[TRIANTAFYLLIDES, P., L. LOIZOU, HADJIANASTASSIOU, JJ.]

IOANNIS KOKKALOS & SONS, LTD.,

Appellants-Defendants,

v.

NICOS KARAYIANNIS,

Respondent-Plaintiff.

(Civil Appeal No. 4709).

Contract—Exemption clause—Principles applicable—Negligence—Bailment—Apples stored in cold storage for reward—Exemption clause exempting bailee from liability "for any damage from any cause whatsoever"—Express undertaking by bailee to supervise cooling in cold stores so as to avoid any damage to goods through lack of cooling—Said exemption clause did not exempt him from his obligation to take care in order to comply with his said undertaking.

Contract—Bailment for reward—It is up to the bailee to explain how damage to goods stored occurred—And if he fails to do so he must be held liable for the loss sustained by the bailor—Damage to apples whilst stored in cold stores—No adequately convincing explanation put forward by bailee as to how damage was caused—In the light of all the evidence, and Court of Appeal being in as good a position as the trial judges to draw inferences from primary facts, proper verdict on the balance of probabilities was that the bailee was responsible for the damage, through negligent management of his cold stores.

Court of Appeal—Inferences from primary facts—Court of Appeal in as good a position as a trial Court to draw such inferences.

Damages—Erroneous computation inconsistent will evidence.

By a letter dated September 21, 1965, the appellants (defendants) were invited by the respondent (plaintiff) to make use of his cold stores; and they delivered to him for cold storage a quantity of apples, which remained in his cold stores for a period of nearly four months.

When the respondent sued the appellants for his storage fees the latter counterclaimed for damages suffered due to the complete or partial deterioration of their apples whilst in the cold stores of the respondent.

The Court below dismissed the appellants' counter-claim and hence this appeal.

Respondent denied that the damage to the apples, whilst in the cold stores, was due in any way, to any negligence, on his part; and he has alleged that by virtue of an express term, endorsed on the receipts given to the appellants when he was accepting possession of their apples for cold storage, to the effect that it was up to the owners of the goods to insure them against risk by fire and that no responsibility at all was undertaken by the owner of the cold stores for any damage from any cause whatsover, he was absolved of all liability for any damage caused to the apples by any cause.

The trial Court held that this notice did not exonerate the respondent from liability, in view of the fact that in paragraph 5 of the said letter of the 21st September, 1965, it was stated expressly that he undertook to supervise daily the cooling in the cold stores, which would be 2°C. above zero, and that if there was any irregularity he was obliged to put it right at once, so as to avoid any damage to goods through lack of cooling.

The issues for consideration by the Court of Appeal were the following:

(A) Whether the aforementioned exemption clause on the receipts can be treated as exonerating respondent from liability in any event.

(B) Whether the respondent was actually to blame for the damage caused to the apples of the appellants.

(C) Whether the damages payable to the appellants were correctly assessed.

With regard to issue (A) the relevant statutory provisions are sections 109 and 110 of the Contract Law, Cap. 149, which deal with the duty of a bailee, and read as follows:-

"109. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

110. The bailee in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in the last preceding section."

With regard to issue (B) the trial Court reached the conclusion that the cold stores of the respondent were functioning properly and that, therefore, no liability on his part had been established for the damage caused to the apples of the appellants, which was attributed, in the trial Court's judgment to the way in which they had been packed by the appellants prior to their being placed in the cold stores of the respondent.

What has weighed considerably with the trial Court in reaching its conclusion about the cause of damage was the fact that apples of the same variety as those of the appellants, which were stored by three other persons, witnesses Charalambides, Papacharalambous and Georghiou, in the same cold stores, at the material time, did not suffer damage to the extent of more than 5%, which is regarded as normal deterioration for apples in cold storage.

A perusal, however, of the relevant evidence as a whole showed clearly that materially differentiating factors were the dissimilar places in the cold stores at which the apples of these 3 witnesses, and those of the appellants, were respectively placed; the apples of these witnesses were stored at places where the cooling was much more effective than at the place where the apples of the appellants were.

The manner in which, and the place where, the apples of the appellants were stacked clearly prevented them from enjoying the benefit of free circulation of cold air from the blowers to the extent enjoyed by the apples of the aforesaid three witnesses, in the same cold stores. And the expert evidence, in this respect was that when placing boxes containing apples in cold

stores it was important to stack them in such a way as to leave free circulation of air from the blowers up to the most distant part of the cold stores. Regarding the finding of the Court that the damage to the apples was caused, because of the manner in which they were packed, namely because they were not wrapped each one separately, there was expert evidence before the Court that apples of the variety of the appellants could have been stored, without being wrapped each one separately, for a period of three or four months without any danger of deterioration.

