PRIVITY OF CONTRACT AND BILLS OF LADING

MIDLAND SILICONES LTD. v. *SCRUTTONS LTD.*

This case[1] may be regarded as a re-assertion of the fundamental principle of English law that "our law knows nothing of a '*jus quaesitum tertio*' arising by way of contract",[2] and a rejection of certain views to the contrary that have grown up in more recent times. Goods were shifted from New York to London under a Bill of Lading which incorporated the U.S. Carriage of Goods by Sea Act, 1936, whereby the United States adopted the Hague rules with certain modifications. Section 4(5) of the Act provided:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading.

There was an express term in the Bill of Lading to the like effect. The shipper made no declaration with respect to value. The carrier had a standing arrangement with the defendant stevedores under which the defendants undertook to unload and deliver the goods shipped. This arrangement was on the basis that the defendants should have such protection as was afforded to the carrier by the terms conditions and exceptions of the Bill of Lading. The stevedores while delivering the goods negligently dropped and damaged them. The consignors sued the stevedores in negligence for the loss caused which exceeded $500 and the defendants relied on the terms of the Bills of Lading limiting the carrier's liability.

Three main agreements were advanced on behalf of the stevedores. Firstly, it was argued that the decision in *Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.*[3] established an exception to the doctrine of privity of contract in the case of carriage of goods by sea and that exception was sufficiently wide to cover the present case. Secondly, it was argued that through the agency of the carrier the stevedores were brought into contractual relations with the shipper and they could now found on that against the consignors, the plaintiffs. Finally, it was argued that there should be inferred from the facts an implied contract, independent of the Bills of Lading, between the stevedores and the plaintiffs.

The latter two arguments may be conveniently disposed of first. Their Lordships rejected the argument that the carriers were agents for the stevedores. No agency could be shown to exist. On the contrary the stevedores were independent contractors.[4] The allegation of an agency is by no means a novel argument and the decision here is just an application of the general rules governing the creation of that relationship.[5]

However, the judgment of Lord Reid is of some interest. He said[6] that an argument based on agency might succeed if (a) the Bill of Lading made it clear that the stevedores were intended to be protected by the provisions in it which limited liability; (b) the Bill of Lading made it clear that the carrier, in addition to contracting for those provisions on his own behalf, was also contracting as agent for the stevedores that these provisions should apply to

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[1] *Midland Silicones Ltd.* v. *Scruttons Ltd.* (1962) A.C. 446.
[2] *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* (1915) A.C. 847 at 853 *per* Viscount Haldane, L.C.
[3] (1924) A.C. 522.
[4] See Viscount Simonds (1962) A.C. 446 at 466.
[5] See G. C. Cheshire and C. H. S. Fifoot, *Law of Contract* (5 ed., 1960) at 387ff.
[6] *Op. cit.* n. 3 at 474.

the stevedores; (c) the carrier had authority for the stevedores to do that (or perhaps later ratification by the stevedores would suffice) and (d) that any difficulties about consideration moving from the stevedores were overcome. These conditions listed by his Lordship severely limit the circumstances in which this argument will be available to a person in the position of the stevedore. It would seem that the courts will deny the existence of an agency unless there is an express authority given to the carrier to contract as agent (though it was conceded that later ratification might be sufficient) *and* the Bill of Lading itself provides evidence that all the parties contemplated that the carrier was contracting as agent for the stevedores. It is clear that these elements did not exist here. This question of agency had been considered in the case of *Cosgrove* v. *Horsfall*.[7] In that case the plaintiff, an employee of the London Passenger Tramway Board, who was given a free pass to travel on the Board vehicles on terms that neither the company nor its servants should be liable for any damage due to him, sued the defendant, a fellow employee who injured him through his negligence. It was argued on behalf of the defendant that the Board in contracting with the plaintiff did so as the defendant's agent. The Court in that case also rejected the argument though it recognized that if agency could be made out on the facts the result could be different. These cases, it is suggested, reflect a general trend to refuse to allow easy proof of an allegation of agency where defendants are seeking to avoid liability arising under the ordinary legal rules.

