

Interpreting Bills of Lading: The Lords Giveth; the Lords Taketh Away

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discusses the recent decision in *The Starsin*

The Starsin [2003] UKHL 12 concerned carriage of timber from Malaysia to Europe on the bulk carrier *Starsin*, which was time-chartered to Continental Pacific Shipping Ltd (CPS). CPS subsequently became insolvent and took no part in the litigation. On arrival, 17 consignments were found to have been damaged due to negligent stowage before the voyage. The damaged cargo had progressively deteriorated during the course of the voyage.

The holders of the bills of lading (cargo owners) sued the shipowners for breach of the carriage contracts contained in or evidenced by their bills of lading, or alternatively in tort for negligent stowage of the goods. The cargo owners’ action raised three specific questions:

- 1) Whether the shipowners or CPS was the contracting carrier; or alternatively, whether both the shipowners and CPS were contracting carriers under the bills of lading;
- 2) If CPS was the contracting carrier, whether the shipowners could nonetheless be sued in tort; and
- 3) If the shipowners could be sued in tort, whether the Himalaya clause in the bills of lading exempted them from liability.

IDENTITY OF THE CARRIER

The first question involved the familiar conundrum of whether the bills of lading should be construed as shipowner’s or charterer’s bills.

The bills had been issued on CPS’s liner form and had CPS’s name and logo prominently printed on their face. They were signed by CPS’s port agent just below the typed phrase “As Agent for Continental Pacific Shipping (The Carrier)”. On the reverse of the bills, clause 1(c) provided that “‘Carrier’ means the party on whose behalf this Bill of Lading has been signed”.

However, provision was made for the bills to be signed by the master of the vessel, which is usually a strong pointer towards a shipowner’s bill (see *The Rewia* [1991] 2 Lloyd’s Rep 325). More importantly, the fine-print conditions on the reverse of the bills included an identity of carrier clause (clause 33) that identified the shipowners as the contracting carrier, and

provided that the charterer “shall not be under any liability arising out of the contract of carriage, nor as carrier nor bailee of the goods”. For good measure, a demise clause was included (clause 35) to similar effect.

How, then, should these inconsistencies in the bills be resolved? At first instance, Colman J ([2001] 1 Lloyd’s Rep 85) held that they were to be construed on their faces as charterer’s bills and that CPS was therefore the contracting carrier. However, the majority of the English Court of Appeal (Rix LJ dissenting: [2001] 1 Lloyd’s Rep 437), placing more emphasis on the clauses on the reverse of the bills, held that they were shipowner’s bills and that the cargo owners were therefore entitled to sue the shipowners in contract.

The House of Lords unanimously rejected the approach of the majority of the Court of Appeal as being out of step with mercantile practice and the views of leading academic commentators (see eg Girvin and Bennett [2002] LMCLQ 76, 84-87). The speeches of their Lordships on this issue emphasise the need to adopt a straightforward, commonsense approach to the construction of mercantile instruments:

- The aim is to ascertain the “sense ... which businessmen, in the course of their ordinary dealings, would give” to business documents (paras 10, 45; *Glynn v Margetson & Co* [1893] AC 351);
- Where one is dealing, as here, with standard forms used to cover a wide range of transactions, greater emphasis should be placed on those terms which the parties have specifically chosen to include, as opposed to pre-printed terms (paras 11, 45, 81, 183-185; see *Robertson v French* (1803) 4 East 130; 102 ER 779). The typed and written terms of the signature were therefore more significant in ascertaining the parties’ intentions than the boilerplate clauses on the reverse of the bills;
- Where complex instruments that have evolved over many years are used in international trade, parties will often use inappropriate or internally inconsistent forms without amending them. In such a case, rather than pursuing a chimera of consistency, a Court should adapt the form to reflect the intentions of the parties (paras 12, 71, 182; *The Okehampton* [1913] P 173);
- In the context of international trade, where speed is of the essence and documents are addressed to a range of traders and banks, it is unrealistic to expect parties to have to resort to the fine-print conditions on the reverse of documents to work out an issue as fundamental as the identity of parties to the carriage contract (paras 15, 45, 74-75);
- The use of the document in the market should also be taken into account. Transferable bills of lading, as here, are typically made out to the order of

an issuing or confirming bank in a documentary credit transaction. Their Lordships noted that Article 23 of the Uniform Customs and Practice for Documentary Credits (UCP) stipulates that bills of lading have to identify the carrier on their face in order to be accepted as conforming, and that banks will not examine terms and conditions on the reverse of documents (paras 16, 47, 76-80, 126, 188; *National Bank of Egypt v Hannevig's Bank* (1919) 3 LDAB 213; *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542). Although recognising that the UCP regulates the documentary credit relationship rather than the carriage contract, their Lordships were rightly of the view that these two market practices were so closely intertwined as to require consistency of interpretation.