With regard to issue (C) the trial Court found that the damage suffered by the appellants was to be calculated at a price, for sound apples of that variety, of 185 mils per oke, instead of at 250 mils per oke, as claimed by the appellants.

Held, (I) on issue (A):

1. If a bailee is to be relieved from responsibility for his own negligence, as regards goods entrusted to him by way of bailment for reward, the exemption clause which aims at achieving this should be clear and unambiguous; and the contract in which such clause is to be found must be construed as a whole. The burden is on the bailee to bring himself within the ambit of an exemption clause.

2. As a matter of construction normally an exemption or exclusive clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract.

3. Any doubt as regards the construction of an exemption clause must operate against the author of the document in which it is contained.

4. Even though the words of a clause are wide enough in their ordinary meaning to exclude liability for negligence, nevertheless if it is apparent that sufficient content can be given to them without doing so, then they will be given that content only. They will not be held to cover negligence. (See *Gillespie Brothers & Co. Ltd.* v. *Roy Bowles Transport Ltd. and Another* [1973] 1 All E.R. 193 at p. 200).

5. In the light of the legal principles governing the issue under consideration (set out at pp. 385 - 394 of the judgment post) and after applying them to the particular facts of the present case, we have reached the conclusion that there cannot be sustained the contention of the respondent that the trial Court erred in finding that the said exemption clause did not exempt him from his obligation to take care in order to comply with paragraph 5 of his letter of September 21, 1965.

6. The exemption clause in question must be construed as referring to damage caused otherwise than through neglect of the respondent to carry out his express obligation under the said paragraph 5, namely to supervise daily the cooling in the cold stores so that it would be kept at the level of 2°C. above zero and to put right at once any defect so as to avoid damage to goods through lack of cooling; in other words, the respondent was not exempted from liability arising out of not implementing, through negligence, his above obligation.

Held, (II) on issue (B) after reviewing the evidence:

1. In the light of the evidence, and being in as good a position as the trial judges to draw inferences from primary facts (see, *inter alia, Patsalides* v. *Afsharian* (1965) 1 C.L.R. 134), we have reached the conclusion that the proper verdict, on the balance of probabilities, was that the respondent was, indeed, responsible through negligent management of his cold stores, for the damage caused to the apples of the appellants.

2. In a case of bailment for reward it is up to the bailee to explain how the damage occurred to goods which are the subject matter of the bailment and if he fails to do so he must be held liable for the loss which the bailor has sustained. The respondent has failed to put forward any adequately convincing explanation as regards how there was caused the damage to the apples of the appellants while they were kept in his cold stores. (See *The Food Preserving and Canning Industries Ltd.* v. *The Famagusta Navigation Company* (1963) 2 C.L.R. 482).

Held, (III) on issue (C):

On the totality of the evidence given in this respect the price of 185 mils per oke is not the proper price for apples of the variety and quality of the appellants. It was not open to the trial Court, in the circumstances, to accept as the price per oke of the apples, in calculating the damages payable to the appellants, anything less than 200 mils per oke.

Appeal allowed.

Cases referred to:

The Food Preserving and Canning Industries Ltd. v. *The Famagusta Navigation Company* (1963) 2 C.L.R. 482 at p. 486;

Price & Co. v. *The Union Lighterage Company* [1904] 1 K.B. 412 at pp. 414, 415;

Nelson Line (Liverpool), Limited v. *James Nelson & Sons, Limited* [1908] A.C. 16, at p. 19;

Calico Printers' Association v. *Barclays Bank,* 145 L.T. 51, at p. 63;

Olley v. *Marlborough Court Limited* [1949] 1 K.B. 532 at p. 549;

James Archdale & Co. Ltd. v. *Comservices Ltd.,* [1954] 1 W.L.R. 459 at p. 461;

J. Spurling Ltd. v. *Bradshaw* [1956] 1 W.L.R. 461 at p. 466;

Suisse Atlantique Société d' Armement Maritime S.A. v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 at pp. 398, 399;

Kenyon, Son & Craven Ltd. v. *Baxter Hoare & Co. Ltd. and Another* [1971] 1 W.L.R. 519;

A. P. Salmon Contractors Ltd. v. *Monksfield* [1970] 1 Lloyd's Rep. 387 at p. 389;

Hollier v. *Rambler Motors (AMC) Ltd.,* [1972] 1 All E.R. 399 at p. 408;

Gibaud v. *Great Eastern Railway Company* [1921] 2 K.B. 426 at p. 437;

Reynolds v. *Boston Deep Sea Fishing and Ice Company, Limited,* 38 T.L.R. 429;

Gillespie Brothers & Co. Ltd. v. *Roy Bowles Transport Ltd. and Another* [1973] 1 All E.R. 193, at p. 200;

Patsalides v. *Afsharian* (1965) 1 C.L.R. 134.

