27,1983

IN THE PRIVY COUNCIL No. 7 of 1982

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN:

CASTLE INSURANCE COMPANY LIMITED (formerly Pacific & Orient Underwriters (HK) Limited) and 84 others — Appellants (Defendants)

- and -

HONG KONG ISLANDS SHIPPING CO. LIMITED (and Cross Appeal) — Respondents (Plaintiffs)

CASE FOR THE APPELLANTS

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1. The Appellants and Respondents have brought this Appeal and Cross-Appeal to Her Majesty in Council with the final leave of the Court of Appeal of Hong Kong given on 21st January 1982. pp.199-200
This is an Appeal and Cross-Appeal from the Judgment of the Court of Appeal of Hong Kong (Huggins, V-P., Leonard J.A., and Silke J.) dated the 8th July 1981, allowing in part an Appeal from a Judgment of Mr. Commissioner Mayo dated 15th October 1980 setting aside an ex parte Order of Mr. Registrar Barrington-Jones of 23rd July 1979 giving leave to add Hong Kong Atlantic Shipping Co.Ltd. as Second Plaintiffs in a claim for General Average contribution. pp.155-195 pp.146-151

2. The issues in this Appeal and Cross-Appeal are:-

(i) When, as a matter of principle and in the absence of special agreement, a cause of action accrues in respect of a claim for general average contribution.

(ii) When on the true construction of certain general average Bonds and Guarantees a cause of action accrues in favour of the Shipowner and whether the wording of these documents is such as to warrant a departure from the general position adumbrated under (i).

(iii) Whether the proposed Second Plaintiffs, whose claim at the time of joinder is otherwise time-barred, can intervene in proceedings

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commenced in time by the original Plaintiffs on the ground that they are undisclosed principals of the original Plaintiffs.

(iv) Whether the Court had power under the relevant Rules of Court to permit the joinder of the proposed Second Plaintiffs whose action at the time of joinder is time-barred.

(v) Whether, if the Court did have such power, there are any grounds for interfering with the decision of the Court given in the exercise of its discretion to refuse to permit such joinder.

The Facts

3. The First to Eleventh Appellants are Insurance Companies (hereinafter called "the Insurers"). The Twelfth to Eighty-fifth Appellants (hereinafter referred to as "the Cargo Owners") were consignees of various quantities and types of cargo carried aboard the vessel "POTOI CHAU" in October 1972 from various Far Eastern ports to Jeddah, Hodeidah, Aden and Bombay. The Respondents are believed to be Managing Agents for Hong Kong Atlantic Shipping Co.Ltd. who were the legal owners of the "POTOI CHAU" at the material time.

p.11,l.33-6
p.172,l.51 - p.173, l.3
p.62, l.40

4. On 25th October 1972 the "POTOI CHAU" ran aground on the coast of Somalia as a result of which it is alleged in the Points of Claim that its Owners, their servants or agents reasonably and intentionally made sacrifices of ship and cargo and incurred extraordinary expenditure, all of which constituted acts of general average. On 30th October 1972, salvage operations commenced. Between 4th and 20th November some 2,311.5 tons of cargo were jettisoned. The vessel was refloated on 21st November 1972, and arrived under her own power at Aden on 24th November 1972. All the cargo, except for a quantity bound for Bombay, Jeddah and Hodeidah, was there discharged and forwarded to its various destinations by other means. The vessel, after temporary repairs, proceeded to Bombay arriving there on 2nd January 1973. The remainder of the cargo was there delivered or forwarded by other vessels. The vessel was then declared a constructive total loss and the voyage abandoned on 16th January 1973.

pp.10,l.46 - 11, l.31
p.172,l.27-45

5. The Cargo Owners were insured by the Insurers against any liability to pay general average contribution. It is alleged that on unspecified dates each of the Cargo Owners became holders of the Bills of Lading issued on behalf of the Owners of the vessel which contained the provision:-

"28. General Average

General Average shall be adjusted, stated and settled according to YORK ANTWERP RULES, 1950"

In order to secure the release of their cargo without payment of cash deposits, the Cargo Owners signed average agreements with the original Respondents agreeing to pay the proportion of general average chargeable to their respective consignments. To

pp.11,ll.33-54; 61, l.14-31;

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the same end, the Insurers guaranteed payment of the respective proportions of general average attaching to the Cargo Owners' consignments in consideration of such cargo being released from the Ship's lien without cash deposits being paid. These Guarantees were expressed in various different forms of wording. All such guarantees were made prior to March 1973. The relevant forms of wording are tabulated in the Appendix hereto. The Respondents and/or Hong Kong Atlantic Shipping Co.Ltd. thereafter engaged Messrs. Stevens and Elmslie to prepare an Average Statement. The Statement was dated 31st August 1977. It was published on 31st October 1977. The Appellants have contended that the grounding was caused by the breach of duty on the part of the Shipowners which could have been avoided had the Shipowners exercised due diligence. Payment of general average contribution has accordingly not been made.

pp.113-7, 122, 1.26 - 123, 1.1.
p.142, 11.1-9.
p.11, 1.15
p.174, 11.17-19
p.33, 1.30 - p.34. 1.18
p.58, 11.15-32
p.36, 11.12-20