Applying these principles of construction, their Lordships concluded that the bills were charterer's bills, containing or evidencing carriage contracts made with CPS as the carrier. The shipowners were accordingly not liable in contract. The cargo owners' alternative argument, that both the shipowners and CPS were contracting carriers, was also rejected: "All the provisions of the bills, both back and front, indicate the existence of a single carrier, though they do not agree upon its identity. Two inconsistent provisions cannot be reconciled by adopting a construction which is consistent with neither. The carrier must be one or the other; it cannot be both." (para 190, per Lord Millett).

The decision of the House on this issue is most welcome. It is pragmatic, encourages commercial certainty, and provides a necessary measure of fairness and transparency to cargo owners navigating the minefield of demise/identity of carrier clauses (even if the cargo owners here were reluctant to embrace a fair and transparent interpretation that pointed them towards an insolvent charterer!).

It is important to note that the House of Lords' position on demise/identity of carrier clauses remains true to the traditional approach originally articulated in *The Berkshire* [1974] 1 Lloyd's Rep 185: such clauses are still permissible, and will still be effective in defining the carrier, provided that they are given appropriate prominence on the face of the bill and are not contradicted or overridden by specific typed or written terms (in that sense, we have come full circle - demise clauses were originally found on the "business" side of bills but subsequently migrated to the reverse: para 70, per Lord Hoffmann).

In more general terms, their Lordship's construction of the bills of lading is of interest in that it perhaps reflects a less "new age", more tightly structured approach to the interpretation of commercial instruments (particularly standard form instruments of long usage), involving specific reference to traditional canons of construction and established specialist market practices.

RIGHT TO SUE IN TORT

Having failed in their bid to sue the shipowners in contract, the cargo owners argued in the alternative that the shipowners were liable in tort for negligent stowage of the goods.

One of the advantages of suing in contract on the bills of lading is that, after the passage of the Carriage of Goods by Sea Act 1924 (UK) (see section 13A of the Mercantile Law Act 1908 for the New Zealand equivalent), rights of suit no longer depend on whether or when property has passed in the goods. The same is not true, however, of rights of suit in tort.

In this case, only one of the cargo owners, Makros Hout, owned their cargo at the time that it was negligently stowed by the shipowners' employees. All the other cargo owners obtained title to their goods some time afterwards. They argued that the shipowners were at least liable for the continuing deterioration of the goods after they had obtained title. At first instance, Colman J agreed that a duty of care was owed to all those who would become cargo owners during the course of the voyage; that there was a breach of that duty at the outset; and that the cause of action in tort was completed when further damage occurred after the transfer of title to each cargo owner. Colman J's decision on this point apparently created an impression in some quarters that the requirement of legal ownership or possessory title laid down in *The Aliakmon* (*Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785) had been modified or abolished (see eg arguments in *The Seven Pioneer* [2001] 2 Lloyd's Rep 57 at paras 28-29).

However, the House of Lords was at pains to confirm that the rule in *The Aliakmon* is alive and well and to be strictly observed. Their Lordships held that the cause of action in negligence was completed once and for all with the damage caused by the initial stowage, and that consequential progressive deterioration of the cargo over the course of the voyage did not result in new causes of action in tort (paras 36-40; 64, 87-91, 139). Therefore, only Makros Hout had a cause of action in tort against the shipowners.

HIMALAYA CLAUSE

This leaves the most vexed question in this matter: can the shipowners rely on the Himalaya clause in CPS's bill of lading to exempt them from liability?

Himalaya clauses were famously developed to allow international trade to circumvent the technical strictures of the traditional doctrines of privity of contract and consideration (see generally *The Mahkutai* [1996] AC 650, 658-665; Treitel and Reynolds *Carver on Bills of Lading* (Sweet & Maxwell, 2001) paras 7-047-7-063). Whilst no longer strictly necessary after statutory reforms to contractual privity and rights of suit on bills of lading, these drafting devices are nonetheless still commonly found in bills of lading. Lord Hoffmann summarised the workings of the Himalaya clause thus (para 93):

The shipper makes an agreement through the agency of the carrier with the third party servant or contractor. Such third parties may have authorised the carrier in advance to contract on their behalf or they may otherwise ratify the agreement. The terms of the agreement are that if such a third party renders any services for the benefit of the cargo owner in the course of his employment by the carrier, he will be entitled to the exemptions and immunities set out in the clause. At that stage, the agreement is not a contract. The third party makes no promise to the shipper to render any services and, until he has actually rendered them, no contract has come into effect. It is the act of rendering the services which provides the consideration and brings into existence a binding contract under which the third party is entitled to the exemptions and limitations.

The Himalaya clause in this case, although problematically drafted, was reasonably standard in content: part (1) purported to confer a blanket immunity on the carrier's servants, agents and independent contractors from liability for (amongst other things) negligent damage to the goods; part (2) extended to the carrier's servants, agents and independent contractors all the rights, exemptions, defences and immunities available to the carrier; and part (3) deemed such third parties to be parties to the contract of carriage to the extent necessary to provide them with such protection against the shipper and subsequent holders of the bill of lading.