Appeal.

Appeal by defendants against the judgment of the District Court of Limassol (Malachtos, P.D.C. and Loris, D.J.) dated the 28th March, 1968, (Action No. 783/66) dismissing their counterclaim for damages caused to their apples, in an action brought against them by the plaintiff for the sum of £130.770 mils, due as cold storage fees for apples which the defendant had stored in the cold stores of the plaintiff.

G. Cacoyiannis, for the appellants.

H. Maounis and *Ev. Michaelides,* for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court delivered by :

TRIANTAFYLLIDES, P. : The appellants, who were the defendants in an action before the trial court, challenge the dismissal of a counterclaim made by them against the respondent, as plaintiff.

We are not concerned with the fate of the claim of the respondent, because it was agreed that the appellants should pay him C£120 in full satisfaction thereof; it related to cold storage fees for apples which the appellants had stored in cold stores belonging to the respondent.

The appellants counterclaimed for the damages which they, allegedly, suffered due to the complete or partial deterioration of their apples, which they stored, as aforesaid, in the cold stores of the respondent; it was the contention of the appellants that the respondent did not exercise proper care in relation to the preservation of their apples in his cold stores and that. as a result, they suffered damage.

It is common ground that the appellants were invited by the respondent, by a letter dated September 21, 1965,

to make use of his cold stores, and they delivered to him for cold storage about 5600 okes of apples, which remained in his cold stores for a period of nearly four months, that is from September, 1965, up to the middle of January, 1966.

As a result of the deterioration of their apples, whilst in cold storage, the appellants had to sell them for a total amount of C£693.320 mils, out of which they paid an amount of C£29.375 mils by way of expenses for the sorting out of the apples which were fit for sale.

The respondent has denied that the damage to the apples of the appellants, whilst in his cold stores, was due, in any way, to any negligence, on his part; and he has, furthermore, alleged that by virtue of an express term endorsed on the receipts given to the appellants, when he was accepting possession of their apples for cold storage, he was absolved of all liability for any damage caused to them by any cause.

It is correct that on the receipts in question, of which the appellants through their agents had had knowledge, there was a notice that it was up to the owners of the goods to insure them against risk by fire and that no responsibility at all was undertaken by the owner of the cold stores for any damage from any cause whatsoever.

It has been held by the trial court that this notice did not exonerate the respondent from liability, in view of the fact that in paragraph 5 of his said letter of September 21, 1965, it was stated expressly that he undertook to supervise daily the cooling in the cold stores, which would be 2°C. above zero, and that if there was any irregularity he was obliged to put it right at once, so as to avoid any damage to goods through lack of cooling.

The trial court found, also, that the damage suffered by the appellants was to be calculated at a price, for sound apples of that variety, of 185 mils per oke, instead of at 250 mils per oke, as claimed by the appellants; and that an allowance of 5% had to be made for damage normally caused to apples when in cold storage.

But, in the end, no damages at all were awarded to

the appellants, because the trial court reached the conclusion that the cold stores of the respondent were functioning properly and that, therefore, no liability on his part had been established for the damage caused to the apples of the appellants, which was attributed, in the trial court's judgment, to the way in which they had been packed by the appellants prior to their being placed in the cold stores of the respondent.

It is convenient for us to deal, first, with the question of whether the aforementioned exemption clause on the receipts given by the respondent to the appellants, when accepting delivery of their apples for cold storage, can be treated as exonerating him from liability in any event.

It is useful to refer to what was, in this case, the duty of the respondent as a bailee, and to what extent he could be treated as relieved of any liability regarding the discharge of such duty:

The relevant provisions of our Contract Law, Cap. 149, are sections 109 and 110, and they read as follows:-

"109. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

110. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in the last preceding section."

In *The Food Preserving and Canning Industries Ltd.* v. *The Famagusta Navigation Company*, (1963) 2 C.L.R. 482, Wilson, P. said (at p. 486) the following:-

"The Law does not specifically deal with the question of whose responsibility it is to prove that the damage was not the result of negligence but it has been interpreted. We would refer to section 151 of the Indian Contract Act, by Pollock & Mulla, 6th Edn., p. 516 where the authors cite English precedents as being binding and apply the decision of the Privy Council in the case of ***Brabant & Co.***

v. *King*, 1895 Appeal Cases, p. 632. In that case the Government was a bailee for hire. It stored the appellants' explosive goods in sheds near to the water-edge and subsequently the goods were damaged as a result of flooding. The principles applicable in that case would be equally applicable to the circumstances of this case except that the facts in that case were more strongly against the warehouseman or bailee than they were here.

