

Bill of lading — stevedore can rely on Himalaya clause in forwarder's bill of lading

CARRINGTON SLIPWAYS PTY LTD v PACIFIC AUSTRAL PTY LTD & ORS

New South Wales Supreme Court decision of Rogers J, Chief Judge, Commercial Division, 2 February 1989

I. QUESTIONS FOR THE COURT

This is an important decision of the NSW Supreme Court in relation to the liability of various parties involved in the shipment of goods. The parties sued included the freight forwarder who had arranged their shipment, the owner of the vessel on which the goods were shipped and the stevedoring company which discharged the goods in Sydney. The time charterer of the vessel on which the goods were shipped was also sued but that claim was abandoned. Mr Justice Rogers therefore had to determine the liabilities of each party. This raised the following questions —

Did the freight forwarder contract as a principal or as an agent with the consignee who had engaged the forwarder's services to arrange the shipment from Japan to Sydney?

Were the responsibilities and liabilities of the freight forwarder to be determined in accordance with the bill of lading which it issued?

If the freight forwarder was liable, was it entitled to limit its liability in accordance with the Japanese Carriage of Goods by Sea Act?

If the owner of the vessel on which the goods were shipped was liable, was it entitled to rely on the Himalaya clause in either the bill of lading which had been issued by the forwarder, or the bill of lading which had been issued by the time charterer of the vessel?

If the owner was entitled to rely on the Himalaya clause, was it also entitled to rely on the limitation of liability contained in the Japanese Carriage of Goods by Sea Act?

Was the stevedore negligent in the discharge of the goods and, if so, was it entitled to rely on the Himalaya Clause and thus the limitation contained in the forwarder's bill of lading or the time charter's bill of lading?

This list of questions provides some insight into the confusing nature of the factual circumstances in this matter. This raised problems for the time charterer and owner of the carrying vessel who, on one view of the matter, had no direct contractual relationship with the owner of the cargo.

II. THE FACTS

The facts, as set out in the judgment of Rogers J, were that Pacific Austral Pty Ltd (the forwarder) had been retained by the plaintiff (the cargo owner) to arrange a shipment from Osaka to Sydney of two marine diesel engines which it had acquired in Japan. The crate in which the second of the engines was stowed fell on to the wharf and was badly damaged during discharge.

III. STEVEDORES' NEGLIGENCE

A considerable amount of factual and expert evidence was given concerning the discharge operation. Both the carrier interests and the stevedores sought to show that the accident occurred due to the faulty design of the crate. They asserted that the incorrect positioning of the diesel engine on the longitudinal bearers of the crate caused torsional pressure on the inner edges of those bearers. Not without some difficulty His Honour ultimately found that it was the incorrect slinging of the crate by the stevedores which caused the damage. This then gave rise to legal argument as to whether the stevedores, the forwarder and the owner were entitled to limit their liability under any, and if so which, of the two bills of lading.

IV. ROLE OF FORWARDER

The owner and stevedore sought to rely on the provisions of the time charterer's bill of lading which only came into the possession of the consignee or its agent at the port of discharge when, as His Honour found, almost by chance the delivery order was stamped on to the face of that bill of lading and was supplied to the customs agent of the consignee in order to obtain the cargo.

In declining to allow the stevedore or the owner of the vessel to take advantage of the time charterer's bill of lading, His Honour rejected an argument that Pacific Austral had been engaged as an agent for the plaintiff to arrange for the carriage of the engine and as such, it was within the ambit of its appointment that, as agent for the plaintiff, it should contract in terms of the time charterer's bill of lading for the carriage of the goods to Sydney. In support of his finding His Honour referred to recent United Kingdom authorities which showed that there has been a growing acceptance in recent years of the fact that a freight forwarder can and does contract as principal.

