Privy Council Appeal No. 7 of 1982

Castle Insurance Company Limited
(formerly Pacific & Orient Underwriters
(H.K.) Limited) and **84 Others** — *Appellants*

v.

Hong Kong Islands Shipping Co. Limited — *Respondents*
(and Cross-Appeal)

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY 1983

Present at the Hearing:

LORD DIPLOCK
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
SIR JOHN MEGAW

*[Delivered by **Lord Diplock**]*

The immediate question in this interlocutory appeal and cross-appeal from an order of the Court of Appeal of Hong Kong is whether the original plaintiffs in the action, Hong Kong Islands Shipping Company Limited ("the Ship Managers"), should be allowed to join Hong Kong Atlantic Shipping Company Limited ("the Ship Owners") as second plaintiffs in an action brought by writ issued on 25th October 1978 against 85 defendants, of whom 74 ("the Consignees") were consignees of cargo carried upon a general ship "Potoi Chau" owned by the Ship Owners and managed by the Ship Managers and the remaining 11 defendants ("the Cargo Insurers") are insurers of the cargo. The plaintiffs' claims in the action are for general average contributions to losses consequential on general average sacrifices made and general average expenditures incurred in the course of a voyage from ports in the Far East to Jeddah,

Hodeidah, Aden and Bombay. The claims against the Consignees are not made against them at common law as owners of the cargo at the time of the sacrifices and expenditure but are based upon the contracts contained in the bills of lading or, in the preferred alternative, upon agreements in one or other of the forms that are usually, though inaccurately, referred to as Lloyd's Average Bonds. The claims against the Cargo Insurers are based upon agreements contained in what are usually, and again inaccurately, called letters of guarantee.

The Court of Appeal, upholding in this respect the order of Mr. Commissioner Mayo at first instance, refused to allow the joinder of the Ship Owners as plaintiffs in the claim against consignees of the cargo. This refusal is the subject of the cross-appeal by the plaintiffs. The Court of Appeal, however, reversing in this respect the order of the Commissioner, allowed the joinder of the Ship Owners as additional plaintiffs in the claims against the Cargo Insurers. This is the subject of the appeal. The grounds of the Court of Appeal's decision were that as against the cargo owners the Ship Owners' claims were barred by the expiry of the six year limitation period; whereas as against the Cargo Insurers the Ship Owners' claims were not.

Since limitation periods are involved it is necessary to state a few salient dates:-

25 October 1972. The "Potoi Chau" encountered cyclonic weather in the Indian Ocean and ran aground off the northeast coast of Somalia.

30 October 1972. The services of professional salvors were engaged under Lloyd's Open Form of Salvage Agreement, and salvage operations, including jettison of considerable quantities of cargo, continued until 27 November 1972, by which time the ship and her remaining cargo had arrived at Aden and were in safety.

27 November to 25 December 1972. The Aden cargo and cargo destined for Jeddah and Hodeidah were discharged at Aden, the latter for onward carriage to its destination. The Aden cargo was released to the respective Consignees upon their signing average bonds in the usual Lloyd's forms, in the case of uninsured cargo secured by a deposit and in all other cases by a letter of guarantee from the cargo insurer of the particular consignment.

25 December 1972. The "Potoi Chau", to which temporary repairs had been carried out at Aden, left that port for Bombay with the cargo consigned to Bombay remaining on board.

2 January 1973. The "Potoi Chau" arrived at Bombay and discharged the Bombay cargo. It was released to its Consignees on terms as respects average bonds and cargo insurers' letters of guarantee similar to those that had been exacted on the release of the Aden cargo at that port. Inspection of the vessel after dry-docking at Bombay showed her to be a constructive total loss and on 16 January 1973 the voyage was abandoned.

24 January to end February 1973. The cargo destined for Jeddah and Hodeidah that had been left at Aden was carried on by other vessels to its port of destination and there released by the Ship Managers to the Consignees on similar terms as respects average bonds and cargo insurers' letters of guarantee.

9 January 1976. An award to the salvors of salvage in the sum of £120,000 and £25,801 interest was made by the arbitrator under the Lloyd's Open Form of Salvage Agreement.

31 August 1977. The Average Adjustment and Statement was completed and published. It showed a substantial general average contribution due to those concerned in ship by those concerned in cargo that had been delivered at its destination and released to its Consignees.