At p. 640 Lord Watson, delivering the judgment of the Court says this :

'Their Lordships can see no reason to doubt that the relation in which the Government stood to the appellant company was simply that of bailees for hire. They were therefore under a legal obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred'.

At page 641 he continues :

'It would be very dangerous doctrine, for which there is not a vestige of authority, to hold that a depositor of goods for safe custody, who, by himself or his servants, has had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee. The authorities relating to the vexed maxim *'Volenti non fit injuria'* have no bearing whatever upon the point. From the very nature of the transaction the depositor is entitled to rely upon the care and skill of the bailee. The duty is incumbent upon the latter, in the due fulfilment of his contract, of considering whether his premises can be safely used for the storage of explo-

sives or other goods, and, if they cannot, to take immediate steps for placing the goods in a position of safety. If the defects of these Government magazines were as apparent to the servants of the appellant company as the jury have found they were, they ought to have been equally patent to the official storekeeper, with whom the duty of safe custody rested' ".

If a bailee is to be relieved from responsibility for his own negligence, as regards goods entrusted to him by way of bailment for reward, the exemption clause which aims at achieving this should be clear and unambiguous; and the contract in which such clause is to be found must be construed as a whole.

In *Price & Co.* v. *The Union Lighterage Company,* [1904] 1 K.B. 412, Lord Alverstone, C.J. stated the following (at pp. 414, 415):-

"Since the case of *Phillips* v. *Clark,* [1857] 2 C.B. (N.S.) 156 it has been settled that when a clause in such a contract as this is capable of two constructions, one of which will make it applicable where there is no negligence on the part of the carrier or his servants, and the other will make it applicable where there is such negligence, it requires special words to make the clause cover non-liability in case of negligence."

In *Nelson Line (Liverpool), Limited* v. *James Nelson & Sons, Limited,* [1908] A.C. 16, Lord Loreburn. L.C. said (at p. 19) :-

"If the words are considered by themselves, they seem to excuse the shipowners not merely from this, but from any imaginable liability, except such as by law cannot be underwritten. They run as follows: 'The owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance'.

But the whole agreement must be regarded, and especially the context of the clause in which this alleged exemption occurs. The words in question do not stand by themselves. They are at the end of a very long sentence, the earlier part of which is

wholly without effect if the last part means what the defendants maintain."

In *Calico Printers' Association* v. *Barclays Bank,* 145 L.T. 51, Greer L.J. stated (at p. 63) the following :-

"The position is clear now, namely, that where there are words of exception in a contract, once the contract is made, which are not so clear as to make it certain that they include negligence, the court will hold that their effect must be confined to some other obligation than the obligation to exercise reasonable care. If there is, as in the case of ships and barges and other common carriers, a liability to which the exception can apply, then it will not include exception from liability for negligence. But effect has to be given to every part of a contract; effect must be given to the exceptions just as much as to the body of the contract unless they are clearly contradictory of one another, in which case I agree with the argument that where, in the middle of the contractual document, a party says : 'I will exercise reasonable care' to do so and so and then in the exception says : 'But I will not be liable if I do not exercise reasonable care', the probability is that the exception would be regarded as repugnant and struck out of the contract altogether. But if there is something to which the exception can apply other than negligence, then it will be applied to those other obligations of the contract and will not be applied to the obligation to take due care. Where there is nothing it can apply to except the obligation to take reasonable care, then effect must be given to the exception and liability must be excluded."

In *Olley* v. *Marlborough Court Limited,* [1949] 1 K.B. 532, Denning, L.J. stressed (at p. 549) that "in order to exempt a person from liability for negligence, the exemption should be clear on the face of the contract".

Somervell, L.J. said the following in *James Archdale & Co. Ltd.* v. *Comservices Ltd.,* [1954] 1 W.L.R. 459 (at p. 461) :-

"Any clause, of course, has to be considered according to its actual wording, but speaking gene-

rally one can summarize the cases, I think, in this way: that general words in an exception clause do not ordinarily except the party seeking to rely on the exception from liability for his own negligence or that of his servants. There is an exception to what I may call that *prima facie* approach if, on looking more closely into the subject-matter, it is found that substantially the only scope for the operation of the exception clause is the negligence of the servant of the person who is seeking the benefit of it. In that case although the words are general it has been construed as excluding a liability for negligence. The example of this exception to what I call the *prima facie* approach will be found in *Alderslade* v. *Hendon Laundry Ltd.*, [1945] K.B. 189."

