12,1958

IN THE PRIVY COUNCIL

1958

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N :-

52107

PERCY SIMONS trading as ACME CREDIT SERVICES
(Plaintiff) Appellant

- and -

ANTHONY EUGENE MIDDLETON GALE (Defendant)
Respondent

C A S E FOR THE RESPONDENT

INCE & CO.,
10-11, Lime Street,
LONDON, E.C.3.
Respondent's Solicitors.

IN THE PRIVY COUNCIL No. 2 of 1958

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN: PERCY SIMONS trading as Acme Credit Services (Plaintiff) Appellant

-and-

ANTHONY EUGENE MIDDLETON GALE (Defendant) Respondent

CASE FOR THE RESPONDENT

Record.

1. This is an Appeal by leave of the Supreme Court of New South Wales, from a Judgment after Verdict of the Honourable Mr. Justice Walsh, sitting as the Supreme Court of New South Wales in Commercial Causes. Upon the hearing of the action in which the Judgment appealed against was given, a jury having been dispensed with by consent of the parties, the learned Judge on the 12th November 1957 found a verdict for the Respondent (the Defendant in the said action) and directed that Judgment be entered accordingly. Judgment after Verdict was duly signed on the 10th December, 1957, whereby it was adjudged that the Appellant recover nothing against the Respondent and that the Respondent recover against the Appellant his costs of defence.

pp. 32-35

p.13,11.13-14

p.27,11.29-33

p. 31

p.31,11.18-21

2. The Appellant claimed to be entitled to recover the sum of £29,000 and interest thereon from the Respondent under two policies of insurance, both dated the 25th April 1956. The circumstances in which the relevant contracts of insurance were made and the policies issued and the facts by reference to which the Appellant asserted that he was entitled to be indemnified thereunder are hereinafter in this Case set out.

(Separate Exhibits)

3. On the 7th December 1955 in Sydney, New South Wales, one J.H. Trevis, acting on behalf of the Appellant, approached one Harrington, a representative of insurance brokers in Sydney, Edward Lumley & Sons (N.S.W.) Pty., Ltd. (here-

p.40,11.35-40

Record

-after called "the Sydney brokers" with a request to arrange for insurance cover. According to Trevis, the insurance cover was required for the following circumstances:

p.39,l.18 p.40 One Salvador Brucelas, of Manila, Philippine Islands, had told Trevis that he (or a partnership consisting of himself and one Martinez) proposed to buy for £A.23,000 a vessel called the "Cap Tarifa", then lying in Noumea, New Caledonia. The ship was to be used to transport cattle from Townsville, Queensland, to Manila. For the purpose of financing this transaction, an irrevocable p.39,l.28 letter of credit for 160,000 dollars had been established by Brucelas and Martinez in Sydney in favour of New Zealand and Mercantile Agency Co. Ltd., Townsville, who were to be the vendors of the cattle to be shipped. As the purchase price of the cattle for the first shipment was to be p.40,l.30 only some £A39,000, and as the total value of the credit (160,000 dollars) was about £A71,000, there would be a substantial sum available out of the proceeds of the letter of credit, when paid, over and above the sum payable to the vendors of the cattle. Brucelas asked the Appellant, through p.39,ll.19-21 Trevis, to advance to him, or to the partnership, the sum of £A23,000 to finance the purchase of the vessel. The sum advanced was to be repayable out of the proceeds of the letter of credit above re- p.40,ll.14,15 ferred to. Confirmation had, according to Trevis, been received that the cattle were available. The vessel had to be converted for the carrying of p.47,ll.38-41 cattle. It was anticipated that the vessel would sail from Noumea about the 20th December 1955, arrive in Brisbane about the 27th December 1955 for the work of conversion to be carried out there, would sail from Brisbane about the 11th January 1956, arrive at Townsville about the 14th January 1956 and, having loaded there a cargo of cattle, p.40,ll.39-43 would sail for Manila about the 18th January 1956. Trevis asked Harrington to arrange for insurance cover in the following terms:

> "If in the event of the ship not completing loading of cattle at Townsville within 90 days from sailing from Noumea from any cause whatsoever that this Company be paid an amount approximating £A27,000."