His Honour also rejected an argument based upon the well known case of *Brandt v Liverpool, Brazil and Riverplate Steam Navigation Co. Limited*¹ by holding that there was no handing over of the delivery order at the wharf to the shipowner to obtain delivery of the goods and accordingly the principle enunciated in *Brandt's* case was not applicable. The third argument which was rejected by His Honour was to the effect that the plaintiff became bound by the terms of the time charterer's bill because the goods were bailed to the owner of the vessel and the plaintiff was bound by the terms upon which the owner received the goods, notwithstanding the lack of any contract between the plaintiff and the owner. His Honour found that in the circumstances of this case there was neither express nor implied consent by the plaintiff to a bailment of the goods to the shipowner and certainly there was no such consent upon conditions which differed from the conditions in the forwarder's bill of lading.

V. HIMALAYA CLAUSE

The question then arose as to whether the shipowner and the forwarder were entitled to rely on the provisions in the forwarder's bill of lading by reason of the Himalaya clause. The plaintiff argued that the requirements formulated in the *Eurymedon*² had not been satisfied as there had been no ratification of the contract which had been made without pre-existing authority and there was no consideration passing from the shipowner. His Honour accepted that ratification was effected by the filing of the defence in the proceedings and followed the decision, as he was bound to do, of the NSW Court of Appeal in *Life Savers (Australasia) Ltd v Frigmobile Pty Ltd*. His Honour also found that the carriage of the goods by the owner provided the necessary consideration.

A further argument advanced by the plaintiff to prevent the shipowner and stevedore relying upon the forwarder's bill of lading was based upon the interpretation of the Himalaya clause in the bill of lading. It had purported to give to third parties the benefit of "all defences under this bill of lading" and it was argued that the package limitation contained in the Carriage of Goods by Sea Act of Japan was a defence provided by law and not "under this bill of lading". His Honour rejected that submission.

The next part of His Honour's judgment contains perhaps the most interesting aspect of the decision. In arguing that the stevedore could not take the benefit of the Himalaya clause in the forwarder's bill of

¹ [1924] 1 KB 575.

² [1975] AC 154.

³ [1983] 1 NSWLR 431.

lading, it was again argued by the plaintiff that there was no consideration provided by the stevedore and there was no contractual relationship between the stevedore and the plaintiff. The main argument put on behalf of the plaintiff was that the stevedores were not the forwarder's agents within the meaning of the Himalaya clause. That was clearly correct as the stevedores were retained by the time charterer. Mr Justice Rogers quoted Lord Wilberforce's comments in *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd (The New York Star)* in which his Lordship had said —

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Although, in each case, there will be room for evidence as to the precise relationship of carrier and stevedore and as to the practice of the relevant court, the decision (the *Eurymedon*) does not support, and their Lordships do not encourage, a search for fine distinctions which would diminish the general applicability in the light of established commercial practice, of the principle.

His Honour then asked rhetorically "Where was the offer?" to the servants, agents, employees or independent contractors of the actual carrier which was capable of acceptance by being acted upon. His Honour, clearly aware of the territory he was entering into, commented, "it is in this respect that the stevedores invite a far ranging extension of the principles so far laid down by the High Court and the Privy Council". His Honour then accepted that extension and relied in part on the fact that all parties could be presumed to have "made the appropriate arrangements for insurance in the expectation that the limitation provision would be brought into play and the risk distributed in accordance with it". Mr Justice Rogers reasoned that a contractual relationship between the consignee and the stevedore could be found if it was considered that the offer made by the plaintiff of restricted liability was perceived "as being made to anyone who in fact unloads the goods and who by that very fact avails itself of the offer".

Accordingly His Honour found that the forwarder, who issued the bill of lading, the shipowner and the stevedore, who were within the Himalaya clause in the bill of lading, were all entitled to rely on the limitation of liability contained in the Carriage of Goods by Sea Act of Japan. His Honour rejected an argument, to the effect that the plaintiff was only entitled to the one sum of Yen 100,000, on the basis that the liability of each of the three defendants was distinct and several.