6. A specially endorsed Writ was issued against all the Appellants on 25th October 1978 in the sole name of Hong Kong Islands Shipping Co.Ltd. (the Respondents) claiming contribution from the Cargo Owners, and payment under the guarantees from the Insurers. The total claim, before interest was U.S.$305,099.42. The Writ was not served at once. At an unknown date (but prior to service of the Writ) the Respondents' Solicitors were instructed that the Owners of the vessel at the material time were Hong Kong Atlantic Shipping Co.Ltd., and in May 1979 these Solicitors made an ex parte application for leave to add Hong Kong Islands Shipping Co.Ltd. as Second Plaintiffs and to make consequential amendments of the Points of Claim. No reference was made to the question of limitation in the supporting Affidavits put before the Court. On 16th July 1979 a letter of consent to the joinder was signed by a Director of Hong Kong Atlantic Shipping Co.Ltd. On 23rd July 1979 the learned Registrar granted leave ex parte for the amendment of the Writ. On 26th July 1979, the Amended Writ was duly stamped.

pp.1-16
pp.16-17
pp.16-20
p.58, 1.5
p.19, 1.32 - p.20, 1.18
p.57, 1.37

7. On 10th September 1979 notice was given of the Appellants' intention to apply to strike out the Second Plaintiffs. On 6th November 1979 on the Respondents' ex parte application, Zimmern J. ordered that the Writ be renewed for a period of 12 months from 25th October 1979. It was thereafter contended by the Appellants that this renewal was improper, being made too late. On 21st December 1979 the Respondents filed a Summons for leave substantially to re-amend the Writ, principally by varying the sums claimed against certain Appellants, reducing the total claimed (before interest) from U.S.$305,099.42 to U.S.$223,949.16.

pp.141-142
p.126, 1.14 and 1.38
p.136, 1.24 - p.137.
pp.39 - 55.

8. On 5th January 1980 a Summons was issued on behalf of nine Insurers and 22 Cargo Owners for an Order striking out Hong Kong Atlantic Shipping Co.Ltd. as Second Plaintiffs on the ground that, at the date of the application to Mr. Registrar Barrington-Jones giving leave to amend the Writ by adding the Second Plaintiffs as a party, the time limit for the Second Plaintiffs' claim against the Respondents had expired and that the Order granting leave should not therefore have been made. Each party filed Affidavits in connection with this application. On 11th October 1980, the Respondents gave further notice that after the Judgment of Mr. Commissioner Mayo given

pp.55 - 56.
pp.57-58;60-64 and p.125

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pp.126-8; pp.129-138. on 15th October 1980, a further application would be made to renew the Writ for another 12 months as against the unserved Defendants. The Appellants opposed this. Affidavits were exchanged.

pp.146-152. 9. On 15th October 1980 Mr. Commissioner Mayo heard and gave Judgment allowing the Appellants' application to strike out the Second Plaintiffs and setting aside the Registrar's Order made ex parte joining Hong Kong Atlantic Shipping Co.Ltd. The learned Commissioner held both as a matter of general principle and on the true construction of the relevant contracts that the claim of the Second Plaintiffs was time-barred and that for that reason joinder should not be permitted. He held that if there was any discretion in the matter he was satisfied that it should be exercised in favour of rejecting the application for joinder. He also extended the Writ for a further year.

pp.153-155. 10. By Notice of Appeal dated 10th November 1980 the Respondents appealed to the Court of Appeal of Hong Kong. The Appeal against the Order of Mr. Commissioner Mayo was heard by the Court of Appeal, Sir Alan Huggins V-P, Leonard, J.A. and Silke, J. on 4th, 5th, 6th and 9th March 1981. Judgment was given on 8th July 1981.

pp.155-195. 11. Detailed Judgments were given by Sir Alan Huggins, V-P and Leonard, J.A. The Judgment of Silke, J. was limited to agreeing with that delivered by the Court of Appeal. Briefly stated (and by reference to the issues identified in Paragraph 2 of this Case) the Court of Appeal decided as follows:-

Issue (i)

pp.156,l.31-164; pp.176-188, l.20; p. 195. pp.164,ll.45-50; 181, l.30-183,l.34, 184, l.41-185,l.27. 190,ll.9-23 A cause of action in respect of a claim for General Average contribution accrues at common law at the time when the general average loss occurs albeit that such liability is subject to defeasance if the vessel does not reach safety. There is nothing in the York Antwerp Rules which serves to postpone the cause of action.

Issue (ii)

pp.113-7; p. 165,ll.1-8 and 35-40. 168,ll.18-44. pp.165,l.9-170,l.14 190,l.23-191,l.39 pp.167,l.53; 170,l.11 169,l.14. pp.191,ll.17 & 36; 191,l.50. p. 191,ll.34-9. There is nothing in the Average Bonds signed by Cargo Owners which can properly lead to the conclusion that the Shipowner's cause of action is postponed until issue or publication of a general average Statement. The position is, however, quite different in relation to the guarantees. Each of the four forms of wording on its proper construction postpones the Shipowner's cause of action until such time as a general average Statement has been "drawn up", "produced" or "presented" (per Sir Alan Huggins V-P) or "completed", "published" or "amended" (per Leonard, J.A.). In relation to two of the four forms Leonard, J.A. held that time would not begin to run until a reasonable time after publication.

Issue (iii)

The argument that the proposed Second Plaintiffs can intervene as undisclosed principals of the First Plaintiffs was rejected. pp.170,11.17-38 191,1.40 - 193,1.22

Issue (iv)

The Court does have power to permit joinder of the Second Plaintiffs, notwithstanding that time had expired, pursuant to Order 20 Rule 5 (5) and/or 5 (1) (per Sir Alan Huggins V-P) and (presumably) pursuant to Order 20 Rule 5 (1) (per Leonard, J.A.) pp.170,1.40 - 171,1.29; 191,1.23 - 192,1.27

Issue (v)

But there were no grounds for interfering with the discretion of the learned Commissioner in refusing to permit joinder. pp.171,1.30 - 172,1.25; 192,11.27-45.

12. Accordingly, the Appeal was allowed in part so as to permit the joinder of Hong Kong Atlantic Shipping Co. Ltd. to pursue its claims against the Insurers.