Similarly the argument based on the existence of an alleged implied contract also failed. Their Lordships held there was no proof that such a contract existed. Recently, the courts have shown a reluctance to imply either the existence of a contract or terms in a contract.[8] The basic test laid down in the famous case of *The Moorcock*[9] is that a court will only do so where it is necessary to give business efficacy to the transaction clearly intended by the parties to be carried out. Here it is clear that there was no need to imply any contract to give efficacy to what the parties wished for the transaction involved was one of many between the parties and all of those transactions were concluded without the need for any such contract. However, the fact that this transaction was one of many between the parties is a factor to be considered in relation to the question whether the defendant ought to have been allowed to set up the defence of *volenti non fit iniuria*. This will be discussed more fully later.

Returning now to the first of the three arguments on behalf of the stevedores, in prosecuting this appeal through to the highest tribunal in England the plaintiff sought to elevate the decision in the *Elder, Dempster Case* into a general principle of law binding on the House of Lords. From this case he purported to derive the principle that a contract for the carriage of goods by sea was outside the fundamental rule as to privity of contract. Their Lordships, however, refused to accept this proposition. In the *Elder, Dempster Case* it was decided that an exemption clause in a Bill of Lading, to which the charterers of a ship were a party, extended to protect the owners of the ship. Ever since controversy has raged as to the true *ratio decidendi* of that case.

Viscount Cave based his discussion on the ground that the owners, although they were not parties to the contract, took possession of the goods as the agents of the charterers and so could claim the same protection as their principals. This argument was similar to that adopted by the Court of Appeal.[10] Viscount

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[7] (1945) 62 T.L.R. 140.
[8] See *Sethia (1944) Ltd.* v. *Partabmull Rameshwar* (1950) 1 All E.R. 51.
[9] (1889) 14 P.D. 64.
[10] (1923) 1 K.B. 420 at 441.

Finlay, on the other hand, stated his conclusion thus:

> When the act is done in the course of rendering the very services provided for in the Bill of Lading the limitation on liability therein contained must attach . . . whether owner or charterers be sued.[11]

Lord Sumner, who delivered the remaining leading judgment, was of the opinion that the reception of the cargo amounted to a bailment on terms including the exceptions from liability included in the Bill of Lading and it was for this reason that the defendant could rely on the terms of the Bill of Lading. Lord Dunedin agreed with the opinion of Lord Sumner and Lord Carson agreed with the opinions of Viscount Cave and Lord Sumner.

Numerous attempts have been made to explain this case and to find the true *ratio* of the decision. G. H. Treitel[12] has said that the case discloses three grounds of reasoning. First, that although the Bill of Lading did not as such protect the shipowners it was a circumstance to be taken into consideration in determining what duty they owed to the plaintiff. For this he relies on Lord Sumner's judgment. This is not a new principle but it recognizes the fact that the duty owed may vary in the circumstances, particularly if the plaintiff has consented to run the risk and his consent is evidenced by the Bill of Lading. The second line of reasoning suggested by Treitel is that the shipowners were protected by the Bill of Lading because the charterers were their agents for the purpose of inserting the exemption clause, and thus the shipowners were parties to the contract of carriage. The facts are not consistent with this view. Viscount Cave concludes that the shipowners took possession of the goods as the agents of the charterers and Lord Sumner also acknowledges the possibility of this. How then can the charterers be the agents of the shipowners for the purpose of inserting the clause in the Bill of Lading, and the shipowners be the agents of the charterers for the purpose of relying on it?

The final principle Treitel extracts from the *Elder, Dempster Case* is that the shipowners were protected by the Bill of Lading because where a person employs an agent to perform a contract that agent is entitled in performing the contract to any immunity from liability which the contract confers on the principal. This principle, unlike the other two, involves a new concept, but one which has been vigorously supported by Lord Denning.

As there is no apparent agreement on the principle underlying the decision in the *Elder, Dempster Case* itself, we may act on the suggestion of Professor Stone[13] and seek to find the authoritative *ratio* of the decision by examining the way it has been applied and considered in later cases. On the one hand there is a series of decisions allowing a third party to take advantage of exemption clauses in reliance on the *Elder, Dempster Case*. On the other hand there is a line of cases refusing to allow this benefit to the third party and rejecting the *Elder, Dempster Case* as authority for any such principle. Scrutton, L.J., in *Mersey Shipping and Transport Co. Ltd.* v. *Rea Ltd.*,[14] found a general principle of law in the opinion expressed by Viscount Cave,[15] that the owners took possession of the goods as agents for the charterers and so could claim the same protection as their principals. However, it should be noted that Viscount Cave in the House of Lords relied heavily on what Scrutton, L.J. himself said in the Court of Appeal in the *Elder, Dempster Case*. Thus Scrutton, L.J. in the *Mersey Shipping Case* seems only to be restating his earlier view, and not adding

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[11] (1924) A.C. 522 at 564-5.