25 October 1978. A specially endorsed writ was issued by the Ship Managers as sole plaintiffs against the Consignees and the Cargo Insurers claiming against them, as monies due under the average bonds and letters of guarantee, the Consignees' respective proportions of general average as ascertained and adjusted in the average statement.

19 July 1979. Application by the Ship Managers to join the Ship Owners as additional plaintiffs in the action.

The significance of these dates is that the original writ was issued within six years of the first general average act and within six years of the execution of the average bonds by each of the Consignees and of the letters of guarantee by each of the Cargo Insurers. On the other hand the application to join the Ship Owners as plaintiffs in the action was made more than six years after the last of these events.

Under that branch of English common law into which the *lex mercatoria* has long ago become absorbed, the personal liability to pay the general average contribution due in respect of any particular

consignment of cargo that had been preserved in consequence of a general average sacrifice or expenditure lies, in legal theory, upon the person who was owner of the consignment at the time when the sacrifice was made or the liability for the expenditure incurred. In practice, however, the personal liability at common law of whoever was the owner of the contributing consignment of cargo at the time of the general average act is hardly ever relied upon. There are two reasons for this. The first is that the contract of carriage between the shipowner and the owner of the consignment, whether the contract be contained in a charterparty or a bill of lading, invariably nowadays (so far as the decided cases show) contains an express clause dealing with general average and so brings the claim to contribution into the field of contract law. The second, and this has in practice been the decisive reason, is that there attaches to all cargo that has been preserved in consequence of a general average sacrifice or expenditure a lien in favour of those concerned in ship or cargo who have sustained a general average loss. The lien attaches to the preserved cargo at the time when the sacrifice is made or the liability to the expenditure incurred. The lien is a possessory lien and it is the duty of the master of the vessel to exercise the lien at the time of discharge of the preserved cargo in such a way as will provide equivalent security for contributions towards general average sacrifices made or expenditure incurred not only by those concerned in the ship but also by those concerned in cargo in respect of which a net general average loss has been sustained. The lien, being a possessory one and not a maritime lien, is exercisable only against the consignee, but it is exercisable whether or not the consignee was owner of the consignment at the time of the general average sacrifice or expenditure that gave rise to the lien - a fact of which the shipowner may well be unaware. At the time of discharge the sum for which the lien is security (save in the simplest cases, which do not include that of a general ship) is unquantifiable until after there has been an average adjustment. Indeed in the case of some consignees of cargo that has been preserved in part only or damaged in consequence of a general average loss, so far from being liable to a net general average contribution they may eventually turn out to be entitled to a net payment in general average. The disadvantages and legal complications which would result from the master's actually withholding delivery to its consignee of cargo preserved by general average acts are conveniently set out in paragraph 453 of Lowndes and Rudolf on General Average (10th. Edn.) and need not be repeated here. In practice what happens is what happened in the instant case; the master,

acting on behalf of the shipowner and of any persons interested in cargo who will be found on the adjustment to be entitled to a net general average payment, releases the preserved cargo to the consignees upon the execution by each consignee of an average bond in one or other of Lloyd's standard forms accompanied, in the comparatively rare cases of cargo that is uninsured or underinsured, by a deposit in a bank in joint names of money as security or, more usually, by a letter of guarantee from the insurer of the cargo.

Although the instant case is not concerned with the common law liability to general average contribution of the owner of the cargo at the time of the general average act, the bills of lading contained an express clause dealing with general average which was in the following terms:-

> "28 (General Average). General Average shall be adjusted, stated and settled according to YORK-ANTWERP RULES 1950."

This creates a contractual liability on the part of the consignee as indorsee of the bill of lading to pay general average contribution, if there be any chargeable on the cargo shipped, whether it was he, the shipper or some intermediate indorsee of the bill of lading, who happened to be owner of the goods at the time when a general average sacrifice took place or a liability for a general average expenditure was incurred. Since this liability arises under a simple contract, the period of limitation is six years from the accrual of the cause of action; but the clause is intended to regulate, and to transfer to whoever acquires title to the consignment of cargo under the bill of lading, what would otherwise be a common law liability of the owner of the cargo at the time of the general average act; so for the purposes of the instant case a necessary starting point is first to determine when, at common law, a cause of action for a general average contribution would have accrued against the owner of cargo, and then to see whether the wording of the clause is apt to postpone the accrual of a cause of action for such contribution against a holder of the bill of lading or to create some different cause of action accruing at a later date than that of the general average act in respect of which contribution was claimed.