13. The Appellants by motion dated 11th July 1981 and the Respondents by motion dated 30th July 1981 each sought leave to appeal to Her Majesty in Council. On 21st July 1981 conditional leave to Appeal and Cross-Appeal was granted by the Court of Appeal. Final leave to Appeal and Cross-Appeal was granted on 21st January 1982. pp.196-8 pp.198-9 pp.199-200

Issue 1: Accrual of the cause of action in the absence of special agreement.

14. Time stopped running against Hong Kong Atlantic Shipping Co.Ltd. on 26th July 1979 when the Amended Writ joining them was stamped (see Seabridge -v- H.Cox & Sons (Plant Hire) Limited [1968] 1 Q.B.46 (CA)). The Appellants submit that any claim the Respondents may have against them for general average contribution accrued on one of the following alternative events:

(a) the date or dates when the general average loss occurred i.e. sacrifices were made or expenditure incurred (between 25th October and 21st November 1972);

(b) (alternatively) the arrival of the vessel and cargo at a port of safety after the general average loss had occurred (Aden on 24th November 1972 or Bombay on 2nd January 1973);

(c) (alternatively) the termination of the adventure (no later than the abandonment of the voyage on 16th January 1973);

(d) (alternatively) the date or dates of the making of the Average Bonds and Guarantees on which the

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Respondents' claim is now based (all prior to March 1973).

It is respectfully submitted that the Respondents' cause of action is not postponed until the making or publication of a general average Statement (Statement signed on 31st August 1977 and published on 31st October 1977).

15. The essential question on this part of the Appeal is whether (as the Appellants submit as their primary case) liability to make a General Average contribution arises either when the General Average loss occurs or when the relevant Bond or Guarantee is given or whether (as the Respondents contend) such liability does not arise until a General Average Statement has been produced or published.

16. The English authorities which are directly in point favour accrual of the cause of action at the date when the general average loss occurs - Chandris -v- Argo Insurance Company Ltd. (1963) 2 Lloyd's Rep.65 (per Megaw, J.) and Schothorst and Schuiteme -v- Franz Dauter G.m.b.H. (The "NIMROD"). (1973) 2 Lloyd's Rep.91 (per Kerr, J.) In the Chandris case Megaw, J. was concerned with claims by an Assured to recover general average losses under a Hull Policy. The Insurers' Defence was that the claims were time-barred which was met by the contention that the cause of action did not accrue until publication of a general average Statement. The learned Judge rejected that contention inter alia on the following grounds:-

(i) a cause of action exists when those facts exist which it is essential for a plaintiff to plead to prevent his Statement of Claim from being struck out;

(ii) a claim under an insurance policy is a claim for unliquidated damages and quantification of the claim is not a condition precedent to the cause of action arising;

(iii) in the absence of express contractual stipulation a general average Statement is neither binding nor conclusive;

(iv) to make accrual of the cause of action dependent on the production of a Statement would be to permit indefinite postponement of the accrual date since the Shipowner is responsible for the preparation of the Statement;

(v) it would also mean that if liability did not arise until production of a Statement there would be no prior liability by reference to which the Shipowner's undoubted lien for contribution could be justified; and

(vi) the scheme of liability contended for by the Assured was inconsistent with Section 66 of the Marine Insurance Act 1906.

17. In The "NIMROD" Kerr, J. was concerned with a claim by a Shipowner for a general average contribution. Having referred to the Chandris decision he continued:-

> "But in my view, though it is not necessary to express a final opinion on this point, the effect of the wording of the General Average Bond is not to postpone the accrual of the cause of action to the publication of the General Average adjustment. If I had to decide this point, I would unhesitatingly apply the reasoning of Mr. Justice Megaw in Chandris -v- Argo and also hold that any claim under the Bond began to accrue at the time of the casualty or at the date of the Bond, if later". - at page 98.

It is respectfully submitted that the reasoning of Megaw, J. and Kerr, J. is correct and that the accrual of a cause of action for general average contribution is not postponed until the production or publication of a general average Statement.

18. The Respondents' contention is that until a General Average Statement is produced or published none of the contributing interests has any existing liability to make contribution. This contention is inconsistent with various decisions of the House of Lords in relation to general average. In Tate & Lyle Ltd. -v- Hain Steamship Company Ltd. (1936) 55 Ll.L.R.159 (H.L.) Lord Atkin said:-

> "...I think it clear that on principle the contribution falls due from the persons who were owners at the time of the sacrifice.." - at page 174.

Lord Wright expressed himself in much the same terms:-

> "...But in my judgment the lien which is the ordinary consequence of a general average sacrifice still attached to the goods though the personal liability remained the liability of the charterers who were owners at the time of the sacrifice" - at page 178.

The House of Lords specifically approved the (dissenting) judgment of Greer, L.J., which contained the following well-known passage:-

> "I cannot find that these questions have ever been definitely settled in any of the decided cases, but the law has been frequently stated by Judges and jurists of authority in commercial matters which lead me to conclude that both the liability and the lien come into existence as soon as the sacrifice has been made or the expenses have been incurred, but that the liability and the lien are subject to be defeated by the non-arrival of the cargo at the port of destination"- (1934) 49 Ll.L.R.123 at page 135.

This passage was specifically affirmed by Lord Roche who gave one of the majority judgments in Morrison Steamship Company Ltd. -v- Greystoke Castle [1947] A.C.265. Lord Roche concluded from his review of the authorities that cargo Owners from whom

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general average contribution is claimed are "ab initio responsible for their proper share, though the responsibility may be divested or diminished by the subsequent chances of the voyage" (at page 285). The decision of the House of Lords in Union of India -v- E.B.Aaby's Rederi A/S (The "EVJE") [1975] A.C.797 proceeded on the basis that the cargo Owners were under an existing liability in respect of general average enforceable by lien which was replaced by an undertaking given by cargo Owners (prior to completion of the voyage) to pay such contribution as might legally be due.