[12] G. H. Treitel, "Exemption Clauses and Third Parties" (1955) 18 *Mod. L.R.* 172 at 173.

[13] Julius Stone, "The Ratio of the Ratio Decidendi" (1959) 22 *Mod. L.R.* 597.

[14] (1925) 21 Ll.L. Rep. 375.

[15] *Op. cit.* n. 3 at 533-4.

anything really constructive to the conflict of opinion that has arisen. Similarly, in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*,[16] Devlin, J. held that a defendant to an action in tort could rely on a contract to which he was not a party. He was of the opinion[17] that the third party takes the benefit of those parts of the contract that appertain to his interest, but he based this on an irresistible inference that it was the intention of all the parties that he should be entitled to do so. This reliance on the intention of the parties cannot be seen in the *Elder, Dempster Case* unless perhaps it is an extension of the bailment on terms approach taken by Lord Sumner. Thus Devlin, J. reaches a similar conclusion to that in the *Elder, Dempster Case* for a different reason. It is suggested the cases can be reconciled on the basis that the intention of the parties will affect the terms of the bailment. A case which clearly shows the attitude of Lord Denning is that of *White* v. *John Warwick & Co. Ltd.*[18] in a judgment delivered whilst his Lordship was a member of the Court of Appeal. He has taken the view that there is no doctrine of privity of contract which prevents a third party from taking the benefit of such a clause in a contract to which he is not a party, and finds support for his views in the *Elder, Dempster Case.*

In the Supreme Court of New South Wales Owen J. in *Gilbert Stokes and Kerr Pty. Ltd.* v. *Dalgety and Co. Ltd.*[19] extracted from the *Elder, Dempster Case* an authoritative principle:

> A person employed as a servant or agent by a carrier to perform all or part of a contract of carriage and into whose possession the goods come for the purpose of carrying out the contract is a bailee for the cargo owner who takes and holds the goods on terms similar to those to be found in the contract of carriage.[20]

This case was approved and applied by the Full Court of New South Wales in *Waters Trading Co.* v. *Dalgety & Co. Ltd.*[21]

But despite these two decisions there were those who felt that the *Elder, Dempster Case* would not support such a wide principle. Thus *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*[22] was taken to the High Court of Australia as a test case. The High Court held that no such principle as that alleged could be found in the *Elder, Dempster Case.* The majority based their decision on the well-known doctrine of privity of contract as expressed in *Tweddle* v. *Atkinson*,[23] that only a person who is a party to a contract can take the benefit of a term of it. Fullagar, J.,[24] with whom Dixon, C.J. concurred, said that the *Elder, Dempster Case* turned on the very special and peculiar relationships which are created when goods are consigned to be carried on a chartered ship. Kitto, J.[25] said:

> What must be decided is whether it is the right conclusion from all the facts, including the presence of such exempting provisions as may be expressed or implied in any relevant agreements, whoever may be the parties to them, that the plaintiff consented to the defendant being absolved from the duty of care which is alleged as the foundation of the action.

The cases are thus reconcilable on the basis that the consent was given in the *Elder, Dempster Case* whilst it was not in *Wilson's Case.* It is submitted that this question of consent may be the critical issue for the future. Subse-

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[16] (1951) 2 Q.B. 402.
[17] *Ibid.* at 426.
[18] (1953) 2 All E.R. 1021, esp. at 1026.
[19] (1948) 48 S.R. (N.S.W.) 435.
[20] *Ibid.* at 437.
[21] (1952) 52 S.R. (N.S.W.) 4.
[22] (1956) 95 C.L.R. 43.
[23] (1861) 1 B. & S. 393.
[24] *Op. cit.* n. 22 at 77.
[25] *Ibid.* at 83.

quently the Supreme Court of the United States in *Krawill Machinery Corporation* v. *Robert Herd & Co. Inc.*[26] adopted the view taken in the High Court—overruling the earlier decision of the United States Court of Appeals in *A. M. Collins & Co.* v. *Panama Railroad Co.*[27] where a stevedore was allowed the protection of an exempting clause in the Bill of Lading.