The relevant cases as to the time of accrual of a cause of action for a general average contribution at common law are scanty. They are the subject of close analysis in the judgments of Sir Alan Huggins V-P. and Leonard J.A. in the Court of Appeal. Scanty though the cases may be, their Lordships are

of opinion that the law is plain and was correctly stated by Greer L.J. in his dissenting judgment in *Tate & Lyle Ltd v. Hain Steamship Company Limited* [1934] 49 Ll.L.Rep. 123, at page 135:-

> "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 in words 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."

This judgment was expressly approved by the House of Lords upon appeal where Lord Atkin said [1936] 55 Ll.L.Rep. 159, at page 174:-

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

- a statement that is consistent only with the cause of action accruing at the time of the general average act.

The passage from Lord Justice Greer's judgment was also expressly approved by the House of Lords in *Morrison Steamship Co. Ltd. v. Greystoke Castle* [1947] A.C. 265 by Lord Roche at page 283, and the speech of Lord Uthwatt in the same case is to the like effect.

Finally, and directly on the question of limitation of actions, there is the judgment of Megaw J., as he then was, in *Chandris v. Argo Insurance Co. Ltd.* [1963] 2 Lloyd's Rep. 65, a case under a hull policy of marine insurance in which it was held that the limitation period started to run at the date of the general average act in respect of which the contribution was claimed. To this judgment of Megaw J. their Lordships will also find it necessary to revert in dealing with the next question: whether the general average clause in the bills of lading has the effect of postponing the accrual of the cause of action or of creating or substituting another cause of action accruing at some later date.

Although the claim to general average contribution against the Consignees in the instant appeal appears in the points of claim to be based primarily upon the average bonds executed by them upon discharge of the cargo at its port of destination, a claim based upon the general average clause in the bills of

lading was permitted to be argued in the Court of Appeal where it is discussed in the judgment of Leonard J.A. The Court of Appeal rejected it; but it was renewed, albeit with a justifiable air of diffidence, before this Board.

Upon a claim so framed the judgment in *Chandris v. Argo Insurance Co. Ltd.* is very much in point. That was a single judgment given in six test cases that were heard together and involved *inter alia* claims by assureds against insurers to be indemnified against general average contributions under a hull policy of insurance which incorporated a provision that:-

> "8. General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; but where the contract of affreightment so provides the adjustment shall be according to York-Antwerp Rules 1890 .... or York-Antwerp Rules 1924."

The contracts of affreightment did provide that general average should be "adjusted according to York-Antwerp Rules".

The actions were commenced more than six years after the general average acts in respect of which the liability to general average contributions arose, but less than six years after an average adjustment had been completed by average adjusters and the average statement published. The relevant provision of the Marine Insurance Act, 1906, dealing with the assured's right to recover general average contribution from the insurer under the policy is contained in section 66(5) which reads:-

> "(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."

So the question for the learned judge in *Chandris* was: when does a shipowner become liable to pay a general average contribution to a consignee of cargo under a contract of affreightment which provides for adjustment of general average according to York-Antwerp Rules?

The argument for the assured in *Chandris* was that since the contract of affreightment, and hence the policy, contemplated that there would be an adjustment of general average according to York-Antwerp Rules, and since those Rules contemplate that the adjustment will lead to the making by

average adjusters of a general average statement, this statement, the argument goes, will for the first time quantify the net amount of the general average contribution due from each individual contributor, which up to that time had been only an unliquidated and unascertained sum, so a fresh cause of action thereupon arises for recovery of the amount so quantified.

The difficulty in this argument lies in that part of the judgment of the Privy Council delivered in *Wavertree Sailing Ship Co. Ltd. v. Love and Anor.* [1897] A.C. 373 that states what for more than a century had been the accepted law of general average.