19. The unanimous view of the leading authoritative textbooks is that the claim for contribution accrues at the date of the general average loss and is unconnected with the date of issue or publication of the Statement: Lowndes and Rudolf, "The Law of General Average and the York-Antwerp Rules" 10th Ed.(1975) para.469; Arnould "Marine Insurance and Average" 16th Ed.(1981) para.991; Carver, "Carriage of Goods by Sea", 13th Ed.(1982) para.1459; and Scrutton, "Charterparties and Bills of Lading", 18th Ed.(1974) page 285, n.49).

20. The United States Courts have rejected the contention that the right to claim contribution for general average is dependent on the making of a general average Statement although the right has there been held to accrue upon arrival of the ship at the port of destination and the delivery of the cargo (United States of America -v- Atlantic Mutual Insurance Company (The "LOGAN") (1936) A.M.C.993, 996, U.S.Sup.Ct. and Arthur L.Liman -v- India Supply Mission (The "BEATRICE") (1975) 1 Lloyd's Rep.220, 221 U.S.Dist.Ct.S.D.N.Y.).

21. It is respectfully submitted that in English law a claim for general average contribution is a claim for unliquidated damages and remains so notwithstanding the adjustment (Luckie -v- Busby (1853) 13 C.B.864). In general terms a cause of action accrues when those facts exist which must be pleaded by a Plaintiff in order to prevent his Statement of Claim from being susceptible of being struck out as disclosing no cause of action Chandris -v- Argo at page 73. In determining when a cause of action accrues it is irrelevant whether the Plaintiff is able to prove those facts (Central Electricity Generating Board -v- Halifax Corporation [1963] A.C.785) or indeed whether he is in a position to discover them (Pirelli General Cable Works Ltd. -v- Oscar Faber (1983) 2 W.L.R.6 at page 14). Applying this principle to a claim for general average contribution such cause of action accrues when the general average loss occurs (Chandris -v- Argo at page 77).

22. Section 66 of the Marine Insurance Act, 1906, is concerned with general average loss and proceeds upon the basis that the Assured's liability to make a general average contribution arises when the general average loss occurs. Section 66 (5) is in the following terms:-

> "(5) Subject to any express provision in the policy, where the Assured has paid, or is liable to pay, a General Average contribution in respect of the subject insured, he may recover therefor from the insurer." [emphasis added].

In Chandris -v- Argo Megaw, J. held (correctly it is submitted) that the words "or is liable to pay" meant that the Assured's right to recover from his insurer arises as soon as he is liable to pay a contribution to another party to the adventure and that the Assured's liability vis-a-vis the other interests arises when the general average loss has occurred. The Respondents' contention that the cargo-owner's liability to pay a general average contribution does not arise until a Statement has been produced is inconsistent with the scheme of liability contained in Section 66. Indeed, the contention (if correct) will seriously undermine, if not defeat, the time-honoured practice by which payment of general average liabilities is secured by enforcement of the Shipowner's lien or by substitute arrangements involving cash deposits or guarantees provided by cargo insurers since there can be no lien in the absence of an existing liability.

23. There is no intrinsic feature of a general average Statement (whether under the York-Antwerp Rules or otherwise) which suggests that its making or production crystallises any cause of action.

(a) It is not, at common law, necessary for there to be any Statement at all prior to a claim for contribution. It is for the Shipowner to decide whether he wants a Statement and if he does, to arrange it. In simple cases there may not be one. There is no obligation to employ an adjuster (Wavertree Sailing Ship Co. -v- Love [1897] A.C.373 (P.C.)).

(b) Where (as in the present case) the contract of affreightment provides for general average to be adjusted according to the York-Antwerp Rules, the parties are to be taken to contemplate that general average losses will be the subject of an adjustment. But the Statement is in no way binding or conclusive. The adjuster does not perform an arbitral function.

(c) As Lord Herschell pointed out in the Wavertree case the preparation of a general average Statement which does not bind the parties is not "the adjustment" of General Average. It is merely a step in the process of adjustment. The general average Statement represents no more than the opinion of the adjuster, as the agent of the person who employs him (almost invariably the Shipowner) of what is prima facie due between the contributing interests. It is, however, evidence of nothing. It does not take account of defences which may be open to potential contributories such as denying any liability to pay contribution on grounds of actionable fault on the part of the Shipowner.

(d) The speed at which a general average Statement is prepared is entirely beyond the control of cargo interests. If the Respondents are correct it is open to them to postpone accrual of the cause of action in their favour virtually indefinitely (per Megaw, J. in

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Chandris -v- Argo at p.76). In the few cases where 6 years is insufficient to prepare a Statement either an agreed extension of time can be obtained or a protective Writ issued.

24. To hold that, in the absence of special agreement between the parties, a cause of action does not accrue to the Shipowner until the issue or publication of a general average Statement would seriously disturb the whole basis, both as a matter of commercial practice and as a matter of legal principle, on which general average liabilities have been adjusted and enforced in modern times. It would cause serious practical difficulties. If liability does not arise until a Statement has been produced it is difficult to see what basis the Shipowner can have for exercising a lien on the cargo prior to delivery. If the right of the Shipowner to enforce a lien against the goods at that time is undermined the institution of general average will not survive. If the Assured is in fact held to be under no liability to pay a general average contribution until a Statement has been produced, the role presently played by the Insurer in providing a guarantee to procure the release of the Shipowner's lien will disappear. Moreover, the accrual of different causes of action arising out of a voyage would be rendered seriously out of phase with each other. For example, it would no longer be open to Shipowners to defend cargo damage claims against them (which are often subject to a one year time limit) by relying on a set-off for general average contribution. If an average Statement were held to be of relevance in determining the date of accrual of the cause of action it would be necessary to define with a good deal of precision at what precise moment the cause of action is to be taken as having accrued, e.g. at the completion of the Statement, or at its signing, or possibly its publication either to Cargo Owners or to Insurers who had provided guarantees or possibly to both.