Some English courts also were reluctant to take the *Elder, Dempster Case* as authority for a general exception to the rules on privity of contract.[28] In *Adler* v. *Dickson*[29] the plaintiff, a passenger on board the *S.S. Himalaya*, had been injured through the negligence of the shipping Company's servants. She sought to avoid the operation of a clause in the passage ticket exempting the company from liability in such circumstances by suing the actual servants of the company who had been negligent. The Court of Appeal held that the defendants could not rely on the exemption clause. Jenkins, L.J.[30] said:

> Even if these provisions had contained words purporting to exclude the liability of the Company's servants *non constat* that the Company's servants could successfully rely on that exclusion . . . for the Company's servants are not parties to that contract.

Their Lordships distinguished the *Elder, Dempster Case* on the grounds that it dealt with goods not persons, that the Law Lords were not unanimous in the reasons they gave for the decision and that there was no intention to lay down a general principle. It will be noted that members of the Court of Appeal in *Adler* v. *Dickson* drew a distinction between the effect of a limitation clause where passengers rather than goods are involved. It would appear that their Lordships were embarrassed by the *Elder, Dempster Case* for there is no reason in principle why such a distinction should be made.

It was in this climate of opinion that the *Midland Silicones Case* came up for decision. Viscount Simonds rejected the stevedores' argument. He adopted the words of Fullagar, J. in *Wilson's Case*[31] and explained the *Elder, Dempster Case* on the basis that when the shipowner received the goods into his possession he did so on the terms of the Bills of Lading. His Lordship stated that the *Elder, Dempster Case* turned on a question of bailment. There was no clear evidence that the *Elder, Dempster Case* established a more general exception to the rules governing privity of contract and his Lordship considered that he was not bound to spell out a *ratio* from a difficult case in order that he might be bound by it. Lord Reid also considered he was not bound to follow the earlier decision of the House of Lords because its *ratio* was obscure. Unlike Viscount Simonds he took the view that the case did establish an exception to the general law, but an anomalous and unexplained exception that was limited to the facts of the case, or to very similar facts.

Lord Keith said that he preferred to take the view of Lord Sumner in the *Elder, Dempster Case* as the true basis of the decision. He continued that his Lordship meant that in the circumstances of the case, the cargo was received by the shipowners with the assent of the shippers on the same conditions as were granted to the charterers by the Bill of Lading. Applying this to the facts of the present case his Lordship concluded that no such assent could be seen.

Lord Morris was of the opinion that nothing in the *Elder, Dempster Case* would be regarded as suggesting any exceptions or modification to the general

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[26] (1959) 1 Ll.L. Rep. 305 esp. at 310.
[27] (1952) 197 F. 2d. 893.
[28] See *Green* v. *Russell* (1959) 2 All E.R. 525 at 531 (*per* Romer, L.J.) and 536 (*per* Pearce, L.J.).
[29] (1955) 1 Q.B. 158.
[30] *Ibid.* at 186.
[31] *Op. cit.* n. 22 at 78.

principle established in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[32]

If one considers the majority judgments two general trends appear. First, their Lordships refuse to follow the *Elder, Dempster Case* and make it one of the exceptions to the rule that the House of Lords is bound by its own decisions. This is done simply by stating that the decision is obscure or (as Lord Reid put it) that no specific exception to the general rule can be shown to exist. Closely connected to this is the second common element. This is a general refusal to try to find the real reasoning behind the *Elder, Dempster Case.* Their Lordships limit it to its facts. This approach is not entirely without support. Thus A. G. Guest states that "the best way to treat that case is to realise that it does raise a valid exception to the general rule on its own facts".[33] Only Lord Keith was prepared to investigate the reasoning behind the *Elder, Dempster Case.* He concluded that the decisive question was whether or not the plaintiffs in the case could be said to have assented to run the risk of damage by allowing the exemption clause to endure for the defendant's benefit. It is submitted that this is the critical point in the apparent conflict between the two cases.

Lord Denning, as might be expected, dissented, holding that the *Elder, Dempster Case* did give rise to the principle alleged to exist. In *White* v. *John Warwick & Co. Ltd.*,[34] when referring to the *Elder, Dempster Case,* he had said that when a party to a contract has deliberately agreed to exempt a third party from negligence he cannot go back on his words and the third party is entitled to the protection given by the exemption clause.[35]

In the course of his judgment in the *Midland Silicones Case,* his Lordship said that there were two principles which might help a defendant in these circumstances. First, a plaintiff will not be able to complain if injury is done to him if it can be said he has agreed to run the risk of such injury. This consent need not be embodied in a contract between the two parties.[36] His second argument was that it is one special feature of the law of bailment that a bailee can make a contract in respect of the goods which will bind the owner though he is not a party to it and cannot sue or be sued upon it provided that the contract is one which the owner impliedly authorized the bailee to make.[37]