In *J. Spurling Ltd.* v. *Bradshaw*, [1956] 1 W.L.R. 461, it was stressed by Denning, L.J. (at p. 466) that in the ordinary way the burden is on the bailee to bring himself within the ambit of an exemption clause; he, also, said the following in his judgment (at p. 465):-

> "These exempting clauses are nowadays all held to be subject to the overriding proviso that they only avail to exempt a party when he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it. Just as a party who is guilty of a radical breach is disentitled from insisting on the further performance by the other, so also he is disentitled from relying on an exempting clause."

Further on, in his judgment in the same case, Denning, L.J. pointed out that negligence by itself, without more, is not a breach which goes to the root of the contract; but he went on to add that he would not like to say that negligence could never amount to such kind of breach.

The House of Lords dealt with this aspect of a fundamental breach in *Suisse Atlantique Société d' Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361. It is sufficient, for the purposes of the present case, to quote the following passages from the judgments delivered. In his judgment (at pp. 398, 399) Lord Reid stated:-

"As a matter of construction it may appear that the terms of the exclusion clause are not wide enough to cover the kind of breach which has been committed. Such clauses must be construed strictly and if ambiguous the narrower meaning will be taken. Or it may appear that the terms of the clause are so wide that they cannot be applied literally: that may be because this would lead to an absurdity or because it would defeat the main object of the contract or perhaps for other reasons. And where some limit must be read into the clause it is generally reasonable to draw the line at fundamental breaches. There is no reason why a contract should not make a provision for events which the parties do not have in contemplation or even which are unforeseeable, if sufficiently clear words are used. But if some limitation has to be read in it seems reasonable to suppose that neither party had in contemplation a breach which goes to the root of the contract."

Also, in his judgment, in the same case, Lord Hodson stated (at p. 410):-

"Sometimes it has been declared that where a fundamental breach of contract had occurred an exceptions clause could not as a matter of law be relied upon, but the better view on the authorities, and that accepted by both sides before your Lordships, is that as a matter of construction normally an exception or exclusive clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract.

I have here quoted the language used by Pearson L.J. in *U.G.S. Finance* v. *National Mortgage Bank of Greece and National Bank of Greece, S.A.*, [1964] 1 Lloyd's Rep. 446 which is contained in the passage cited by my noble and learned friend, Lord Reid—see also the judgment of Diplock L.J. in *Hardwick Game Farm* v. *Suffolk Agricultural Poultry Producers Association*, [1966] 1 W.L.R. 287 in which judgment was delivered on December 20, 1965—a recent example of the acceptance of the opinion of Pearson L.J.

So long as one remembers that one is construing a document and not applying some rule of law superimposed upon the law of contract so as to limit the freedom of the parties to enter into any agreement they like within the limits which the law prescribes one can apply one's mind to each contract as it comes up for consideration. I would adopt the language of Atkin L.J. in *The Cap Palos,* [1921] P. 458, 471, 472,

'I am far from saying that a contractor may not make a valid contract that he is not to be liable for any failure to perform his contract, including even wilful default; but he must use very clear words to express that purpose ...'."

The *Swisse Atlantique* case was applied in *Kenyon, Son & Craven Ltd.* v. *Baxter Hoare & Co. Ltd. and Another,* [1971] 1 W.L.R. 519.

It is well settled that any doubt as regards the construction of an exemption clause must operate against the author of the document in which it is contained: in *A.P. Salmon Contractors Ltd.* v. *Monksfield,* [1970] 1 Lloyd's Rep. 387, Rogers, J. stated (at p. 389):-

"It is a long settled law that if there is an ambiguity an exception must be construed strictly against the author of the document concerned. As it was put by Lord Justice Lindley in the case of *Cornish* v. *Accident Insurance Company Ltd.,* [1889] 23 Q.B.D. 453, at p. 456:

... In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions ..."

In *Hollier* v. *Rambler Motors (AMC) Ltd.,* [1972] 1 All E.R. 399 Stamp, L.J. stated (at p. 408) the following:-

"As I understand the law, it is settled that where in a contract such as this you find a provision excluding liability capable of two constructions, one of which will make it applicable where there is no negligence by the defendant, and the other will make it applicable where there is negligence by the de-

fendant, it requires special words or special circumstances to make the clause exclude liability in case of negligence: see, for example, *Price & Co.* v. *Union Lighterage Co.*, [1904] 1 K.B. 412."