25. It is respectfully submitted that the Court of Appeal were correct to reject the Respondents' contention that the accrual of the cause of action for a general average contribution is, apart from any special agreement between the parties, postponed until issue or publication of a general average Statement.

Issue 2: Construction of the Average Bonds and Guarantees

26. If it be right that, except where there is some special agreement between the parties, the cause of action accrues either when the general average loss occurs or (latest) when the Average Bonds and Guarantees are given in order to procure release of the Shipowner's lien, the next question that arises is whether, on the true construction of the Average Bonds and Guarantees on which the Shipowner sues in the present case, his cause of action is postponed until some later date, namely the issue or publication of the general average Statement. The Appellants accept that where the parties to these contracts are not persons who could be held liable under the contract of affreightment (as will necessarily be so in the case of the Guarantors) the cause of action does not arise earlier than the date of the particular contract on which the Respondents' claims are founded. The real question for present purposes,

pp.11,11.33-54; 61,11.14-31; 113-7; 122, 1.26-123,1.1

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where the Appellants' liability for general average contribution does not arise otherwise than pursuant to such Bonds and Guarantees, is whether (as the Appellants contend) the cause of action arises at the date of making the Bond or Guarantee or (as the Respondents submit) such contracts are so worded as to postpone the cause of action until after the production or publication of a general average Statement.

27. The Appellants submit that in considering this question the Court of Appeal were correct to take as their starting-point the Lloyd's Average Bond signed by many of the Cargo Owners. The obligation of the Cargo Owner under this document to pay a General Average contribution is expressed in the following terms: p.113

> Subscribing Cargo Owners "agree with the said Owner that they will pay to the said Owner of the said ship the proper and respective proportion of any salvage and/or general average and/or particular and/or other charges which may be chargeable upon their respective consignments..." p.113,ll.34-9

The Bond then goes on to provide for cash deposits to be made into the joint names of certain nominated persons ("the Trustees") and to empower the Trustees pending preparation of the usual Statement to make without prejudice payments on account. The Bond then concludes with the following words:- p.114

> "And nothing herein contained shall constitute the said Adjuster or Adjusters an arbitrator or arbitrators or render his or their Certificate or Statement binding upon any of the parties." p.115,ll.4-8

It may be noted that where the Lloyd's Average Guarantee is used the obligation of the Guarantor is expressed in similar terms, viz. an obligation to pay "any contribution for general average and/or salvage and/or other charges which may properly be chargeable against the said merchandise."

28. The Court of Appeal concluded that on the true construction of the Lloyd's Bond the cause of action in favour of the Shipowner is not postponed until a general average adjustment or Statement has been produced. It is respectfully submitted that the conclusion was correct and that the cause of action accrues either at the time when the general average loss occurs or at the date when the Bond is signed by Cargo Owners if later. It is submitted that a similar result would apply on the true construction of the Lloyd's Guarantee except, of course, that necessarily the cause of action cannot accrue earlier than the date of the document. pp.165,ll.1-8 & 35-40; p.195.

29. The construction of the Bond adopted by the Court of Appeal is supported by the case law. In The "NIMROD" (1972) Kerr, J. was concerned with a Lloyd's Bond and expressed the following, admittedly obiter, view:-

> "But in my view, though it is not necessary to express a final opinion on this point, the effect of the wording of the General Average Bond is not to

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postpone the accrual of the cause of action to the publication of the General Average adjustment. If I had to decide this point, I would unhesitatingly apply the reasoning of Mr. Justice Megaw in Chandris -v- Argo and also hold that the claim under the Bond began to accrue at the time of the casualty or at the date of the Bond, if later." - at page 98.

It is submitted that the learned Judge was correct in his approach to the problem, which was to determine when, apart from special agreement, a cause of action for general average accrues and then to consider whether the language adopted by the parties was such as to postpone such accrual to some later date. He was also correct in his conclusion that the terms of the Lloyd's Bond were not such as to postpone the accrual of the cause of action to the publication of the general average Statement.

30. It remains then to consider separately the terms of the various forms of Guarantee which have been used in the present case. The proper question in each case is whether the words used are such as to point inevitably to the conclusion that the parties intended no cause of action to arise until after publication of an average Statement. There are four different forms of Guarantee which are relevant for present purposes. The order in which they are here considered is not the order adopted by the Court of Appeal.

31. Form 1

pp.88-93

"In consideration of your delivering to ... the undermentioned cargo ex '.....' from ... covered under our Policy (ies) No(s) ... for ..., hereby guarantee that this Society will pay any just claim for General Average special and/or other charges as may properly be found due in respect of the said cargo."

(i) There is no reference either express or implied in this Guarantee to any general average adjustment or statement. Even if the words used were such as to indicate that the parties contemplated the preparation of a Statement (which is not the case here, but is the position under the Lloyd's Bond and certain of the other forms of Guarantee) that of itself would not lead to the conclusion that any such Statement was a condition precedent to any cause of action accruing in favour of the Respondents: a fortiori where no reference is made to any Statement or adjustment.