This first principle is a re-statement of the well-known defence to an action in tort, namely *volenti non fit iniuria.* The principle stated by Lord Denning is very similar to that referred to by Kitto, J. in *Wilson's Case.*[38] It is submitted that this view is correct and that it should be adopted in the future. This consent should appear upon a consideration of all the circumstances of the transaction. It may arise independently of any contract between the parties or it may arise from a contract even though the person seeking to rely on the defence of *volens* is not a party to the contract. M. P. Furmston[39] has taken the view that the real question is whether the plaintiffs could be said to have consented to the limitation of the defendant's liability. This enables

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[32] (1915) A.C. 853.

[33] A. G. Guest, "Bills of Lading and a Ius Quaesitum Tertio" (1959) 75 *L.Q.R.* 312 at 316-7.

[34] (1953) 2 All E.R. 1021 at 1026.

[35] See also *Smith* v. *River Douglas Catchment Board* (1949) 2 All E.R. 179.

[36] See also his earlier reference to this in *Adler* v. *Dickson* (1955) 1 Q.B. 158 at 184.

[37] (1962) A.C. 446 at 489-90. His Lordship cites *The Kite* (1933) P. 154 and *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* (1954) 2 Q.B. 402 as illustrations of the application of this principle.

[38] *Op. cit.* n. 22 at 81.

[39] M. P. Furmston, "Return to *Dunlop* v. *Selfridge*?" (1960) 23 *Mod. L.R.* 373 esp. at 386-7.

him to reconcile the *Elder, Dempster Case* and the *Midland Silicones Case* on the basis that such consent could be seen to exist in the *Elder, Dempster Case* but not in the latter case. It is interesting to note that both Lord Denning and Kitto, J., whilst recognizing the possibility of such a defence, held that the required assent did not exist on the facts before them.

However, Lord Denning held that the owner was bound by the terms of the bailment, and that gave the defendants a valid defence.

This argument bows to commercial convenience and recognizes the fact that if one contracts with a named person frequently that person will sub-contract with others to carry out the obligations cast upon him by the main contract. In these circumstances where all the parties concerned are aware that this will happen, if one party agrees to exempt the other from liability he ought to be regarded as having agreed to exempt those who he knows will carry out the actual work that is to be done.

The present state of the law in this field cannot be regarded as very satisfactory, for whilst on the one hand there is a re-assertion of the bald principle of privity of contract laid down in *Tweedle* v. *Atkinson,* nevertheless its re-assertion has been brought about through judgments which do not satisfactorily explain the exception to the rule which has been alleged to exist. Thus the actual authority of the *Elder, Dempster Case* today is uncertain. We are left with a decision of the House of Lords which should be regarded as binding and yet the House of Lords in a subsequent case has refused to give it any operation outside the very exceptional facts of the case itself. This practice of explaining away decisions that are theoretically binding by reference to their facts is one which is inconsistent with the development of a coherent legal system. While it is recognized that cases do occur which are *sui generis,* where they occur the courts should specify what are the facts that set a particular case apart from the ordinary cases.

Some comfort can be derived from the fact that the three common law jurisdictions are in agreement—which must lead to a degree of certainty in commercial transactions. Indeed, after the long negotiations leading to the Hague rules, it would be unfortunate if the courts of the several nations interpreted them differently. But this apparent consistency may be illusory. It may disappear when the possible exceptions, suggested in the judgments in the three courts, are explored more carefully. In particular it might be predicted that there will be more discussion of the *volens* principle discussed by Kitto, J. and Lord Denning. For the result reached by the House of Lords in *Midlands Silicones Ltd.* v. *Scruttons Ltd.* is hardly consistent with the expectations of the parties and may, in fact, cause considerable commercial inconvenience because of the difficulty of allocating liability in transactions where numerous parties are involved.

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STATUTORY PROVISIONS CONCERNING RESTRICTIVE COVENANTS

PIRIE v. *REGISTRAR-GENERAL*

Our cities are changing and the changes are apparent to us all. Where once there was a row of terraced houses, there now rises a multi-storey block of home units. The childhood homes of our parents have been replaced by grey factories. The corner shop is now a massive suburban shopping centre. Young city workers build their homes in areas where not so long ago only the