Record

Subsequently, the amount to be covered was increased to £A29,000. p.49,l.18

4. As a result of this request from Trevis, the Sydney brokers by telegram dated the 7th. December, 1955, asked their associated company of insurance brokers in London, Edward Lumley & Sons Ltd. (hereinafter called "the London brokers") to effect the insurance requested on behalf of the Appellant. A series of cables was thereafter exchanged between the London brokers and the Sydney brokers. The London brokers, in the course of trying to place the insurance, informed the Sydney brokers that the insurance could be effected subject to the following warranties: p.47,11.18-41 pp.48-50 p.48,11.32-36

> "Warranted animals available loading and all arrangements for conversion vessel made at inception of this insurance." p.48,11.33-34

5. The contracts of insurance, containing the warranties above mentioned, were duly made in London on behalf of the Appellant. A cover note, signed by the Sydney brokers, was issued to the Appellant. This cover note was dated the 13th December 1955, though it appears to have been actually issued on the following day, the 14th December 1955. The Respondent submits that this document, executed by the Sydney brokers who were agents for the Appellant in placing the insurance, establishes against the Appellant that the contracts of insurance had been effected and became binding on the insurers and the Appellant on the 13th December 1955. The actual policies of insurance were, in accordance with the usual practice, not prepared or issued until a considerably later date. (separate exhibit) p.17, 11.32-34

6. Two policies of insurance (being the policies in respect of which the action was brought out of which this Appeal arises) were issued in London on the 25th April 1956. One of these policies, for £22,000 part of £29,000, was a Lloyd's policy which the Respondent sub-scribed for his proportion thereof. The other policy was a Companies Combined Policy of the (separate exhibits)

Record

Institute of London Underwriters, for £7,000 part of £29,000. The relevant wording was the same in both policies, namely:-

> "To pay total loss of £29,000 in the event of the vessel not completing loading within 90 days from time of sailing from Noumea from any cause whatsoever.
> No Free of Capture and Seizure.
> Warranted animals available for loading.
> Warranted all arrangements for conversion made at inception of this Insurance."

7. The Appellant's claim against the Respondent appears to be for the whole sum of £29,000 insured by the two policies together with interest, whereas the Respondent's liability (if there be liability) is only for the amount subscribed by him in the Lloyd's policy. It may be however that this point can be disregarded in this Appeal, since the other Lloyd's Underwriters who subscribed the Lloyd's policy, and the Insurers who subscribed the other policy, are content to be bound in respect of their proportions in accordance with the liability (if any) of the Respondent in respect of his said proportion.

p.41,l.31 p.41,l.32 p.42,ll.39-43 p.42,ll.20-30

8. The "Cap Tarifa" did not sail from Noumea until the 10th January 1956. On the 11th January 1956 one Howell, the husband and authorized attorney of Brucelas' partner, one Juanita Martinez, called on Trevis and stated that he and his wife knew nothing of the purchase of the vessel, and that the transaction was outside the scope of the partnership. Trevis persuaded Howell to take no drastic action at that moment.

p.42,ll.35-36 p.42,ll.37-43

9. The vessel berthed at Brisbane on the 16th January 1956. It was surveyed by various persons, including a representative of Brown and Broad Ltd., ship repairers, of Brisbane. According to Trevis, upon that survey, "the

Record

fitting of the vessel was arranged as indicated in a letter obtained from Mr. Hunter of Nixon-Smith." (The Nixon-Smith Shipping and Wool Dumping Co. Pty. Ltd., of Brisbane had been appointed as ship's agents by Trevis, who was acting apparently for this purpose as agent for Brucelas or the partnership). However, as a result of the survey, it was discovered that very extensive repairs would have to be carried out to the vessel's boiler and furnaces, and that the vessel would also have to be dry-docked at Brisbane for essential repairs, in addition to the conversion for the purpose of carrying cattle. Howell refused to ratify the arrangements made by Brucelas. As a result the vessel was not repaired, or converted for carrying cattle. It did not go to Townsville or load any cattle there.

p.42,ll.32-35

p.53,ll.40-42)
p.59,ll.41-43)

p.43,ll.1-14

p.43,ll.15-17

10. In these circumstances, the Appellant by a Writ dated the 20th September 1956 started an action in the Supreme Court of New South Wales, against the Respondent, claiming £29,000 and interest at the rate of 8 per cent per annum from the date of the Writ, under the two policies of insurance.