(ii) The words "any just claim...as may properly be found due" are no different in effect than the words "the proper and respective proportion of any...general average...charges which may be chargeable" which appear in the Lloyd's Bond and "any contribution for general average...charges which may properly be chargeable" in the Lloyd's Guarantee. The reference to "any just claim properly found due" is not to be construed as importing a reference to sums found due under an adjustment. In legal terms an adjustment does not result in any finding as to the proper entitlement or

obligation of any contributing interest. Strictly speaking it is not even evidence of any such entitlement or obligation. The only way in which a claim to general average contribution can properly be found due is by agreement between the contributing interests directly affected or by determination of the Court.

(iii) The purpose of the Guarantee was to replace the Shipowner's lien for general average contribution with an equivalent form of security and to obviate the need for a cash deposit to be put up by the Cargo Owner. The result of the construction put by the Court of Appeal on this and indeed the other forms of Guarantee is that if the Shipowner insists on receiving a cash deposit from the Cargo Owner his lien on the cargo is replaced by another form of existing security whereas if he accepts a Guarantee he has no existing security until some indeterminate future date (i.e. the date of the Statement). It is open to the parties to choose a form of wording which produces this result but it is submitted that the Court will be reluctant to adopt a construction of the document which has this effect unless the words used admit of no other conclusion.

32. It is respectfully submitted that the Court of Appeal were wrong to construe this form of Guarantee as requiring a Statement or adjustment as a condition precedent to a cause of action arising in favour of the Respondents. The conclusion of Leonard, J.A. was that, by the use of the words "just" and "properly", those who signed the Guarantees in this form were reserving the right to question the Statement which would in due course be produced. It is respectfully submitted that the learned Judge was in error in thinking that the parties were by these words according any special status to a general average Statement (not referred to in terms in the Guarantee at all) which it would not normally or otherwise have. With the greatest respect to Sir Alan Huggins, V-P, his reasoning in relation to the words of this Guarantee is difficult to follow. Both of their Lordships (in relation to this and the other three forms of Guarantee) appear to have been influenced by what is submitted to be a misunderstanding of the decision in The "EVJE". Leonard, J.A. appears to have thought that the undertaking given on behalf of the India Supply Mission in that case, which (as the House of Lords decided) resulted in a fresh contractual obligation, caused time to run not from the date of the sacrifice or the undertaking but from the date of publication of the adjustment. References made to The "EVJE" in the judgment of Sir Alan Huggins V-P suggest that that learned Judge may have fallen into the same error.

pp.169,11.19-40; 175,11.18-21; 191,11. 1-17; p.190,11.8-18 p.167,11.38-53

33. Form 2

"In consideration of the delivery in due course to the Consignees of the Merchandise specified below, without collection of a deposit on account of Average, we, the undersigned Underwriters hereby guarantee to the Shipowners on account of the concerned the payment of any contribution to General Average and/or Salvage and/or Charges which may

pp.82-86; 107; 109.

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hereafter be ascertained to be due in respect of the said Merchandise.

We further agree to arrange a prompt payment on account if required by you, so soon as such payment may be certified to by the Adjusters."

pp.168,l.45 - 169,l.19; 175,ll.28-31; 191,ll.22-23.

It is respectfully submitted that there is nothing in the words used in this form of Guarantee which leads to the conclusion that the production of an average Statement is a condition precedent to the accrual of a cause of action in favour of the Shipowner.

34. The only reference to the preparation of a Statement or adjustment is in the second paragraph which empowers the adjusters to certify payments on account in relation to which the Guarantors undertake to arrange prompt payment, if required. This agreed function of the Adjusters in relation to payments on account closely reflects the provisions of Rule XXII of the York-Antwerp Rules 1950 which deals with the collection of cash deposits and provides for payments on account to be made out of such deposits against a written certificate of the Adjuster. But the ultimate liability of the Cargo Owner is in no way affected by any such "without prejudice" payments on account. The effect of the equivalent rule in the York-Antwerp Rules of 1924 was considered by Megaw, J. in Chandris -v- Argo. The learned Judge held that the specific provision in the rule (Rule XXIII of the 1924 Rules) that such deposits and payments "shall be without prejudice to the ultimate liability of the parties" was not to be understood as conveying any inference of an agreement by the parties to postpone the date when legal liability would otherwise arise. It is submitted that the position is no different on the true construction of the present Guarantee.

35. Nor, it is submitted, do the words in the opening paragraph guaranteeing payment of any contribution "which may hereafter be ascertained to be due" lead to the conclusion that accrual of the Shipowner's cause of action is postponed until after production of a Statement. For reasons that have already been given the general average Statement itself does not result in any ascertainment of the rights of the parties. Failing agreement, only the Court can do that. There is no doubt that the parties contemplated that a Statement would in due course be produced. However, the words used do no more than recognise that the parties, and in particular the Shipowner whose responsibility it is to prepare an adjustment, have at the date of issuing the Guarantee yet to do their sums. They do not lead to any inference that the intention of the parties was to postpone accrual of the cause of action.

pp.168,l.45 - 169,l.18.

36. In reaching a different conclusion Sir Alan Huggins V-P paid insufficient regard to the fact that any such payments on account which the Adjusters might certify (none were in fact called for) would be wholly "without prejudice" to such contribution (if any) as might thereafter be ascertained to be due. Leonard J.A. was right not to rely on the second paragraph of the Guarantee as leading to any inference as to the time of accrual of the Shipowner's cause of action. However, he fell

p.191,ll.23-33.

into error in concluding that ascertainment of the precise amount of the contribution due in respect of the cargo was a necessary condition precedent to the accrual of the cause of action. It is submitted that very much clearer words would be needed before it could properly be inferred that the parties intended to produce a result (so far as the time of accrual of the cause of action is concerned) different from that which has been accepted for many years as being the law.

