

4. COMMENTARIES AND CASE NOTES

WESTPAC BANKING CORPORATION v. COMMONWEALTH STEEL COMPANY LIMITED AND ANOTHER

Westpac Banking Corporation v. Commonwealth Steel Co. Ltd and Others, a decision of Mr Justice Rogers in the Commercial List of the Common Law Division of the Supreme Court of New South Wales [1983] 1 N.S.W.L.R. 735; Westpac Banking Corporation v. Commonwealth Steel Company Limited and Anor, a decision of Mr Justice Yeldham in the Commercial List of the Common Law Division of the Supreme Court of New South Wales, unreported, 21 October 1983.

In two interesting related and recent decisions of the Supreme Court of New South Wales a number of observations were made as to bills of lading evidencing the shipment of goods and what constitutes "shipped on board" bills of lading.

The cases arose as a result of a dispute between two banks in respect of a payment under a documentary letter of credit. The facts are relatively simple: the South Carolina National Bank at the request of its customer, the National Railway Utilisation Corporation (a company carrying on business in South Carolina in the United States of America), issued an irrevocable documentary letter of credit in favour of an Australian beneficiary, the Commonwealth Steel Company Limited. It was to be available against a sight draft of the steel company accompanied by certain specified documents including a full set of clean on board bills of lading made to its order. The terms of the documentary letter of credit provided that the American bank would honour upon presentation drafts drawn (and held by specific bona fide holders) and documents presented under the letter of credit, provided they complied with its terms. The documentary letter of credit was subject to the 1974 Revision of the International Chamber of Commerce's *Uniform Customs and Practice for Documentary Credits*. The steel company negotiated the drawing under the documentary letter of credit with the (then) Bank of New South Wales. The American bank rejected this negotiation because it considered that the bills of lading did not meet the requirements of the *Uniform Customs and Practice for Documentary Credits* and, in particular, that the bills did not conform to Article 20(b) thereof.¹

The set of three bills of lading issued to the shipper by the shipping line appeared to have been prepared by the same means at the same time. The bills of lading showed

- Sydney as the place of receipt for shipment;
- Melbourne as the intended port of loading;
- Charleston in the United States of America as the port of discharge; and
- the intended vessel and voyage as "V. 42 Columbus America".

The remainder of the bill of lading was described by Mr Justice Yeldham in the second of these two cases, in the following way:

In about the middle of the bill of lading, and in the same purple typing as the particulars . . . [described above] . . . and as the description of the cargo appearing on the face of the document, are the words "Shipped on Board" and below them, with a double space intervening, the words "Freight Prepaid". The date "29 Jan. 1980" was later stamped in the double space; the words "loaded on board" were affixed by means of a rubber stamp; the document is dated 29th January, 1980; the alterations and additions were later initialled on behalf of Newcastle Cargo Services Pty Ltd which was the ship's agent; and the latter signed the bills at Newcastle on 29th January, 1980 "For and on Behalf of the Masters and Owners".²

The Australian bank sued Commonwealth Steel Company Limited and the American bank in the Supreme Court of New South Wales, while the steel company filed a cross-claim against the American bank.

In the first of the two cases here under discussion Rogers J. made three significant findings. First, that Part 10 rule 2(b) of the Supreme Court Rules 1970 (N.S.W.), requiring an applicant for an order for service outside the jurisdiction to show that there is a prima facie case against the foreign defendant, had been satisfied. In so coming to this conclusion Rogers J. noted that the plaintiff Australian bank and cross-claimant steel company would have to show compliance with Article 20(b) of the *Uniform Customs and Practice for Documentary Credits* and in relation to this Article the words "shipped on board", which appeared in typing on the bill of lading, are "capable of satisfying the call [in Article 20(b)] for 'words indicating shipment on a named vessel'".³

Secondly, Rogers J. considered that, by reason of Part 10 rule 1(i) of the Supreme Court Rules 1970 (N.S.W.), the test for determining

² *Westpac Banking Corporation v. Commonwealth Steel Company Limited and Another*, Commercial List of the Common Law Division of the Supreme Court of New South Wales, unreported, 21 October 1983, pp. 2-3.

³ *Westpac Banking Corporation v. Commonwealth Steel Co. Ltd* [1983] 1 N.S.W.L.R. 735, 738.

whether originating process can be served outside the State is, in the words of Adam J. in *Richardson v. Tiver*, "whether if he (the foreigner) had been within the jurisdiction he would have been properly sued with the other defendant within the jurisdiction."⁴ Furthermore, Rogers J. made it clear that the rule does not require that the liability alleged of the person to be served outside the jurisdiction be joint with or alternative to that of a person in the jurisdiction. In arriving at these conclusions Rogers J. choose not to follow the decision of *Angus & Coote Pty Ltd v. Qantas Airways Ltd*⁵ where it had been held that

service outside the jurisdiction may be permitted only where two or more parties are under a joint liability, one or more of them being within the jurisdiction and the other or others of them being outside it, or, to cases where two or more defendants, at least one being within the jurisdiction or otherwise amenable to the jurisdiction, are sued in the alternative and there is genuine doubt as to which, if any, was liable for the plaintiff's damage.⁶

Thirdly, in the context of a discussion on Part 10 rule 1(c) of the Supreme Court Rules 1970 (N.S.W.) — which provides, *inter alia*, that originating process may be served outside the State where the contract the subject of the proceedings was made in New South Wales — it was observed that the object of the issue of a documentary letter of credit was to create a type of currency (by permitting a bill of exchange or draft to be drawn under it and negotiated) and, thus, it cannot be said that an offer constituted by an irrevocable documentary letter of credit is accepted only when payment is sought from the bank which issued the credit. Furthermore, the time at which an offer in the form of an irrevocable documentary letter of credit is accepted is when the letter of credit is communicated to the beneficiary or when it is drawn upon.

In the second of the two decisions, Yeldham J., in determining whether the bill of lading at the heart of the dispute was a "shipped on board" bill as the Australian bank and steel company submitted it was or whether it was a "received for shipment" bill as the American bank argued it was, considered the operation and effect of Article 20 of the *Uniform Customs and Practice for Documentary Credits* against the background of, in particular, the Hague Rules. In this regard, Yeldham J. found that it is clear that

Article 20 of the Uniform Customs and Practice for Documentary Credits was drafted with a recognition of the distinction, which clearly appears in Article III rules 3 and 7 of

⁴ [1960] V.R. 578, 579.

⁵ [1979] 2 N.S.W.L.R. 398, 403.

⁶ Note 3 *supra*, 738.

the Hague Rules, between bill of lading issued when goods are received into the charge of the carrier but have not been shipped on board, and the situation, after they are so shipped, when either a "shipped" bill is to be issued or alternatively, if a bill of lading complying with rule 3 has earlier been issued, it is to be noted in accordance with rule 7.⁷

Mr Justice Yeldham also found, upon examining the face of the bill of lading, that at the time it was signed by the ship's agent the words "Shipped on Board . . . Freight Pre-Paid" were already on it — these words did not constitute a notation. Thus, although the original printed form of bill of lading in this instance was a "received for shipment" bill, at the time it was presented to the issuer of the irrevocable documentary letter of credit — that is, the American bank — it was a "shipped on board" bill of lading.

The outcome of any appeal from the decision of Mr Justice Yeldham will be awaited with interest.

⁷ Note 2 *supra*, 11.