A case in which it was found that the exemption clause was so clear as to exclude liability for negligence was that of *Gibaud* v. *Great Eastern Railway Company*, [1921] 2 K.B. 426; Scrutton, L.J. said (at p. 437) :-

"It is said: There may be a clause exempting the company but it is not a clause exempting them for liability for their own negligence, because the Courts are slow, unless clear words are used, to protect a man from the consequence of his own negligence, or the negligence of his servants. I do not propose to go through the distinctions which have been referred to in this Court in *Travers* v. *Cooper*, [1915] 1 K.B. 73, because the Court said the distinction is a very fine one, but substantially it comes to this, that though, if you merely enumerate losses without dealing with causes, such a clause may not protect you from your own negligence, if you enumerate causes and suggest you are free from all losses however caused, that will protect you from your own negligence. The words that have been held to give protection are, 'Under any circumstances whatsoever', 'In any circumstances', 'Under any circumstances', or 'any injury, however caused'. When I read the clause 'will not be in any way responsible', and remember that the liability of the company was for negligence—that is to say, they were bound to use reasonable care—it seems to me that those words are clearly sufficient to protect the company, particularly in a case where it is eminently reasonable that they should be protected if the man who deposits property of large value has not taken the trouble to pay the company for the excess in value of the property which he is leaving with them."

A similar result was arrived at in *Reynolds* v. *Boston Deep Sea Fishing and Ice Company, Limited*, 38 T.L.R. 429, where in the headnote there is to be found the following reference to the judgment of Scrutton, L.J. :-

".... in his view nothing should be taken as weak-

ening the rule that to exempt from negligence very clear words should be used. Courts had disagreed as to what were clear words, and in every case it would be necessary to see what liability there would be upon the person pleading the exempting words, and if the only liability were for negligence it would be easier to free himself than if he were liable for other things. Here the only liability was for negligence, and very clear words had been used—the words 'no liability whatever'—they could not very well be clearer."

The law regarding exemption clauses has been reviewed as follows in *Gillespie Brothers & Co. Ltd.* v. *Roy Bowles Transport Ltd. and Another*, [1973] 1 All E.R. 193, by Lord Denning M.R. (at p. 200):-

"The correct proposition, as I have always understood it, is this: even though the words of a clause are wide enough in their ordinary meaning to exclude liability for negligence, nevertheless if it is apparent that sufficient content can be given to them without doing so (as in the case of a common carrier), then they will be given that content only. They will not be held to cover negligence.

But, even so, I say to myself: this indemnity clause, in its ordinary meaning, is wide enough to cover the negligence of the carrier himself. Why should not effect be given to it? What is the justification for the courts, in this or any other case, departing from the ordinary meaning of the words? If you examine all the cases, you will, I think, find that at bottom it is because the clause (relieving a man from his own negligence) is unreasonable, or is being applied unreasonably in the circumstances of the particular case. The judges have, then, time after time, sanctioned a departure from the ordinary meaning. They have done it under the guise of 'construing' the clause. They assume that the party cannot have intended anything so unreasonable. So they construe the clause 'strictly'. They cut down the ordinary meaning of the words and reduce them to reasonable proportions. They use all their skill and

art to this end. Thus they have repeatedly held that words do not exempt a man from negligence unless it is made clear beyond doubt; nor entitle a man to indemnity from the consequences of his own negligence; see *Great Western Railway Co.* v. *James Durnford & Sons Ltd.*, [1928] All E.R. Rep. 89, and *John Lee & Son (Grantham) Ltd.* v. *Railway Executive,* [1949] 2 All E.R. 581. Even when the words are clear enough to ordinary mortals, they have made fine distinctions between the *kind* of loss and the *cause* of loss; so that, if a clause exempts from 'any loss' it is not sufficient, but if the magic words 'however caused' are added, it is: see *Joseph Travers & Sons Ltd.* v. *Cooper,* [1915] 1 K.B. 73 at 101, *Gibaud* v. *Great Eastern Railway Co.,* [1921] 2 K.B. 426 at 437 and *Rutter* v. *Palmer,* [1922] 2 K.B. 87 at 94. Likewise, they have regularly disallowed exemption clauses where sufficient content can be given to them without exempting negligence: see *Hollier* v. *Rambler Motors (AMC) Ltd.,* [1972] 1 All E.R. 399. Nor will the words of an exemption clause normally be held to apply to a situation created by a fundamental breach of contract: see *UGS Finance Ltd.* v. *National Mortgage Bank of Greece and National Bank of Greece SA,* [1964] 1 Lloyd's Rep. 446 at 453, per Pearson LJ, which was approved by the House of Lords in *Suisse Atlantique Société d' Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale,* [1966] 2 All E.R. 61. The time may come when this process of 'construing' the contract can be pursued no further. The words are too clear to permit of it. Are the courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? When it gets to this point, I would say, as I said many years ago, '... there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused': see *John Lee & Son (Grantham) Ltd.* v. *Railway Executive,* [1949] 2 All E.R. at 584. It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so."

