

## **Exclusivity of the Warsaw Convention**

### ***Emery Air Freight v. Nerine Nurseries Ltd.***

The decisions of the New Zealand High Court<sup>1</sup> and Court of Appeal<sup>2</sup> in *Emery Air Freight v. Nerine Nurseries Ltd.* are of interest for the very different approaches taken by the courts to the issue of the exclusivity of the Warsaw Convention system and its relationship to common law rights of action – an issue which has also recently been addressed by the House of Lords in *Sidhu v. British Airways Plc.*<sup>3</sup>

The case was concerned with carriage of a consignment of flower bulbs from Palmerston North to the Netherlands. Nerine contracted with local freight agent Jarratt for the carriage of the bulbs to Amsterdam. Jarratt sent the bulbs by road from Palmerston North to Auckland, and then sub-contracted their air carriage from Auckland airport to Amsterdam to Emery. Emery in turn arranged for the bulbs to be carried to Sydney by United Airlines and from there on by Alitalia. The bulbs arrived in Amsterdam severely damaged, apparently due to exposure to rain and warm temperatures while in transit in Sydney under Alitalia's control.

Nerine issued summary judgment proceedings in the District Court against Jarratt, which promptly went into receivership, and against Emery; but not, surprisingly, against Alitalia. Nerine maintained that Jarratt had acted as its agent in entering into the carriage contract with Emery; that Emery, rather than Jarratt, was therefore the contracting carrier; and that Emery was consequently liable to Nerine for any loss or damage to its goods under Art. 18 of the amended Warsaw Convention, as enacted in New Zealand by the Carriage by Air Act 1967.<sup>4</sup> In the alternative, Nerine argued that Emery was a bailee for reward, and had breached its common law duty of care. The District Court accepted Nerine's first argument. Emery appealed to the High Court.

In the High Court, Eichelbaum, C.J., rejected Nerine's Warsaw Convention argument, finding that it had not been established that Jarratt had acted as Nerine's agent in contracting with Emery. The judge found that the format of the two air waybills, issued by Jarratt to Nerine and by Emery to Jarratt respectively, suggested that Jarratt had contracted as principal both with Nerine and with Emery. The judge held that, as there was no direct contractual relationship between Nerine and Emery, Emery could therefore not incur liability in relation

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<sup>1</sup> H.C., Wellington, A.P. 144/94, 10 February 1995.

<sup>2</sup> [1997] 3 N.Z.L.R. 723.

<sup>3</sup> *Sidhu v. British Airways Plc; Abnett v. British Airways Plc* [1997] 1 All E.R. 193. See Campbell [1996] LMCLQ 318 for a discussion of the Court of Session judgments in *Abnett*.

<sup>4</sup> The Warsaw Convention 1929 as amended by the Hague Protocol 1955, and the Guadalajara Convention 1961 have the force of law in New Zealand by virtue of s. 7 of the Carriage by Air Act 1967. The French and English texts of the Conventions are set out in Sch. 1 and 2 to the Act.

to Nerine, either as “the carrier” under the Warsaw Convention, or as “the contracting carrier” under the Guadalajara Convention.<sup>5</sup>

However, Eichelbaum, C.J., considered that Nerine’s alternative claim in bailment was sustainable.<sup>6</sup> The judge cited *Tasman Pulp & Paper Co. Ltd. v. Brambles JB O’Loghlen Ltd.*<sup>7</sup> and *Gatewhite Ltd. v. Iberia Lineas Aereas de Espana S.A.*<sup>8</sup> as authority for the proposition that the Warsaw and Guadalajara Conventions do not deprive an owner of goods of the right to sue at common law. He then referred to the principle established in *Morris v. C.W. Martin & Sons Ltd.*,<sup>9</sup> and approved by the Privy Council in *Gilchrist Watt & Sanderson Pty Ltd. v. York Products Ltd.*<sup>10</sup> and *The Pioneer Container*<sup>11</sup> that:<sup>12</sup>

... where a third person (a second bailee) voluntarily takes possession of the owner’s goods, from one (a first bailee) who had the owner’s authority to sub-bail them, the second bailee assumes an obligation to take due care of them, and is liable to the owner as if a bailee from the latter.

Applying this principle to the facts, Eichelbaum, C.J., noted that it was not in issue that the relationship between Nerine and Jarratt was one of bailor and bailee, and that the air waybill issued by Jarratt to Nerine included a clause authorising sub-bailment to third parties, subject to the latter’s contractual terms. The judge rejected Emery’s argument that its duties had been confined to making on-carriage arrangements with Alitalia, finding instead that Emery had undertaken responsibility (as the “second bailee”) for carriage from Auckland to Amsterdam, that its arrangements with Alitalia were sub-contractual, and that the condition in which the consignment arrived in Amsterdam amounted to “strong evidence of failure on the part of Emery, or its servants or sub-contractors, to exercise due care for the goods”. Eichelbaum, C.J., therefore upheld Nerine’s summary judgment in the District Court, albeit on a different ground.

