relevant mates' receipts, but against letters of indemnity signed by the shippers (and 3 of their directors). When the Respondents claimed against the Appellants, the Appellants denied that they were under any liability to the Respondents.

6. The main questions raised in the action between the Respondents and the Appellants were -

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(1) The Respondents alleged that by the custom of the trade between Sarawak and Singapore mates' receipts were treated as, and were equivalent to, bills of lading, and adduced oral and documentary evidence to that effect. The Appellants contested the existence of this custom, and said further that such a custom could not be recognised in law.

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(2) Alternatively the Respondents alleged that having regard to the undisputed practice of the trade, the issuing of these mates' receipts and the circumstances of this case (including the Appellants' knowledge of the Respondents' interest in the goods and the course of dealing between the Respondents and the shippers) the Appellants had represented to the Respondents that they held the goods to their order and/or had attorned to the Respondents and/or the Appellants were estopped from denying the Respondents' right to the possession of the goods. The Appellants disputed the representation, attornment and estoppel.

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(3) Alternatively the Respondents alleged that the issuing of the mates' receipts and the appropriation of the goods to the contract of pledge were sufficient to transfer a special property in the goods to the Respondents and so to disentitle the Appellants and the shippers from dealing with the goods adversely to the rights of the Respondents. This point was also contested by the Appellants.

(4) The first Appellant denied that he was under any personal liability, alleging that he had by oral demise chartered the vessels on bareboat terms to the second Appellants. These allegations were disputed by the Respondents, who claimed that the first Appellant was also liable.

7. The trial of the action took place before Kulasekaram, J. on 34 days between the 2nd December, 1963 and the 29th April, 1964. Many witnesses gave evidence of the existence of the custom upon which the Respondents relied (cf. paragraph 6(1) above). There was also evidence relating to the fourth question set out above. 10

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8. Kulasekaram, J. reserved judgment on the 29th April, 1964 and did not deliver it until the 30th December, 1965. He treated the first main question set out above as a question of law. He said that in his view no amount of custom could change the character of the mate's receipt so as to confer any additional rights or make it equivalent to a document of title; a local custom, however strong, could never achieve this effect. The learned Judge held that no custom could grow in a matter like this to have a binding effect in law unless it were of universal application; mates' receipts could never become documents of title unless there were clearly expressed legislation in the local area, or the custom in this particular trade had been proved to be applicable all over the world. Kulasekaram, J. therefore did not make any findings of fact at all regarding the Respondents' proof of the custom on which they relied. 20 30

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9. On the second main question Kulasekaram, J. found that the effect of the mates' receipts was that the goods were consigned to the order of the second Respondents, and the Appellants knew what was going on, and might have known that the mates' receipts were intended to be deposited and in fact were deposited with the first Respondents as the principals of the second Respondents. Nevertheless, he concluded that there was no clear understanding between the 40

Appellants and the Respondents that the Appellants would be holding the goods for the Respondents. The plea of attornment therefore failed. The learned Judge did not specifically deal with the third main question, but he held that the goods were not pledged to the Respondents, and the moment the Appellants were satisfied that the persons claiming delivery were the shippers they were justified in delivering the goods to them. The learned Judge did not consider it necessary for him to deal with the fourth main question at all, and did not do so. He thus made no finding whether the oral bareboat charter alleged by the first Appellant had been made or not. He dismissed the Respondents' claims.

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ll. 37/45

10. The Respondents appealed to the Federal Court of Malaysia. The judgment of the Court of Appeal was given by Wee Chong Jin, C.J. (with whom Tan Ah Tah, F.J. and Chua, J. agreed) on 7th July, 1967. On the first main question, the learned Chief Justice reviewed the parties' arguments on the question of law and reviewed the historical position; he held that in principle there was no reason why a local trade usage or custom should not create a document of title to goods so that the transfer of the document operated to pass the property in the goods which it was the intention of the transferor to pass. He referred to the decision in Lickbarrow v Mason (1794), 5 T.R. 683 and the role of custom in establishing the bill of lading as a document of title, and to Goodwin v Robarts, L.R. 10 Ex.337, 352, where Cockburn, C.J. said:

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"Bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing which without it would not have had that effect at common law. It is from mercantile usage as proved in evidence and ratified in the great case of Lickbarrow v. Mason that the efficacy of bills of lading to pass the

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property in goods is derived."

Wee Chong Jin, C.J. therefore rejected the ground upon which Kulasekaram, J. had decided the first question against the Respondents.

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11. On the question of fact whether the relevant custom had been proved, the Chief Justice reviewed the evidence contained in the record and the parties' submissions as to its effect. He found that the Respondents had proved that it was a custom of the trade relating to shipment of goods between Sarawak ports and Singapore that mates' receipts such as those to which the present action relates were treated as documents of title to the goods thereby covered in the same way as bills of lading. He found that this was the evidence of witnesses whose impartiality was beyond doubt. The Chief Justice also found that in this trade no carrier would give delivery of goods carried under a mate's receipt save on production of the relevant mate's receipt. He found that it was a regular practice to consign the goods covered by the mate's receipt only to the order of a person, but where there was no intention to transfer the general or special property in the goods they were consigned "to selves", that is, to the shipper. It was known to all engaged in the trade that if one saw in a mate's receipt the words "consigned to the order of" a named bank one knew that the goods were pledged to that bank. Similarly, the practice of the trade was to endorse mates' receipts in the same manner as bills of lading were endorsed in the international shipping trade. There was a practice among banks in this trade to convert mates' receipts to trust receipts or letters of hypothecation. Finally, there were instances where carriers in this trade had accepted liability to the holders of mates' receipts on the same basis as to holders of bills of lading. The learned Chief Justice accordingly found the custom proved in fact.