Not printed.

The Particulars of the Cause of Action were delivered on the 6th December 1956.

pp. 1,2

By amendment made at the hearing, the claim for interest was amended to run from the date when the money was alleged to have become payable under the policies of insurance, the 9th April 1956.

p.6,ll.10-22

p.13,ll.11-13

11. The grounds of defence, so far as they are relevant for the purposes of this Appeal, were:

(1) That the Appellant was in breach of the express warranty contained in both policies, namely:

"warranted all arrangements for conversion made at inception of this insurance."

(2) That the Appellant did not show that

Record

he had any insurable interest in either of the said policies at the date of the alleged loss, namely the 9th April 1956, being the date of the expiration of the 90 days from the sailing of the vessel from Noumea.

p.31,ll.12,13 pp.6-11

12. The action was tried by the Honourable Mr. Justice Walsh, sitting without a jury by consent of the parties, as a Commercial Cause, in the Supreme Court of New South Wales in Commercial Causes, on the 8th and 9th October 1957. The Appellant adduced no oral evidence, other than formal evidence of an officer of the Registrar-General's Department who produced the Certificate of Registration under the Business Names Act, of the firm known as Acme Credit Services.

p.8,ll.21-29 p.37

p.7,ll.36-38

The two policies of insurance dated the 25th April 1956 were also produced and exhibited.

p.8,l.31 p.11,l.22 pp.39-75,l.13

13. The only relevant witness called on behalf of the Respondent was Mr. John William Wight, a solicitor, who was the Respondent's solicitor in the action. He produced certain documents including a file of correspondence under the signature of Trevis, a letter from the Respondent's solicitor dated 12th December 1956, and the reply thereto, dated 17th December 1956, from the Appellant's solicitors, with enclosures. This letter gave or purported to give further particulars of paragraph 5 of the Appellant's Particulars of the Cause of Action. This witness also produced the Certificate of Insurance of the Sydney brokers dated the 13th December 1955. These documents were, after objection taken on behalf of the Appellant, admitted in evidence and exhibited.

p.75,l.14.- p.76 pp.77-89

(separate exhibit)

p.11,ll.24- p.11a,l.2

pp.13-27

14. On the 12th November 1957 Walsh J. delivered oral Judgment.

pp.15,l.15- p.16,l.11

15. The learned Judge dealt first with the Respondent's contention that the Appellant had failed to show that an insurable interest existed

Record

at the time of the loss in that the Appellant had failed to prove that, "prior to the time when the policies crystallized, that is the expiration of 90 days from the date of sailing", the loan to cover the repayment of which the policies had been effected, had not been repaid from some other source than the contemplated source of repayment, namely the letter of credit. Thus, the loan might have been repaid to the Appellant, in whole or in part, out of the proceeds of the sale of the vessel. The Appellant had contended that this submission was not open to the Respondent on the pleadings. The learned Judge, without deciding whether the Appellant's contention as to the pleadings was justified, held that in any event there was evidence from which it was open to him to infer that at all material times the Appellant's interest in obtaining repayment of the loan continued. This inference was based, and based only, on the terms of a letter to the Respondent's solicitor dated the 14th February 1956 in which, according to the learned Judge, the Respondent's solicitor was told by Trevis "that a loss on the loan appeared inevitable, and was put in a position to check that statement and make enquiries from then on as to any developments which took place."