It is not clear from the judgment whether Eichelbaum, C.J., saw Nerine’s bailment claim as operating wholly independently of the Warsaw Convention, or as subject to any Convention conditions or limits, such as the limitation of liability and time limit provisions in Arts. 22 and 29.<sup>13</sup> What is clearly implicit in the judgment, however, is that Eichelbaum, C.J., considered the Warsaw Convention system to be non-exclusive, both with regard to the plaintiff’s right to

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<sup>5</sup> *Supra*, fn. 1, at pp. 9-11. The judge noted at 11 that the “proposition that notwithstanding that it sub-contracted the carriage to Alitalia, Emery as a matter of construction was the ‘actual carrier’ [under the Guadalajara Convention] was not advanced” before him. This argument was put forward, unsuccessfully, by Nerine in the Court of Appeal: *supra*, fn. 2, at pp. 733-735.

<sup>6</sup> *Supra*, fn. 1, at pp. 11-14.

<sup>7</sup> [1981] N.Z.L.R. 225.

<sup>8</sup> [1990] 1 Q.B. 326, noted Reynolds [1989] LMCLQ 37.

<sup>9</sup> [1966] 1 Q.B. 716.

<sup>10</sup> [1970] 1 W.L.R. 1262.

<sup>11</sup> *The Owners of Cargo Lately on Board the Vessel K.H. Enterprise v. The Owners of the Vessel Pioneer Container (The Pioneer Container)* [1994] 2 A.C. 324; 1994 1 Lloyd’s Rep. 593, noted Bell [1995] LMCLQ 177.

<sup>12</sup> *Supra*, fn. 1, at p. 12.

<sup>13</sup> Nerine’s bailment claim in the Court of Appeal at least (*supra*, fn. 2, at p. 732) appears to have framed as “subject to a limitation on the quantum of liability, imposed under art 22”.

sue, and the defendant carrier's liability; and that this view was premised on the judge's interpretation of the decisions in *Tasman* and *Gatewhite* as unconditionally upholding an owner's common law rights of action.

With respect, there are a number of difficulties with this approach. To begin with, it ignores the purpose of the Convention system, and fundamentally undermines the notion of a uniform, comprehensive regime covering international air carriage. Secondly, Eichelbaum, C.J.'s reliance on the *Tasman* and *Gatewhite* decisions is problematic. The relevance of these decisions to the present case is not immediately clear. Nerine was not only the owner of the bulbs, but was also named as the consignor in the air waybill issued by Jarratt.<sup>14</sup> As the consignor, Nerine's rights are expressly determined by the relevant Convention provisions. The issue decided in *Tasman* and *Gatewhite* – whether the Convention excludes the common law right to sue of an owner *not* named as consignor or consignee in the waybill – therefore simply did not arise in this case.<sup>15</sup> Furthermore, Eichelbaum, C.J.'s characterization of the decisions in *Tasman* and *Gatewhite* seems unduly broad. It must be acknowledged that both *Tasman* and *Gatewhite* are not as clear on the issue of the exclusivity of the Warsaw Convention as they might have been. The decisions seem to be susceptible to at least three readings: (1) they recognise that the Warsaw Convention is non-exclusive, and that a cargo owner may therefore bring a common law cause of action unaffected by the Convention; (2) they recognise that a cargo owner may bring a common law cause of action, subject to all Convention conditions and limits; or (3) they merely extend, by reference to the common law, the categories of plaintiffs who do have a right to bring a claim *under the Convention*.<sup>16</sup> The general tenor of the decisions suggests that the narrower readings ((2) or (3)) are the more plausible.<sup>17</sup> If this is the case, the decisions in *Tasman* and *Gatewhite* do not provide authority for Eichelbaum, C.J.'s finding of an independent common law cause of action in bailment against a defendant who could not have been held liable as a carrier under the Convention.

On appeal, the Court of Appeal agreed with Eichelbaum, C.J.'s finding that Jarratt had been acting as a carrier in its own right, rather than Nerine's freight forwarding agent. Nerine's main argument was that Emery was nonetheless liable, either as a successive carrier under Art. 30 of the Warsaw Convention, or

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<sup>14</sup> *Supra*, fn. 1, at p. 9.

<sup>15</sup> See Blanchard, J.'s judgment in the Court of Appeal (*supra*, fn. 2, at pp. 736-737): "It is likewise unnecessary for this Court to determine whether *Tasman Pulp & Paper* and *Gatewhite* are still of authority on the question of whether someone other than a consignor or consignee may sue on a cause of action founded outside the conventions. The present claim is by a consignor."