Their Lordships do not refer to this authority for the purpose of relying upon the opinion of the Board that it was not an implied term of the contract of affreightment that in the event of the occurrence of a general average act in the course of the voyage the ship owner would procure an average adjustment and statement to be prepared by a professional average adjuster. There is nothing in the instant appeal that makes it necessary for their Lordships to consider whether changes in mercantile practices which have taken place since 1897 have made such an implication necessary, at any rate in cases of contracts contained in bills of lading for carriage in a general ship. In the instant case this question cannot arise; there was a prolonged and complex average adjustment and statement made by professsional average adjusters. But the Board's other reason for allowing the appeal in *Wavertree Sailing Ship Co. Ltd. v. Love and Anor.* in the view of their Lordships, presents insuperable difficulties to the Consignees' claims so far as they are based upon the general average clause in the bills of lading. It is that an average statement under the York-Antwerp Rules prepared by average adjusters appointed by ship owners is not binding upon cargo owners either as respects any net general average contribution or any net general average claim. Cargo owners can not only dispute entire liability upon such grounds as that the vessel was unseaworthy at the beginning of the voyage owing to failure by the ship owner to exercise due diligence, or that sacrifices or expenses claimed were not made or incurred to preserve from a common peril the property involved in the adventure and therefore did not amount to general average acts, but they can also dispute the quantum of any contribution or claim attributed to their consignment by the average statement. If there were any such dispute it would fall to be determined by a court of justice of competent jurisdiction or, if the contract of affreightment contained an arbitration clause, by arbitration.

So, as a matter of law, in the absence of any agreement to the contrary, the publication of the average statement settles nothing: it has no other legal effect than as an expresssion of opinion by a professional man as to what are the appropriate sums payable to one another by the various parties interested in ship and cargo. It is just not capable of giving rise to any fresh cause of action or of postponing the accrual of an existing cause of action for an unliquidated sum.

Causes of action for unliquidated sums that, in the absence of earlier agreement as to quantum reached between the parties themselves, will only become quantified by the judgment of a court or the award of an arbitrator, accrue at the time that the events occur which give rise to the liability to pay to the plaintiff compensation in an amount to be subsequently ascertained. They are commonplace in the field of contract as well as in the field of tort. Unliquidated damages for breach of contract, claims on a quantum merit, claims for salvage services under Lloyd's Open Form of Salvage Agreement are examples and in their Lordships' view it was rightly decided in *Chandris v. Argo Insurance Co. Ltd.*, that claims for contributions in general average under contractual provisions which do no more than require general average to be adjusted according to York-Antwerp Rules fall within this class and that, accordingly, the cause of action under such a contractual provision in a bill of lading accrues at the time when each general average sacrifice was made or general average expense incurred.

It was submitted that a distinction could be drawn between the more common form of general average clause in bills of lading which refers only to general average being "adjusted" according to York-Antwerp Rules and the general average clause in bills of lading in the instant case which refers to general average being "adjusted, stated and settled" according to York-Antwerp Rules 1950. In their Lordships' view, however, the inclusion of the additional words "stated and settled" makes no difference. The York-Antwerp Rules do not make the average adjuster's assessments of liability to contribute contained in his general average statement binding upon cargo owners nor do the rules impose any legal obligation on cargo owners to settle general average claims by paying the amount so assessed; so in the context the additional words add nothing to what would already be comprehended in "adjusted according to York-Antwerp Rules".

The *Chandris* judgment in what were intended to be test cases has stood unchallenged for 20 years. In

the interests of business certainty their Lordships would have been very reluctant to overrule it; but so far as claims in general average between parties to the maritime adventure are concerned, the almost invariable use of average bonds eliminates the need to rely directly on the general average clause in the contract of affreightment.

Their Lordships turn now to the average bonds executed by the Consignees upon delivery to them of their respective consignments at the port of destination. The Court of Appeal held that the contracts thereby created did not give rise to a fresh cause of action which did not accrue until the amount of the contribution chargeable to the consignment had been ascertained and stated in a general average statement prepared by an average adjuster. It is this decision of the Court of Appeal that is the principal subject of challenge in the Ship Managers' and the Ship Owners' appeal.

