

## **Bill of lading — limitation and exclusion clauses**

*NISSEHO IWAI LIMITED v MALAYSIAN INTERNATIONAL SHIPPING CORPORATION BERHAD — THE "BUNGA TERATAI"*

New South Wales Court of Appeal, 29 April 1988

The decision of Yeldham J of the Supreme Court of New South Wales at first instance found that the defendant carrier was not liable to the plaintiff, the endorsee under the bill of lading, for the loss of 700 cartons of Malaysian prawns in a container that was stolen while in the custody of stevedores after discharge from the vessel.

The plaintiff appealed to the Court of Appeal. The leading judgment was that of Kirby P, with Hope and Clarke JJA agreeing.

Kirby P's judgment in essence discussed the proper construction and approach to be adopted in relation to limitation and exclusion clauses. As the Hague Rules were held both at first instance and on appeal to have ceased to apply at the time of loss, they were not considered further.

Kirby P noted that there was no dispute as to the appellant's assertion that the onus rested upon the respondent carrier to identify the cause of the loss of the goods and further, to show that it was a cause falling within an applicable and relevant exemption or limitation provision in the bill of lading.

Kirby P reviewed at some length the authorities relating to the history and demise of the now discredited doctrine of fundamental breach. He noted the decision of the High Court of Australia in *Van der Sterren v Cibernetics (Holdings) Pty Limited* (1970) 44 ALJR 157, that court's recent unanimous judgment in *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500, and the speech of Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at page 851.

Kirby P rejected the appellant's submission that questions of public policy could control the application of exclusion and limitation clauses in bills of lading, in support of which proposal the appellant referred to the dissenting view of Stephen & Murphy JJ in *Port Jackson Stevedoring Pty Ltd v Salmon & Spraggon (Australia) Pty Ltd* (1978) 139 CLR 231. The Privy Council had rejected that approach in the appeal to it from the High Court in that case and had unanimously reaffirmed the decision in *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd (The "Eurymedon")* [1975] AC 154.

In dealing with factual matters, Kirby P reassessed at length the evidence on which Yeldham J relied in coming to the conclusion that the container was in fact discharged in Sydney into the care and custody of Glebe Island Terminals. While regarding the factual issue as "finely balanced", Kirby P ultimately agreed with Yeldham J's conclusion. This conclusion was critical because the nature of the liability regime to be applied was determined by it. As a result of that finding, the Hague Rules became irrelevant and the court turned to consider clause 8(2) of the bill of lading.

The appellant relied firstly upon an argument that the loss or damage covered by clause 8(2) does not cover losses due to "non-delivery or mis-delivery", to which there is an explicit reference in clause 8(3). The proposed construction was regarded as untenable: Kirby P referred to the width of the expression "loss or damage to or in connection with goods" in its ordinary meaning in this context and held that it was unfeasible to restrict it in accordance with the appellant's submission. Secondly, Kirby P distinguished between clause 8(2), which dealt with cases where there was no "fault" in a carrier at all, in which case it was exempted from liability, and clause 8(3) which dealt with cases where, broadly put, there is fault on the part of the sub-contractor, in which case the carrier's liability was limited though not excluded. Kirby P also dismissed any submission that there was ambiguity in the construction of the clauses in this regard.

Kirby P declined to accept a submission by the appellant that a shipowner is liable under a bill of lading not only for the negligence of its servants but also for its independent contractors. Reference was made to *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807. Kirby P declined, however, to extend this to cover the carrier's independent contractor in the present case. Firstly and foremost, the structure and language of clause 8(2)(d) was "plainly against such a meaning". Secondly, *Riverstone Meat* was concerned primarily with obligations under the Hague Rules and, in particular, the obligation to exercise reasonable diligence to make a vessel seaworthy, which is a non-delegable duty. Accordingly, its reasoning could not be applied to the present case.

Kirby P rejected a submission by the appellant that, in order to rely on the exclusion in paragraph 8(2)(d) relating to the lack of fault or privity, the respondent carrier had to show that the reference to "the carrier" in the closing words of that paragraph included a reference to agents or contractors such as stevedores. This was rejected both on the law and the facts. Kirby P referred to the definition of "carrier" in the bill of lading which, although unhelpful, referred to the respondent alone. Secondly, where it was intended that "carrier" should include independent contractors elsewhere in the bill of lading, a specific provision was made. Thirdly, the relationship between clause 8(2) and (3) already discussed, was further ground for limiting the meaning of "carrier" in clause 8(2)(d) to the carrier itself together with its employees. In support of its submission, the appellant

drew the court's attention to a great deal of evidence relating to the terminal's allegedly inadequate security. However, the court held that this could not be brought home to the carrier, particularly in the light of the court's construction of clause 8(2)(d). Further, the court was not persuaded by an argument that carriers should maintain a continuing responsibility after discharge of goods onto wharves and into the care and control of stevedores acting as independent contractors. In particular, the business of the carrier is to carry and this is completed when goods are discharged. This of course could be varied in the light of any express contractual extension of the period of responsibility, such as in a house-to-house bill of lading.

The Court of Appeal, having arrived at the conclusion it did in relation to paragraph 8(2)(d), affirmed the judgment of Yeldham J. Kirby P did, however, go on to consider an alternative defence based on clause 8(2)(a) of the bill of lading. This defence was dismissed by Yeldham J on the basis that "delivered or made available for delivery" meant, in the context, delivered or made available to the appellant. It was undisputed that the container was never delivered to the appellant.

However, by reference to *Darlington Futures*, Kirby P decided in favour of the respondent on this ground. He felt that it would require a statutory provision or clearer language in the bill of lading to impose a continuing liability on the carrier beyond the point of discharge and concluded that, even if the goods were not "delivered" as the paragraph contemplated, they had certainly been "made available for delivery" in the sense that presentation of the bill of lading would require their delivery to the owner.

The appellant has sought special leave to appeal to the High Court.