
Case Notes

***Dairy Containers Ltd v The Ship "Tasman Discoverer"* [2004] UKPC 22**

Privy Council – Construction of Limits of Liability in Bill of Lading

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Soon, with the ending of appeals to the Privy Council from New Zealand courts and the creation of the Supreme Court of New Zealand, unsuccessful appellants to New Zealand's final court will no longer read the familiar phrase "the Board will humbly advise Her Majesty that the appeal should be dismissed". While it is unlikely to be of any consolation, the appellant in *Dairy Containers Ltd v The Ship "Tasman Discoverer"* ("*Dairy Containers*")¹ will be among the last appellants from New Zealand to read those words. This note summarises the decision of the Privy Council on the appeal and outlines the change in the New Zealand Court system in relation to final appeals brought about by the *Supreme Court Act 2003*. The decision in the Court of Appeal in *Dairy Containers* was the subject of a case note in the last issue of the *MLAANZ Journal*.²

As readers will recall, the short question in the case was whether the terms of a bill of lading, limited the liability of the carrier to £100 paper money per package or unit by a provision which "deemed" the limitation of liability under the Hague-Visby Rules to be "£100 Sterling, lawful money of the United Kingdom per package or unit". The alternative construction put forward by the appellant consignee was that, on the proper construction of the provision in the bill of lading, the limit was the gold value of £100 as provided for by the Hague-Visby Rules (by the combined operation of Article IX and Article IV, rule 5). The difference between the calculations was, of course, significant. The paper money approach limited the claim to £5,500. The gold value construction meant that the full loss of NZD\$613,667.25 could be recovered by the consignee. The Hague-Visby Rules did not apply by force of law to the shipment but were applied by contract (ie. the bill of lading terms) in the form contained in the contract. The question was purely one of the proper construction of the contract contained in the bill of lading.

The Privy Council applied well established principles of contractual interpretation to the critical clause in the bill of lading:³

In the present case ... all turns on the correct interpretation of clause 6 (B)(b)(i). This clause must be construed in the context of the contract as a whole. The general rule should be applied that if a party, otherwise liable, is to exclude or limit his liability or to rely on an exemption, he must do so in clear words; unclear words do not suffice; *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2003] 2 WLR 711, paragraph 144, per Lord Hobhouse of Woodborough. There may reasonably be attributed to the

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¹ [2004] UKPC 22, Lord Bingham of Cornhill, Lord Hoffmann, Lord Phillips of Worth Matravers, Lord Carswell, Dame Sian Elias. The (as yet) unreported decision is available at <http://www.privycouncil.org.uk/files/other/dairy_jud.rtf>.

² (2003) 17 *MLAANZ Journal* p 137.

³ See para 12 of the judgment of Lord Bingham of Cornhill.

parties to a contract such as this such general commercial knowledge as a party to such a transaction would originally be expected to have, but with a printed form of contract, negotiable by one holder to another, no inference may be drawn as to the knowledge or intention of any particular party. The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to who the document is addressed (*Homburg*, supra, paragraph 73, per Lord Hoffmann), which would certainly include a holder such as Dairy Containers.

Clause 6(B)(b)(i) of the bill of lading which provided that the liability of the Carrier “shall be determined”:

6(B)...

- (b) Where no international convention on national law would apply by virtue of (a) above:
 - (i) By the Hague Rules contained in the International Convention for the Unification of Certain Rules relating to the Bills of Lading dated 25 August 1924 (hereinafter called the Hague Rules), if the loss or damage is proved to have occurred at sea or on inland waterways; *for the purpose of this sub-paragraph the limitation of liability under the Hague Rules shall be deemed to be £100 Sterling, lawful money of the United Kingdom per package or unit and references in the Hague Rules, to carriage by sea, shall be deemed to include references to carriage by inland waterways and the Hague Rules shall be construed accordingly;....* (emphasis added)

The Privy Council held that there was no ambiguity in the clause. The parties to the contract had clearly intended to change the meaning of the Hague-Visby Rules, by the use of the “deeming” wording in the clause. The clause which “deemed” the limitation of liability under the Rules to be “£100, lawful money of the United Kingdom per package or unit” could only make sense when read as a provision by which the parties were intending the package limit to be different where the Hague-Visby Rules were applied by contract rather than by force of law. Accordingly, the effect of the clause was to give effect to the limit in Article IV rule 5 of the Hague-Visby Rules without the gold value qualification under Article IX.

The argument for the appellant to resist this meaning of the clause was, in effect, that, because the bill had not been drafted in the manner recommended by the text books to avoid the implication of the gold value limit under the Hague-Visby Rules, it did not succeed in removing the effect of Article IX on the calculation of the package limit for a claim. The Privy Council, while accepting that the failure of the draftsman to use the conventional approach could be said to have created the argument, noted that there were other ways to draft a clause to fix a limit which was not calculated by reference to gold value. It was one thing to say that a particular drafting method had not been used, but another to find that there was, in fact, ambiguity in the clause limiting liability. The question remained whether the bill of lading terms were clear on the limit which was to be applied. The Board found that the bill of lading terms were clear when the clause was properly construed. As the parties had clearly set the limits in their contract there was no basis to say that the limit was not £100 nominal currency per package or limit.