In the light of all the foregoing legal principles, and after applying them to the particular facts of the present case, we have reached the conclusion that there cannot be sustained the contention of the respondent that the trial court erred in finding that the exemption clause contained in the receipts issued by the respondent to the appellants, when accepting delivery of their apples for cold storage, did not exempt him from his obligation to take care in order to comply with paragraph 5 of his letter of September 21, 1965; the exemption clause in question must be construed as referring to damage caused otherwise than through neglect of the respondent to carry out his express obligation under the said paragraph 5, namely to supervise daily the cooling in the cold stores so that it would be kept at the level of 2°C. above zero and to put right at once any defect so as to avoid damage to goods through lack of cooling; in other words, the respondent was not exempted from liability arising out of not implementing, through negligence, his above obligation.

Regarding, next, the issue of whether the respondent was actually to blame for the damage caused to the apples of the appellants, while they were in his cold stores, we are unable to agree with the conclusion reached, in this respect, by the learned trial judges; they stated the following in their judgment :--

> "On the evidence adduced, we are convinced that the cold chamber of the plaintiff was functioning properly. This is clear from the evidence of Stavros Charalambides, D.W.5, Ioannis Papacharalambous, P.W.3 and Theocharis Georghiou, P.W.4, who had Lords apples in the cold chamber of the plaintiff at all material time and the damage caused to them was less than the 5% allowed. That the cold chamber of the plaintiff was functioning properly and in the set degree is also clear from the evidence of Nestor Zerghas, P.W.5, whose evidence we also accept as true and correct.
>
> We have not the slightest doubt that one of the causes of the damage to the apples of the defendant company was the way they were packed. The air was thus prevented from circulating among them

properly. The least we can say about the evidence of Georghios Hadjioannou, D.W.1, is that in taking the temperature of the cold chamber of the plaintiff, he must have made a mistake, otherwise the fact that the apples of the aforementioned 3 witnesses were preserved in such a good condition, cannot be explained."

As it is obvious from the above quoted passage what has weighed considerably with the trial court in reaching its conclusion about the cause of the damage to the apples of the appellants, and in doubting the correctness of the evidence of Hadjioannou, the expert witness who was called by the appellants, was the fact that apples of the same variety—("Lords")—as those of the appellants, which were stored by three other persons, witnesses Charalambides, Papacharalambous and Georghiou, in the same cold stores, at the material time, did not suffer damage to the extent of more than 5%, which is regarded as normal deterioration for apples in cold storage.

A perusal, however, of the relevant evidence as a whole shows clearly that materially differentiating factors were the dissimilar places in the cold stores at which the apples of these witnesses, and those of the appellants, were, respectively, placed; the apples of these witnesses were stored at places where the cooling was much more effective than at the place where the apples of the appellants were.

The cold stores consist of a chamber 28 feet long, 18 feet wide and about 9½ feet high, and it has two coolers (with two fans each) the blowers of which are installed at one, and the same, out of the two narrow sides of the chamber. As it appears from the evidence, the throw of air from the coolers falls just short of the whole length of the chamber; that is to say it does not reach right up to the opposite, at the far end, wall, next to which, in the most distant corner from the blowers, there were stacked, in three rows of boxes reaching practically up to the ceiling, the apples of the appellants. On the other hand, the apples of witnesses Charalambides, Papacharalambous and Georghiou were, as already stated, stored at places where the cool air from the blowers reached them quite adequately.

Also, as it is to be derived from the expert evidence of a District Agricultural Officer, Agrotis, it is important, when placing in cold stores boxes containing apples, to stack them in such a way as to leave free circulation of air from the blowers up to the most distant part of the cold stores.

The manner in which, and the place where, the apples of the appellants were stacked clearly prevented them from enjoying the benefit of free circulation of cold air from the blowers to the extent enjoyed by the apples, in the same cold stores, of the aforementioned three witnesses; it was, therefore, not safe at all to rely on the fact that the apples of the said witnesses did not deteriorate in order to reach the conclusion that the respondent was not liable for the deterioration of the apples of the appellants, and to doubt, also, for the same reason, the correctness of the evidence of the appellants' expert witness, Hadjioannou.