p.15,ll.25-27

p.14,ll.21-32

p.16,ll.7-11

p.15,l.28

p.16,l.11

p.15,l.46-

p.16,l.2

16. In the Respondent's submission, the learned Judge was in error of fact regarding the terms of the letter dated the 14th February 1956. In that letter Trevis, so far from stating (as the learned Judge says) that "a loss on the loan appeared inevitable", actually said the exact contrary. He said:

pp.39-47
1,15

p.46,ll.20-26

> "If the arrangements for chartering ships eventuate in the near future it is a distinct possibility and my wish that all indebtedness by Brucelas to this Company will be liquidated within the 90 days period of the insurance policy and so preclude any claim under the policy."

17. The Respondent submits that the question whether the Appellant had an insurable interest was put in issue by Paragraph 9 of the

p.4,ll.12-16

Record

Particulars of Grounds of Defence. The onus was on the Appellant to prove affirmatively that such insurable interest existed at the date of the alleged loss, namely the 9th April 1956. The Appellant's insurable interest in the loading of cattle in the vessel at Townsville could relate only to the continued existence of a loan by him to Brucelas, or to the partnership, still at that date outstanding and not repaid from any source. The Appellant adduced no such evidence, and no inference could properly be drawn from the letter of the 14th February 1956 (on which alone the learned Judge relied as providing such evidence) that repayment of the loan had not been received before the 9th April 1956.

p.17,l.29-p.20,l.20 p.19,ll.10-15 p.20,l.8-10 p.20,ll.11-20

18. The learned Judge in his Judgment next dealt with the question of the meaning of the words in the warranty "at inception of this insurance". He rejected the Appellant's contention that these words referred to the date when the vessel sailed from Noumea, and held that they referred to a date not later than the date when the Certificate of Insurance was issued, namely the 14th December 1955. It was, he said, "arguable that the reference was to an earlier time, namely the time when application for insurance was first made. This would be on or about 7th December. However, having regard to the views I have formed upon other questions yet to be discussed it makes no practical difference whether the critical date is the 7th or 14th of December; and it is sufficient for me to hold that the policy required that at the latest the arrangements should have been made by the 14th December."

19. The Respondent submits that the learned Judge was right in holding that the critical date could not be later than the 14th December 1955.

20. The Respondent submits that, in the light of the surrounding circumstances, the words "warranted all arrangements for conversion made at inception of this insurance" referred

Record

to arrangements then already made at the date, in the course of the negotiations in London between the London brokers and the insurers, when the insurers stipulated that such a warranty should be included in any insurance. This was on or before the 9th December 1955, when the London brokers reported to the Sydney brokers that the potential insurers required this warranty. It was, it is submitted, related to the statement as to the anticipated itinerary which was included in the first telegram sent by the Sydney brokers to the London brokers on the 7th December 1955:- p.48,ll.29-36 p.47,ll.17-41

"Arrive Brisbane 27th for installation stalls sale (sic) Brisbane 11th Jan." p.47,ll.39-40

The insurers, by requiring the warranty, were seeking an assurance that actual and concluded arrangements had then already been made for the conversion of the vessel by the fitting of cattle stalls, relating to and justifying the anticipated date for sailing from Brisbane.

21. Further, it is submitted, even if these surrounding circumstances cannot properly be taken into account or do not result in the interpretation above suggested, the words "at inception of this insurance" cannot, in their natural and ordinary meaning, refer to a date later than the date when the insurance became effective in the sense that a contract of insurance was made and concluded, binding on the insurers and the insured. That date, the Respondent submits was the 13th December 1955, being the date on which the Sydney brokers, agents for the Appellant, certified and admitted that the insurance had in fact been effected. Moreover, Trevis admits in his letter of the 14th February 1956, that on the 13th December 1955 "it had been established that insurance cover was available". In any event, the date of "the inception of this insurance" cannot have been later than, as the learned Judge held, the 14th December 1955 when the certificate of insurance was actually issued p.41,ll.5,6 p.20,l.20

Record

p.50,ll.2,3 by the Sydney brokers, and when the premium became payable. In fact, the premium was apparently paid to the Sydney brokers on the 13th December 1955.