The central argument mounted by the appellant might be characterised as an attempt to look at the background to an agreement to create ambiguity in the contract, then to use the background as a basis to construe the agreement in a favourable way. The impermissible nature of this kind of process, where the agreement is clear on its face,

has been noted in many decisions on the construction of commercial contracts.⁴ The Privy Council focussed its attention on the words used and the construction of the agreement and found that the terms of the agreement were, in fact, clear and could not be said to be ambiguous.

Other arguments for a construction of clause 6(B)(b)(i) which were said to support the higher gold value limit were rejected. It was not possible to rely on the provision of the bill of lading which gave the provisions of the Hague-Visby Rules primacy where they applied by force of law to strike down the limit in the clause as being repugnant to the provisions of Rules where the limit applied by contract. That clause simply could not be applied to the situation where the parties were exercising contractual freedom to set the limits they wished and by modifying the Hague-Visby Rules as they were to be applied by agreement. Nor could the higher limit, which applied under another clause of the bill of lading (which was applicable in a different situation, namely where the stage of transport where the loss or damage occurred was not known) support a different approach to clause 6(B)(b)(i) where that clause applied to the shipment and was clear on the limit which applied. In short, the various arguments which were based on the background to the contract and its interpretation as a whole could not overcome the words used in the clause and their clear meaning. The clause was clear and the claim was limited as the carrier contended.

The judgment of the Privy Council recorded that the issue in the case was "short, but financially significant". It is pleasing to see that the judgment given by Lord Bingham was also appropriately short and to the point.

The Supreme Court of New Zealand

The appeal in *Dairy Containers* was one of the appeals from the New Zealand Court of Appeal which are being heard by the Privy Council in the period of transition before the Supreme Court of New Zealand comes into full operation. The Supreme Court of New Zealand is now New Zealand's final court of appeal and, when the outstanding appeals have been dealt with, appeals to the Privy Council will be no more.⁵ The Supreme Court was established, and the right of appeal to the Privy Council ended, by the *Supreme Court Act 2003*.⁶ The Supreme Court began its life on 1 January 2004 and will start hearing appeals from 1 July 2004. The Court will be made up of the Chief Justice and not fewer than 4, nor more than 5, other judges. Transitional provisions for appeals are currently in operation.⁷ Until July the Supreme Court can take all steps required for the hearing of appeals including the hearing of applications for leave.⁸

Leave requirements

An appeal will only be available if the Supreme Court grants leave. There is no provision for lower courts to grant leave.⁹ The Supreme Court must not give leave unless it is satisfied that it is in the interests of justice for the Court to hear the proposed

⁴ See eg dictum of Hardie-Boys J in *Benjamin Developments Ltd v Robert Jones (Pacific) Ltd* [1994] 3 NZLR 189 at 203.

⁵ *Supreme Court Act 2003* (NZ), s 3(1)(a).

⁶ *Ibid*, s 3(1)(c).

⁷ *Ibid*, s 55(2).

⁸ Section 55(2) of the *Supreme Court Act 2003* allows the Supreme Court to make determinations in applications for leave before 1 July 2004. In *Jew v Schroder* (Supreme Court, SC CIV 1 2004, 6 May 2004, Gault and Tipping JJ) the Supreme Court gave a judgment on a leave application but the nature of the application did not require a detailed consideration of the leave criteria.

⁹ *Supreme Court Act 2003*, s 12(1).

appeal.¹⁰ It will be necessary in the interests of justice to hear the appeal if the matter involved is a matter of general or public importance, if there has been a substantial miscarriage of justice or, there will be such a miscarriage if the appeal is not heard, or the appeal involves a matter of general commercial significance.¹¹ Leave hearings will be heard by two judges of the court¹² and the question of leave can be decided on written submissions.¹³ The court may order an oral hearing if it wishes but there is no right to such a hearing.¹⁴ The court will give reasons for its decisions on leave but the reasons can be brief.¹⁵

It will be interesting to see how the criteria for the granting of leave are interpreted and applied by the Supreme Court. While under the old appeal system, appeals like the *Dairy Containers* appeal were available as of right to the Privy Council (subject to the formal procedural conditions for the grant of final leave) such appeals will now require leave on the substantive statutory grounds. It seems unlikely that the appeal in *Dairy Containers* would have satisfied the requirements for leave under the new legislation.

¹⁰ Ibid, s 13(1).

¹¹ Ibid, s 13(2).

¹² Ibid, s 27(2).

¹³ Ibid, s 15(1).

¹⁴ Ibid, s 15(2).

¹⁵ Ibid, s 16.