This witness testified that on the day when the damage to the apples of the appellants was discovered he visited the cold stores and with appropriate instruments he checked the temperature in it and found it to be 6.1°C. at the centre of the chamber; and at the two corners away from the blowers it was even higher. He, also, noticed the manner (already described in this judgment) in which the boxes with the apples of the appellants were stacked, and he was definite that they were stored at a place beyond the reach of the blowers.

The court stated that it relied on the evidence of an expert witness called by the respondent, Zerghas, who was the electrical engineer who made the installations of the cold stores in question, and who testified that he was visiting the cold stores regularly, about once weekly, for purposes of proper maintenance, and that they were functioning properly; but, this witness, did not recollect having been called to check the temperature in the cold stores at the time when the damage to the apples of the appellants was discovered.

Moreover, the trial court seems to have taken the view that the damage to the apples of the appellants was, in fact, caused because of the manner in which they were packed. As it appears from the evidence, they were not

wrapped each one separately, but they were placed in boxes with sheets of wrapping paper at the bottom of the boxes, along their sides, and in between the layers of apples; there were about 3 or 4 layers of apples in each box containing 16 to 18 okes.

The conclusion of the trial court that the packing was the cause of the damage to the apples of the appellants is not supported by the expert evidence of Agrotis; it is correct that he did say that it is much better if apples, to be kept in cold stores, are wrapped in paper each one separately, but he stated this in relation to altogether different—and irrelevant for the purposes of the present case—causes of possible damage to them, namely the spreading of brown rot fungus from one apple to another or cold storage lasting for quite a long period of time. This witness testified in very clear terms that apples of the variety of the apples of the appellants could have been stored, without being wrapped each one separately, for a period of three or four months (as it was done with the apples of the appellants) without any danger of deterioration.

In the light of all the above, and being in as good a position as the trial judges to draw inferences from primary facts (see, *inter alia, Patsalides* v. *Afsharian* (1965) 1 C.L.R. 134), we have reached the conclusion that the proper verdict, on the balance of probabilities, was that the respondent was, indeed, responsible, through negligent management of his cold stores, for the damage caused to the apples of the appellants; moreover, in accordance with the decision in *The Food Preserving and Canning Industries Ltd.* v. *The Famagusta Navigation Company* (which has been referred to in an earlier part of this judgment), in a case of bailment for reward it is up to the bailee to explain how the damage occurred to goods which are the subject matter of the bailment and if he fails to do so he must be held liable for the loss which the bailor has sustained; and, in our opinion, the respondent has failed to put forward any adequately convincing explanation as regards how there was caused the damage to the apples of the appellants while they were kept in his cold stores.

There remains to consider, now, the question of the

damages payable to the appellants:

The trial court did not accept the calculation made by the appellants on the basis of a price of 250 mils per oke, and it accepted only a price of 185 mils per oke as the basis for assessing, if need be, the damages in question.

In our view, which was formed on the totality of the evidence given in this respect, the price of 185 mils per oke is not the proper price for apples of the variety and quality of the apples of the appellants. Witness Charalambides, who was called by the appellants, stated that the price of "Lords" apples was between 175 and 250 mils per oke; and he added that apples which were the produce of the Prodromos area, such as the apples of the appellants, were selling at 25 mils more per oke, because they were better. The respondent himself, in giving evidence, stated that the price of such apples in 1965 was between 150 and 200 mils per oke. Witness Papacharalambous, who was called by the respondent, stated that he sold his own apples, of the "Lords" variety, at 185 mils per oke, but that they were not of the best quality and that the price of apples of quality 'A' was 200 mils per oke; and, lastly, witness Georghiou, who was called, too, by the respondent, stated that he sold his apples at 190 mils per oke.

We do not think that it was open to the trial court, in the circumstances, to accept as the price per oke of the apples, in calculating the damages payable to the appellants, anything less than 200 mils per oke, and, therefore, such damages amount, after making allowance for the 5% normal deterioration of apples kept in cold storage, to 5329 okes x 200 mils = C£1,065.800 mils, from which there has to be deducted the amount of C£693.320 mils, which was collected by the appellants when disposing of their deteriorated apples, and to which there has to be added the amount of C£29.375 mils, which was paid in order to sort out the apples which were fit for disposal; there is left, thus, a net amount of C£401.855 mils damages payable to the appellants on their counterclaim.

There shall be, therefore, judgment for the appellants in respect of that amount; the judgment in favour of the

respondent for his agreed claim of C£120 remains undisturbed.

We think that it is proper for the respondent to bear the costs of this appeal; also, that the order of costs made against the appellants by the trial court should be set aside and that the respondent should bear half of the appellants' costs of the action.

Appeal allowed.
Order for costs as above.