22. Further, the date of the vessel's sailing
p.17,l.41- from Noumea, the 10th January 1956, which the
p.18,l.1 Appellant contended was "the inception of this insurance", was relevant, not as "the inception of this insurance", but only as providing the terminus a quo, not of the insurance, but of the period at the end of which it fell to be determined whether a loss had occurred covered by the insurance. So far as concerns the events, the happening of which might operate to prevent the cattle from being load-ed at Townsville within the prescribed period, such events were, or might be, equally relevant to the risk undertaken by the insurers whether they happened before or after the vessel actually sailed from Noumea.

23. The learned Judge next dealt in his
p.20,l.21- Judgment with the question whether the onus
p.24,l.8 was on the Respondent of proving that the warranty "All arrangements for conversion made at inception of this insurance" had been broken, or on the Appellant of proving that
p.23,ll.33-34 it had not been broken. He held that it was for the Respondent to prove that the warranty had been broken.

24. It is submitted that the learned Judge was wrong, and misdirected himself, in so holding. In the absence of an admission by the Respondent, it would have been for the Appellant to prove by affirmative evidence that the "Cap Tarifa" had not completed load-ing within 90 days of sailing from Noumea. So, equally, on the terms of these policies, it was for the Appellant, in the absence of an admission by the Respondent, to prove by affirmative evidence that the "Cap Tarifa" was a vessel in respect of which all arrangements for conversion had been made at the inception of the insurance. Further or alternatively, since the warranty, on its

Record

true construction, amounted to a promise by the Appellant that all arrangements had been or would be made by, at latest, the time when the contract of insurance should become binding on the parties, it constituted a condition precedent to the making of the contract; so that the onus rested on the Appellant of establishing that the condition precedent had been complied with.

Moreover the Appellant by Paragraph 5 of the Particulars of the Cause of Action accepted and took upon himself the affirmative averment of compliance with the warranty in question. p.2,ll.11-17

25. Finally, in his Judgment, the learned Judge found, upon a review of the evidence and as a question of fact, that all arrangements for the conversion of the vessel had not been made by the 14th December 1955, and that therefore the Appellant was in breach of the warranty in the policies, contrued by the learned Judge as is set out in paragraph 18 of this Case. Accordingly he found a verdict for the Respondent. p.24,l.9-p.27 p.27,ll.32,33

26. The Respondent submits that this verdict is of the same status as a verdict of a Jury, and ought not to be subject to review otherwise than on grounds on which a verdict of a Jury would be subject to review. Subject to this submission, the Respondent submits that the finding of the learned Judge was right upon the evidence, and that, on the 14th December 1955 (if such was the relevant date of the "inception of this insurance") not only had all arrangements not been made for the conversion of the vessel, but that, in substance, no such arrangements had been made.

27. The Respondent further submits, for the reasons set out in paragraphs 20 and 21 of this Case, that the relevant date was the 7th or alternatively the 13th December 1955, and that a fortiori the warranty had not been complied with on either of those dates.

Record

28. The evidence in relation to this matter
p.77-p.78, 1.15 was entirely documentary. It included further particulars, furnished by the Appellant's solicitors by letter at the request of the Respondent, in respect of paragraph 5 of the Particulars of Cause of Action. In those
p.77,11.17-24 particulars the Appellant by his solicitors asserted that "the arrangements for the conversion of the 'Cap Tarifa'.....were made orally between Mr. J.H. Trevis on behalf of the Plaintiff and Brown and Broad Ltd. of Brisbane, on or about the 14th December 1955, confirmed by subsequent letters from the
p.77,1.29 Company to Mr. Trevis dated the 15th December 1955 and the 30th December 1955". The
p.78,1.7 Appellant's solicitors further enclosed with the said letter, as being "further particulars" certain other documents, which included statutory declarations made by Trevis and others in November and December 1956 (that is, after action brought) and certain letters passing betwwn Trevis and Brown and Broad Ltd. in July and August 1956.