The average bonds, to give them their common though legally inaccurate description, were in the usual Lloyd's forms which appear to have been in use in substantially the same terms for well over a century, *Svendsen v. Wallace* [1884] 10 App.Cas. 406, 410. There are two varieties one of which provides for security in the form of a cash deposit on joint account in a bank, the other does not call for any cash deposit but it is stated on its face that it is: "To be used in conjunction with Underwriters' guarantee". In both varieties the wording of the preamble and the mutual promises is the same. As respects the bonds providing for cash deposits, of which there were very few in the instant case, it is only necessary for their Lordships to draw attention to the fact that the provisions relating to the cash deposit deal with interim payments on account out of the deposit of sums certified to be proper "by the Adjuster or Adjusters who may be employed to adjust the said ... general average". The implication from this is clear: it was the mutual intention of the parties that there should be an average adjustment undertaken by professional average adjusters.

Since their Lordships differ from the Court of Appeal on the legal effect of these average bonds, it is convenient to set out their terms omitting only those relating to the cash deposit in the bonds which were not accompanied by an insurer's guarantee.

> "AN AGREEMENT made this first day of March 1973 BETWEEN Owner of Ship or Vessel called the "POTOI CHAU" of the first part and the several Persons whose names or Firms are set and subscribed hereto being respectively consignees

of Cargo on board the said Ship of the second part

WHEREAS the said Ship lately arrived in the Port of on a voyage from and it is alleged that during such voyage the vessel met with a casualty and sustained damage and loss and that sacrifices were made and expenditure incurred which may form a Charge on the Cargo or some part thereof or be the subject of a salvage and/or a general average contribution but the same cannot be immediately ascertained and in the meantime it is desirable that the Cargo shall be delivered Now THEREFORE THESE PRESENTS WITNESS and the said Owner in consideration of the agreement of the parties hereto of the second part hereinafter contained hereby agrees with the respective parties hereto of the second part that he will deliver to them respectively or to their order respectively their respective consignments particulars whereof are contained in the Schedule hereto on payment of the freight payable on delivery if any and the said parties hereto of the second part in consideration of the said Agreement of the said Owner for themselves severally and respectively and not the one for the other of them hereby 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 particulars and/or other charges which may be chargeable upon their respective consignments particulars whereof are contained in the Schedule hereto or to which the Shippers or Owners of such consignments may be liable to contribute in respect of such damage loss sacrifice or expenditure and the said parties hereto of the second part further promise and agree forthwith to furnish to the Owner of the said Ship a correct account and particulars of the value of the goods delivered to them respectively in order that any such salvage and/or general average and/or particular and/or other charges may be ascertained and adjusted in the usual manner."

This is a fresh agreement which stands on its own independently of the bill of lading and is for fresh consideration on either side: the release by the ship owner of his claim to any possessory lien for a general average contribution (also referred to as a "charge") he may have on the consignment, and the assumption by the consignee of a personal liability, secured by a cash deposit or an insurer's guarantee, to pay such general average contribution/charge which may have been payable, at common law, by the owner of the consignment at the time of the general

average act or, under the contract of affreightment, by the shipper (each of whom, particularly in the case of a general ship, may well be someone other than the consignee). Their Lordships draw attention to the statement in the preamble that the general average contribution (if there be one) "cannot be immediately ascertained". The agreement then goes on to deal with what is to be done by the parties until it is ascertained. First of all the consignment is to be delivered "on payment of freight payable on delivery if any" i.e. against payment to be made immediately. This is to be contrasted with the promise by the consignee which immediately follows expressed in the future tense that he "will pay" his proper general average contribution. This is a promise to make a payment of a liquidated sum at some date in the future which cannot arrive until what is his proper general average contribution/charge has been ascertained. The contrast between this promise to do something in the future and a promise to do something immediately is again apparent from the succeeding promise by the consignee to furnish particulars of the value of the consignment "forthwith" in order that something further may be done in the future that is needed to enable the liquidated sum that the consignee has promised that he will pay to be ascertained. What is to be done is in order that the general average contribution/charge "may be ascertained and adjusted *in the usual manner*". The words italicised are crucial. They direct one to the procedure that is in actual practice followed when general average is adjusted according to York-Antwerp Rules even though such practice may involve the non-insistence by persons interested in the adventure upon their strict legal rights. The usual practice, in the case of a general ship at any rate, is for the ship owner to employ a professional average adjuster to determine and set out in a general average statement his determination on the one hand of the sums payable as a contribution from each party to the adventure who is liable to contribute to general average and on the other hand of the sums in respect of general average sacrifices or expenditures which are recoverable by way of reimbursement by each party to the adventure by whom such sacrifices were made or expenditures incurred. The usual practice is for actual payment of contributions/charges to be deferred until completion of the general average statement, unless, as did not happen in the instant case, the average adjuster has given a certificate providing for some interim reimbursement to be made to a claimant for a general loss without prejudice to ultimate liability.