37. Form 3

> "In consideration of your delivering the goods described below without payment of a cash deposit, we hereby guarantee the payment of General Average and/or Salvage and/or Special Charges for which the said goods are legally liable under an adjustment drawn up in accordance with the contract of affreightment."

pp.95; 98;101-3; 105-6.

It is respectfully submitted that for many of the reasons already given these words do not on their proper construction lead to the conclusion that the parties intended any postponement of the accrual of the Shipowner's cause of action. It is true that there is in this clause specific reference to an adjustment. But, as The "NIMROD" and Chandris -v- Argo establish, the fact that the contract envisages that a Statement or adjustment will be produced does not lead to the conclusion that the cause of action based on a general average contribution is postponed accordingly. In both these cases general average was to be adjusted according to the York-Antwerp Rules which clearly contemplate that an adjustment will be prepared. Yet in both cases contentions similar to those advanced by the Respondents in this case and accepted by the Court of Appeal in relation to the construction of the Guarantees were rejected.

pp.165,l.10-168,l.44; 175,11.8-16; 199,11.23-52

38. It is respectfully submitted that the liability of the Cargo Owners to pay a general average contribution arises either at the time when the general average loss occurs or when the Bond is signed if later and that the parties to this Guarantee did not intend to imply differently. The use of the present tense "are legally liable" was strictly correct in view of the decision in Chandris -v- Argo albeit that no objection can sensibly be taken to language such as "may be legally due" or "may be properly chargeable". No liability arises as a matter of law under a general average Statement. If (which is not accepted) the parties, labouring under a misapprehension of law, thought otherwise, that is no reason to conclude that such misapprehension can affect the time of accrual of the Shipowner's cause of action. The reference to the adjustment being drawn up in accordance with the contract of affreightment was intended to make clear that in ascertaining the extent and quantum of Cargo interests' liability in general average the adjustment was to be drawn up in the manner specified in the contract of affreightment.

39. Form 4

p.99 "In consideration of your delivering the under-mentioned Consignees the goods specified below without payment of a deposit we undertake to guarantee the due payment of the General Average Contribution and/or special charges that may be properly found due on the said goods upon the completion of the Average Statement by the Adjusters."

pp.169,l.41 - 170,l.14; 175,ll.23-8; 191,ll.18-21. In concluding that on the true construction of this clause the parties intended to postpone the accrual of the Shipowner's cause of action until production of a general average Statement it is respectfully submitted that the learned members of the Court of Appeal misunderstood, both in relation to this form as well as in relation to the other three forms of Guarantee, the status of a general average Statement. It decides nothing. Indeed it is evidence of nothing other than the Adjuster's opinion as to what is due from whom and to whom. Failing agreement between the parties only the Court can find what is properly due. However, except in the case of an action for a declaration of suitable breadth it has to be accepted that in practice no claim for a specific sum will be prosecuted to judgment until a Statement has been produced. But the same position applies in relation to an action by the Shipowner under the Lloyd's Bond where it has long been accepted that his cause of action arises either when the general average loss occurs or at the date of the Bond. It is respectfully submitted that very much clearer words would be needed than those used in Form 4 before it could properly be inferred that the parties intended the Shipowner's cause of action to arise on production of the general average Statement.

40. Issue iii) : Right of Second Plaintiffs to intervene as undisclosed principals of the original Plaintiffs

pp.170,ll.15-38; 191,ll.40 - 193,l.22. The Court of Appeal rejected this contention on the part of the Respondents and it is respectfully submitted that they were right to do so. There was no suggestion in the Points of Claim which were endorsed on the Writ issued by the original Plaintiffs that they were suing otherwise than in their own name as Principals. There is no authority to support the proposition that a person whose own claim is statute-barred can nevertheless intervene as of right to assert that claim in proceedings to which he has not become a party prior to the expiry of the limitation period on the bare assertion that he is an undisclosed principal of some other party to the proceedings.

41. Issue (iv) : Whether the Court had power to permit joinder of the Second Plaintiffs.

pp.170,l.40- 171,l.20; 172,ll.3-25; 193,l.23 - 194,l.32 The Court of Appeal held that the Court did have a discretion pursuant to Order 20 rule 5 of the Rules of the Supreme Court to permit joinder of the Second Plaintiffs notwithstanding that a separate action instituted by the Second Plaintiffs would be time-barred. However, the Court of Appeal went on to conclude that the learned Commissioner was correct

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as a matter of discretion to refuse to permit such joinder in reliance on the practice referred to in Mabro -v- Eagle Star & British Dominions Insurance Co. Ltd. [1932] 1 K.B.485. pp.171,l.30 - 172,l.25; 193,l.23 - 194,l.45.

42. It is respectfully submitted that the Court of Appeal were wrong in holding that Ord.20 r.5 conferred any discretion on the Court in the circumstances of the present case. It should have held that the application for leave to join the Second Plaintiffs was governed exclusively by Ord.15 r.6(2)(b) and that the practice has been long established to refuse leave to join a new Plaintiff in existing proceedings where a separate action instituted at the time of joinder by that Plaintiff would be statute-barred. The leading authority is Mabro's case where Scrutton, L.J. restated the practice and justified it in the following terms:-

> "In my experience the Court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence." (at p.487).

43. In concluding that the Court did have discretion in the matter under Ord.20 r.5 the members of the Court of Appeal differed to some extent as to which of the sub-rules to Ord.20 r.5 was relevant. Both Sir Alan Huggins V-P and Leonard, J.A. agreed that the Court had power under Ord.20 r.5(1). In addition, Sir Alan Huggins V-P took the view that discretion was conferred by Ord.20 r.5(5).