p.56,1.32- 29. The letters from Brown and Broad Ltd., who
p.57,1.18 are ship repairers at Brisbane, dated 15th
p.58,11.14-33 December and 30th December 1955 (referred to in the further particulars mentioned in the preceding paragraph) show that the first contact with any ship repairers in respect of the con-version of the "Cap Tarifa" to a cattle-carrying vessel took place in a telephone conversa-
p.56,1.43 tion on, presumably, the 14th December 1955. Accordingly, if the relevant date for "the inception of this insurance" was the 7th or the 13th December 1955, it is clear that no attempt had been made even to initiate arrange-ments for the conversion of the vessel by that date. If the relevant date is the 14th December 1955, the letters show that nothing which could properly or fairly be described as "all arrangements for the conversion of the vessel" were made on
p.57,11.6-13 that date. The letter of the 15th December 1955 contains the words:

> ".....but we confirm our advice to you that on present indications we

Record

could carry out the work approximately the first week in January.

In connection with a quotation for the job, we regret we cannot quote as you will understand that we have not fitted the ship previously, and do not know what work is entailed nor the amount of material required."

p.57,l.18-p.58,l.13

30. In a letter from Trevis to Brown & Broad Ltd., dated the 21st December 1955 it appears that as a result of a telephone call Brown & Broad Ltd. had by then "booked the 'Cap Tarifa' in for the purpose of fitting cattle stalls", and Trevis was asking for a "firm quote", for which purpose he was "obtaining a plan of the boat". In a further letter from Brown & Broad Ltd. to Trevis, dated the 30th December 1955, the former say:

p.57,11.31-39

p.58,11.14-34

p.58,11.28-31

"As mentioned in our letter of the 15th December, the work on this ship could be carried out, but we emphasize again that we are unable to give a firm quote for the job".

It is submitted that these letters are wholly inconsistent with the possibility that "all arrangements" had been made, even by the 30th December 1955, for the conversion of the vessel. The finding of the learned Judge is, it is submitted, the only possible finding of fact on this matter.

31. The Respondent further submits that even if, contrary to his contention and to the decision of the learned Judge, "the inception of this insurance" ought to be treated as being the date of the sailing of the "Cap Tarifa" from Noumea (namely the 10th January 1956), and if the question of fact whether or not the warranty had been complied with by that date fell to be considered, upon the evidence, in this Appeal, the true conclusion upon the evidence is that even by that date, "all arrangements for the conversion of the vessel"

Record

had not been made.

32. In this connection, the Respondent refers to the admissions contained in letters adduced
pp.39-47,l.15 in evidence. Thus, in Trevis's letter of the 14th February 1956, he refers to what happened
p.42,ll.31-40 on the arrival of the vessel at Brisbane on the 16th January 1956. He mentions that the vessel was there surveyed by various persons, includ-
p.42,ll.40-43 ing a representative of Brown & Broad Ltd., and adds:

> "The fitting of the vessel was arranged as indicated in a letter obtained from Mr. Hunter of Nixon-Smith".

p.59,ll.1-27 The relevant letter (or certificate) from
p.59,ll.13-19 Hunter is dated 20th January 1956. It refers to conferences which took place after the vessel's arrival "concerning the fitting up of
p.59,ll.19-23 the vessel for the carriage of cattle". It proceeds:

> "Detailed measurements of the vessel have been taken and the representative of Messrs. Brown and Broad expressed their readiness and ability to carry out the necessary fittings to enable the vessel to load cattle".

It is clear, in the Respondent's submission, that "all arrangements for the conversion of the vessel" had not been made up to the 15th January 1956 and, in fact, no such arrangements were even then made.

33. As regards the statutory declarations, and
p.78,l.17- the letters of July and August 1956, referred
p.89 to at the end of paragraph 28 of this Case, the Respondent submits that they cannot be evidence against the Respondent. The makers of the statutory declarations and the writers of the letters in question were not called as witnesses for the Appellant and were therefore not made available for cross-examination. The Respondent is, however, entitled to rely upon admissions in such documents, as having been

Record

included in Particulars of the Cause of Action, furnished by the Appellant.