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12. This conclusion was enough to enable the Court of Appeal to decide the appeal in favour of the Respondents, but the learned Chief

Justice went on to decide the second and third main questions also in favour of the Respondents. He found that the Appellants knew that the Respondents would rely upon the representation in the mates' receipts that the Appellants were holding the goods for the Respondents, and the Respondents did rely upon that representation. He found that the fact that the shippers, on taking delivery without production of the mates' receipts, gave indemnities to the Appellants clearly indicated that both the shippers and the Appellants were well aware of, and conducted their shipping transactions in accordance with, the trade usage, and both knew that the Respondents had an interest in the goods covered by the mates' receipts. He also found that from the course of dealing the Appellants knew that the mates' receipts would be delivered by the shippers to the second Respondents via the first Respondents. He accepted the contention that, as the Appellants had received the goods from the shippers for delivery to the Respondents and had issued the mates' receipts in circumstances in which they knew that in the ordinary course of business the mates' receipts were likely to be delivered to the Respondents and relied upon by them, the Appellants must be taken to have represented to the Respondents that they held the goods for the Respondents.

13. The learned Chief Justice also cited and applied the cases of Bryans v. Nix (1839), 4 M. & W. 775 and Evans v. Nichol (1841), 3 M. & G. 614. Just as in those cases the plaintiffs were held to have good titles to sue in conversion (or trover), so in the present case the Respondents had a good title to sue and were entitled to succeed in conversion against the Appellants for having delivered the goods to the shippers. The shippers had shipped the goods for delivery to the Respondents and had taken mates' receipts naming the Respondents as consignees and had handed the mates' receipts to the Respondents. This was a final appropriation of these goods to the shippers' contract of pledge with the Respondents. The shippers had lost the right to revoke or

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disturb that appropriation, and thereafter any dealing with the goods by the shippers or the Appellants inconsistent with the rights of the Respondents was a wrongful conversion of the goods as against the Respondents.

14. As regards the fourth main question, the parties were agreed that this could not properly be dealt with on the appeal to the Federal Court, as its determination depended almost entirely on the credibility of the witnesses who gave evidence relevant to that question. The Federal Court accordingly allowed the Respondents' appeal held that the Respondents were entitled to damages against the second Appellants, and ordered that there should be a re-trial of the issue whether or not the first Appellant was also liable for damages for wrongful conversion. 10

15. The Respondents respectfully submit that the Federal Court was right to allow their appeal and that Court's decision was in accordance with authority and with the evidence in the case. The Appellants' contentions that these mates' receipts were without effect or value in the hands of the Respondents is contrary to the commercial realities as shown by the evidence in this case and is neither supported by nor consistent with the relevant authorities. Further, Kulasekaram, J. was wrong in holding that a custom can obtain legal recognition only if it is observed all over the world. 20 30

16. The Respondents respectfully submit that the Appellants' appeal should be dismissed with costs and the order of the Federal Court should be affirmed for the following (among other)

REASONS

- (1) BECAUSE the Respondents as holders of the mates' receipts were pledgees of the goods and were entitled to receive delivery of the goods from the Appellants:
- (2) BECAUSE by the custom of the trade between Sarawak and Singapore the mates' receipts were equivalent to, and to be treated as, 40

bills of lading:

- (3) BECAUSE the Appellants attorned to the Respondents as holders of the goods on the Respondents' behalf:
- (4) BECAUSE the Appellants were estopped from denying that they held the goods to the Respondents' order:
- 10 (5) BECAUSE the Appellants were estopped from denying the Respondents' title to the goods:
- (6) BECAUSE the Appellants knew or ought to have known that the mates' receipts were held by the Respondents as pledgees of the goods:
- 20 (7) BECAUSE when the mates' receipts had been issued naming the second Respondents as consignees and the shippers had delivered the receipts to the first Respondents the shippers had no right to direct delivery of the goods to anyone other than the second Respondents:
- (8) BECAUSE the shippers appropriated the goods to the executory contract of pledge between them and the first Respondents and thereby lost any right to direct delivery of the goods to anyone other than the consignees named in the mates' receipts:
- 30 (9) BECAUSE of the authority of Bryan v. Nix and Evans v. Nichol:
- (10) BECAUSE the Respondents have a good right of action for the conversion and non-delivery of the goods:
- (11) BECAUSE of the other reasons given by Wee Chong Jin, C.J.

J. G. LE QUESNE

JOHN HOBHOUSE

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HOLDEN AT SINGAPORE
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Appellants

- and -

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CASE FOR THE RESPONDENTS

COWARD, CHANCE & CO.,
ST. SWITHIN'S HOUSE,
WALBROOK, E.C.4.

Solicitors for the Respondents.