44. It is submitted that Sir Alan Huggins, V-P was wrong to place reliance on Ord.20 r.5(5). Before the Court of Appeal Mr. Staughton Q.C. (as he then was) appearing on behalf of the present Respondents expressly disavowed any reliance on Ord.20 r.5(3) to (5). He was right to do so. Sub-rule (5) does not apply where what is sought is the addition of a new party. Moreover, the Court of Appeal were wrong to conclude that Ord.20 r.5(1) confers a broad discretion on the Court to permit amendments to the writ even where a relevant period of limitation current at the date of issue of the writ has expired, notwithstanding the terms of Ord.20 r.5(2) and the specific and restricted provisions of Ord.20 r.5(3) to (5). There has been a conflict of authority on this point which is referred to in notes in the White Book 20/5-8/7. It is submitted that the rule is correctly stated in that note, the better view being that expressed in Braniff -v- Holland & Hannen and Cubitts (Southern) Ltd. [1969] 1 W.L.R. 1533 C.A. and Brickfield Properties Ltd. -v- Newton [1971] 1 W.L.R. 862 C.A.

45. In any event it is respectfully submitted that if leave were to be given to join the Second Plaintiffs, time would not cease to run in favour of the Appellants until the writ has been duly amended pursuant to Ord.15 r.8(4). It is submitted that the theory of "relation back" does not apply to an amendment which involves the addition of a new party and that the law was correctly stated by Brandon L.J. (as he then was) in Liff -v- Peasley [1980] 1 W.L.R.781 at p.803. That being so,

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even if the Second Plaintiffs were to be joined, this would not preclude the Appellants from relying on the Statute of Limitations. The sensible course is therefore to refuse joinder.

46. Issue (v): Whether there are grounds for interfering with the decision of the learned Commissioner to refuse to permit joinder.

pp.171,l.30 - 172,l.2; 194,ll.27-45.

If it be the case (contrary to the Appellants' contentions) that the learned Commissioner had power to join the Second Plaintiffs notwithstanding that their claim was time-barred it is submitted that he was well entitled in the exercise of his discretion to decline to do so and that the Court of Appeal were correct in holding that no proper grounds had been shown for interfering with that decision.

47. The Appellants humbly submit that this Appeal should be allowed and the Cross-Appeal dismissed for the following among other reasons:-

(A) In line with high authority, the cause of action in respect of a Shipowner's claim for general average contribution accrues, in the absence of special agreement, at the time of making the general average sacrifice or incurring the general average expenditure.

(B) The particular general average Bonds and Guarantees given in order to secure release of the cargo do not, on their true construction, postpone accrual of the Shipowner's cause of action until issue or publication of a general average Statement.

(C) The proposed Second Plaintiffs have no right to intervene in the proceedings on the ground of being undisclosed principals.

(D) There is no power under the Rules of the Supreme Court to permit joinder of the Second Plaintiffs.

(E) If there is such power, the Court of Appeal were right to refuse to interfere with the decision of the learned Commissioner.

IAN HUNTER

RODERICK CORDARA

No. 7 of 1982

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL
OF HONG KONG

BETWEEN:

CASTLE INSURANCE COMPANY LIMITED (formerly Pacific & Orient Underwriters (HK) Limited) and 84 others

Appellants
(Defendants)

- and -

HONG KONG ISLANDS SHIPPING CO. LIMITED

Respondents
(Plaintiffs)

(and Cross Appeal)

CASE FOR THE APPELLANTS

CLYDE & CO.
30 MINCING LANE,
LONDON EC3R 7BR

Solicitors for the Appellants

APPENDIX

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1. "In consideration of your delivering to...the undermentioned cargo ex "...." from ... covered under our Policy (ies) No (s) ... for ... hereby guarantee that this Society will pay any just claim for General Average, special and/or other charges as may properly be found due in respect of said cargo". Pp.88-93

(per Huggins, V-P, 3; per Leonard, J.A., 2)

2. "In consideration of the delivery in due course to the Consignees of the Merchandise specified below, without collection of a deposit on account of Average, we, the undersigned Underwriters, hereby guarantee to the Shipowners on account of the concerned the payment of any contribution to General Average and/or Salvage and/or Charges which may hereafter be ascertained to be due in respect of the said Merchandise. Pp.82-86, 107

We further agree to arrange a prompt payment on account if required so soon as such payment may be certified to by the Adjusters."

(Variant):

"In consideration of the delivery in due course of the cargo to the Consignees against the signature to an average bond in the usual and ordinary form without collection of a deposit ... we hereby guarantee to you the payment of any contribution to General Average and/or Salvage and/or Charges which may hereafter be ascertained to be properly due in respect of said cargo. We further agree to make a prompt payment on account, if required, so soon as the details enabling us to do as are supplied by the Average Adjusters". P.109

(per Huggins V-P, 2; per Leonard, J.A., 4)

3. "In consideration of your delivering the goods described below without payment of a cash deposit, we hereby guarantee the payment of General Average and/or Salvage and/or Special Charges for which the said goods are legally liable under an adjustment drawn up in accordance with the contract of affreightment". Pp.95,98 101, 105-6.

(Variant):

"In consideration of your delivering ... the goods described below without payment of a cash deposit, we ... hereby guarantee the payment of General Average and/or Salvage and/or Special Charges for which the said goods are legally liable under an adjustment drawn up in accordance with the contract of affreightment. We further agree to arrange a prompt payment on account if required on presentation of a certificate from the Average Adjuster". Pp.102-3

(per Huggins V-P, 1; per Leonard, J.A., 1).

4. "In consideration of your delivering to the under-mentioned Consignees the goods specified below without payment of a deposit we undertake to guarantee the due payment of the General Average Contribution and/or special charges that may be properly found to be due on the said goods upon the completion of the Average Statement by the Adjusters". P.99

(per Huggins V-P, 4; per Leonard, J.A., 3)