34. If and in so far as the statutory declarations and letters are admissible as evidence in favour of the Appellant, they would, if accepted, show no more than that on the 23rd December 1955 an oral agreement was made between Trevis and Brown & Broad Ltd. for the carrying out of such work (then undefined, and unknown to either party) as might be necessary for the conversion of the vessel at Brisbane at a price of cost plus 10 per cent, with no stipulation even as to the time which such work would take. As to this matter the learn-ed Judge said: p.84,ll.1-25

> "I have not overlooked that in subsequent declarations, officers of Brown and Broad Ltd. have asserted that there was a definite arrangement. But as to this, two things may be said. The first is that the letters and declarations must be examined by me to ascertain whether they support such an assertion; and I cannot accept it merely because it is made. The second is that, as Mr. Shand argued, at least some parts of the declarations suggest that the definite arrangement came into being on the 23rd December, at a conversation which took place on that date and, therefore, tend to negative the proposition that a definite arrangement was made on 14th December." p.27,ll.14-27

35. In pursuance of the verdict for the Respondent found by the learned Judge as set out in paragraph 25 of this Case, he directed that Judgment be entered accordingly. Judgment for the Respondent after verdict was accordingly entered and signed on the 10th December 1957. p.27,ll.31-32 p.27,ll.32-33 p.31

36. By Notice of Motion dated the 22nd November 1957 the Appellant moved for an order granting the Appellant leave to appeal to Her Majesty

Record

in Council from the whole of the final judgment of the Honourable Mr. Justice Walsh sitting as the Supreme Court of New South Wales. On this Motion being heard in the Supreme Court of New South Wales on the 6th December 1957, conditional leave to appeal was granted, and by Order dated the 20th December 1957 final leave to appeal was granted.

pp.32-34,l.12
p.34,l.14-
p.35,l.16

37. The Respondent submits that this Appeal should be dismissed with costs for the follow -ing (amongst other)

R E A S O N S

(1) BECAUSE "the inception of this insurance" referred to in the warranty contained in the policies of insurance was on the 7th December 1955, being the date when negoti -ations were initiated resulting in the contracts of insurance.

(2) BECAUSE, alternatively, "the inception of this insurance" referred to in the warran -ty was on the 13th December 1955, being the date on which the contracts of insur -ance were made.

(3) BECAUSE, in the further alternative, "the inception of this insurance" referred to in the warranty was on the 14th December 1955, being the date on which the contracts of insurance were made.

(4) BECAUSE the finding of fact contained in the verdict of the Court below that the warranty had not been complied with on the 14th December 1955 is conclusive.

(5) BECAUSE, if the said finding of fact is open to review, and if the onus is on the Respondent to prove that the warranty had not been complied with by the 7th. or alternatively the 13th. or alternatively the 14th December 1955, the Respondent so proved.

(6) BECAUSE the onus was on the Appellant to prove that the warranty had been complied with by the 7th, or alternatively the 13th, or alternatively the 14th December 1955, and the Appellant failed so to prove.

(7) BECAUSE if "the inception of this insurance" referred to in the warranty was on the 10th January 1956, the Appellant failed to prove that the warranty had been complied with by that date; or alternatively, the Respondent proved that it had not been complied with by that date.

(8) BECAUSE the Appellant failed to prove that he had an insurable interest in the policies of insurance or either of them at the date of the loss alleged to have been sustained by the Appellant, which said date was the 9th April 1956.

(9) BECAUSE the judgment appealed from is right and should be affirmed.

JOHN MEGAW

C.T. BAILHACHE

IN THE PRIVY COUNCIL No. 2 of 1958

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N :-

PERCY SIMONS trading as ACME CREDIT SERVICES
(Plaintiff) Appellant

- and -

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C A S E FOR THE RESPONDENT

INCE & CO.,
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