<sup>16</sup> See R. Wilkinson, "The Cargo Owner's Right to Sue under the Warsaw Convention" (1992) 17 *Annals of Air and Space Law* 441, 451 in respect of *Tasman*.

<sup>17</sup> See, e.g., Prichard J.'s dicta in *Tasman* (*supra*, fn. 7, at p. 235, emphasis added): "Nor do I find the absence elsewhere in the Convention of reference to the enforcement of their rights by other parties [i.e. parties, other than the consignor or consignee, who have a proprietary interest in the cargo] of any significance. That such parties do have rights *is recognised in the Convention*. It is wholly unnecessary to say that they can enforce their rights by action: but if it is intended that they are to be precluded from doing so, then surely that is the statement one would expect the Convention to make in unmistakeable terms..."

as an actual carrier under Art. II of the Guadalajara Convention. Both Articles, however, state that the successive or actual carrier is liable only for the carriage that it “performed”. To overcome this hurdle, Nerine argued that “perform” should be construed in these Articles as performance of the carrier’s contractual obligations, rather than as the physical act of performance of carriage. On this analysis, Jarratt, Emery and Alitalia would all incur liability when the goods were damaged while under Alitalia’s physical control in Sydney, because all of these parties had undertaken contractual responsibility for that particular leg of the carriage in their respective contracts or sub-contracts.

The Court rejected this interpretation. Delivering the leading judgment, Blanchard, J., expressed the view that when the plaintiff’s right of action was conferred under the Warsaw Convention and extended by the Guadalajara Convention, the potential defendants were identified, and the right to claim given against those persons only, and in particular circumstances only.<sup>18</sup> Blanchard, J., observed that, while the concept put forward by Nerine of simultaneous layers of contractual liability “might have some appeal to the mind of a lawyer”, it nonetheless sat uneasily with the straightforward language of the Warsaw Convention system and with the obvious desire of its drafters to simplify the legal position of international carriers.<sup>19</sup> After examining the wording of Art. 30 and Art. II in some detail, the judge concluded that “perform” naturally referred to the physical act of carriage and its incidents. As a consequence, Emery was not liable either as a successive or as an actual carrier, as the damage did not occur while the goods were under its physical control.<sup>20</sup>

The Court of Appeal also dismissed Nerine’s bailment argument. Adopting essentially the same approach taken by the House of Lords in *Sidhu v. British Airways Plc*,<sup>21</sup> the court held that the effect of Art. 24(1) – which provides that, in “the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention” – is to exclude any claims, whether founded on common law or brought under the Convention, which are inconsistent with the Convention scheme. The court held that, while Nerine had title to sue in bailment, its bailment claim *against Emery* was nonetheless prohibited by Art. 24, because it sought to impose common law liability on a carrier outside of, and inconsistent with the liability framework carefully spelled out in Art. 30 of the Warsaw Convention, or alternatively Art. II of the Guadalajara Convention.<sup>22</sup> Blanchard, J., held that it would be:<sup>23</sup>

quite inconsistent and therefore impermissible if someone other than a carrier described in art 30(3) (or someone other than an actual or contracting carrier) could be sued. The general

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<sup>18</sup> *Supra*, fn. 2, at p. 733.

<sup>19</sup> *Ibid.*, 734.

<sup>20</sup> Blanchard, J., did not expressly determine whether Emery was a successive carrier under Art. 30 or an actual carrier under the Guadalajara Convention, presumably because it did not affect the result of the case. Henry, J., expressed the view (*ibid.*, 726) that Emery was “probably” a successive carrier under Art. 30.

<sup>21</sup> *Supra*, fn. 3.

<sup>22</sup> *Supra*, fn. 2, at p. 728 (Henry, J.), 735-737 (Blanchard, J.).

<sup>23</sup> *Ibid.*, 737.

purpose of the conventions must be recalled. It is to protect carriers operating across international boundaries from the vagaries of local laws and to impose a uniform regime upon them and upon those dealing with them.

The court therefore allowed Emery's appeal and set aside Nerine's summary judgment in the District Court.

The decision of the Court of Appeal seems correct, both as to the court's interpretation of the Convention, which places appropriate emphasis on its purpose as a uniform international code, and as to the fairness of the result in the case, given that Nerine had had ample opportunity to pursue its Convention remedies against the appropriate carrier, Alitalia, within the Art. 29 time limit. While it is a pity that the Court of Appeal, like the House of Lords in *Sidhu*, decided not to resolve the scope and precedent status of *Tasman* and *Gatewhite*,<sup>24</sup> its decision in all other respects clarifies and simplifies the relationship between the common law and the Warsaw Convention system, by confirming the exclusivity and supremacy of the latter.

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<sup>24</sup> *Ibid.*, 726, 736-737, and see fn. 14 *supra*.

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