In their Lordships' view, although, from the point of view of clarity, the draftsmanship of the Lloyd's

Forms of Average Bonds leaves much to be desired, the application of commercial common sense to the language used makes clear the intention of the parties to it as respects payments by the consignees. The contractual obligation assumed by the consignee is to make a payment of a liquidated sum at a future date which will not arrive until the general average statement has been completed by an average adjuster appointed by the ship owners. That in the instant case, where no question of the issue by the adjuster of certificates for interim reimbursements arose, was the earliest date at which the Ship Owners' cause of action against the Consignees under the average bond for payment of general average contribution arose. It was not time-barred at the date of the application of 19 July 1979 to add the Ship Owners as additional plaintiff.

Since the average bond provided that the Consignees' general average contributions should be adjusted in the usual manner, which in the instant case meant according to York-Antwerp Rules, the Consignees were not thereby deprived of any defence they might have on the ground that the statement had not been drawn up according to such rules, as for instance that they were excused from liability owing to the unseaworthiness of the "Potoi Chau" resulting from the failure of the Ship Owners to exercise due diligence - a defence which it appears from the affidavit evidence they intend to raise.

For these reasons their Lordships are of the opinion that the plaintiff's cross-appeal should be allowed as against the Consignees.

It follows from the foregoing that their Lordships do not accept the correctness of the statement of Kerr J. in *Schothorst and Schuitema v. Franz Dauter G.m.b.H. (The "Nimrod")* [1973] 2 Lloyd's Rep. 91, 97 that the reasoning of Megaw J. in *Chandris* applies to an average bond in Lloyd's usual form, and that the cause of action upon such bond accrues at the date of the general average act or of the bond if later. This statement by the learned judge was confessedly *obiter*; the conclusion expressed was reached without any analysis of the language of the general average bond; it was treated as being the necessary corollary of regarding the reasoning in *Chandris* on a claim under a hull policy of insurance as applying "equally to a claim for general average contribution made by one party to the adventure against another party to the adventure". As has already been indicated their Lordships agree that the reasoning in *Chandris* applies to claims for general average contributions between parties to the adventure where such claims are based upon either

the liability at common law or contractual liability under a general average clause in the usual terms contained in the contract of affreightment; but the suggestion that the same reasoning leads to the same conclusion in the case of a new and entirely different contract, an average bond, is a *non sequitur* and in their Lordships' view is wrong.

Their Lordships can deal quite briefly with the defendants' appeal against the Court of Appeal's order allowing the joinder of the Ship Owners as an additional plaintiff in the claims against the Insurers, since their Lordships find themselves in agreement with the reasons of the Court of Appeal for making this order.

The letters of guarantee given by the various Insurers were not in identical terms. Four different forms are set out in the judgment of Leonard J.A. in the Court of Appeal to which reference can be made; to two of these forms there were also minor variants. Although the expression "we hereby guarantee" appears in each of the forms the verb "guarantee" is used loosely, as meaning "agree" or "undertake" and not in its strict legal sense of agreeing to answer for the debt, default or miscarriage of another. By each of the forms of letters of guarantee the insurers assume a primary liability to pay a sum of money on the happening of a defined event.

The sum agreed to be paid is defined in various terms each of which either expressly or by necessary implication indicates the event on the happening of which it is to become payable. The most explicit language in which the sum and the event are spelt out is: "The general average contribution that may be properly found to be due upon the completion of the Average Statement by the adjusters"; but their Lordships agree with the Court of Appeal that what is explicit in this form is implicit in each of the others.

Their Lordships will accordingly humbly advise Her Majesty that the appeal ought to be dismissed, the cross-appeal allowed and the matter remitted to the Court of Appeal of Hong Kong with a direction that such order be made as is proper to give effect to their Lordships' judgment. The respondents' costs of this appeal and cross-appeal and of the proceedings before Mr. Commissioner Mayo and in the Court of Appeal of Hong Kong must be paid by the appellants.