Their Lordships noted that the present case went further than any previous Himalaya clause decisions, in which the third party has usually been a stevedore or a subcontractor other than the charterer or shipowner, and in which the third party has merely sought to take advantage of a time limit or jurisdiction clause, rather than relying on the Himalaya clause to exempt it from liability altogether. As such, the case raised particularly difficult conceptual questions about the relationship between the Himalaya clause and the carrier liability regime of the Hague Rules.

The first question was whether the shipowners came within the scope of the Himalaya clause. Their Lordships held that, as CPS was the contracting carrier, the shipowners were acting as an independent contractor of the carrier in arranging for the stowage and carriage of the goods, and therefore did fall within the ambit of the Himalaya clause (paras 28-29, 55, 95, 199). They also rightly refused to read down part (1) of the Himalaya clause to only those immunities available to the carrier, even if this meant that part (2) was, strictly speaking, redundant. Given the nature of the clause, it was hardly surprising that the drafter "thought it might be prudent to wear belt as well as braces" (para 112 per Lord Hoffmann; see also paras 30, 200-201).

Nonetheless, their Lordships held by a 4-1 majority that, despite the plain meaning of part (1) of the Himalaya clause, it did not exempt the shipowners from liability. The main reason for this conclusion was the perceived conflict between the Himalaya clause and the Hague Rules, which were incorporated by clause paramount into the relevant bills of lading. Article III rule 2 of the Rules imposes a duty on the carrier to "properly and

carefully load, handle, stow, carry, keep, care for, and discharge the goods carried". Article III rule 8 of the Rules provides:

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect...."

Lord Bingham concluded (paras 33-34) that the position of the shipowner was factually and legally different from that of other third parties such as stevedores "because the act performed to bring any contract into existence between the shipowner and the cargo owners is the carrying of the goods". It would therefore be "anomalous" and an elevation of "form over substance" to give the shipowners the benefit of the Himalaya clause, but not to give effect to Article III rule 8, which was incorporated into the carriage contract.

The reasoning of Lords Hoffmann, Hobhouse of Woodborough and Millett on this point was slightly different (paras 113-115, 155-159, 201-212). Whilst acknowledging that the collateral contract created by the Himalaya clause was not itself a "contract of carriage" for the purposes of the Hague Rules, their Lordships nevertheless concluded that, because part (3) of the Himalaya clause deemed the shipowners to be parties to the main carriage contract to the extent necessary to take the benefit of the exemption clause against the shipper and subsequent holders of the bills of lading, the clause fell foul of Article III rule 8.

With respect, the difficulty with this reasoning is that it is inconsistent with both a careful reading of the Hague Rules and their Lordships' own earlier finding that the shipowners were not liable in contract because they were *not* the contracting carrier on a proper construction of the bills of lading. Article I(a) of the Rules defines "carrier" as including "the owner or the charterer *who enters into a contract of carriage with a shipper*". The Hague Rules regime channels all liability to the contracting carrier, rather than apportioning it between the contracting carrier and any actual carriers to which carriage is sub-contracted (here, the shipowners). It is precisely this definition of "carrier" in the Hague Rules that allows charterers and shipowners to take advantage of identity of carrier clauses and demise clauses in bills of lading to define who the contracting carrier is. If, on a proper construction of the bills of lading, the charterer, CPS, is the contracting carrier, it necessarily follows that only CPS is subject to the Hague Rules regime. Whilst the shipowners (like any other third parties relying on Himalaya clauses) may be deemed to be parties to the main carriage contract *to the extent* of securing protection against subsequent holders of the bills of lading, it therefore does not follow that exempting them from liability conflicts with Article III rule 8. The Himalaya clause in this case does not purport to, and

does not in fact, affect the liability of the *contracting carrier* as defined in the Hague Rules and the carriage contract. It only defines the liability of *an independent sub-contractor of the carrier*.

Furthermore, Article III rule 8 only prohibits relief from liability “arising from negligence, fault, or failure *in the duties and obligations provided in this Article*”. However, Article III obligations, including the obligation to stow goods properly, are imposed on the *contracting carrier* under the Hague Rules, not on third parties. Indeed, it was accepted (paras 34, 209) that the shipowners were *not* subject to the positive obligations imposed on the carrier by Article III. It is therefore difficult to see how Article III rule 8 (or indeed the rest of the Hague Rules) can be relevant to the legal relationship between the shipowners and the cargo owners, as opposed to that between CPS and the cargo owners.

Lords Hoffmann, Hobhouse and Millett (paras 115-116, 167 and 212) also placed some emphasis on the fact that Article III rule 8 refers to the liability of the “*carrier or the ship*”. It was said that, unless the words “or the ship” are tautologous, the Article must govern the *shipowner’s* in rem liability in tort, regardless of whether it was the carrier or not. This would seem to read too much into these words. Whilst not free from doubt, “or the ship” is generally regarded as personification shorthand signalling that Article III governs both the *carrier’s* in personam and in rem liability (see eg *Carver on Bills of Lading*, para 9-158). Moreover, their Lordships’ interpretation of “or the ship” is rather difficult to square with the House’s earlier demolition job on the personification theory in *The Indian Grace* [1998] AC 878.

For the above reasons, Lord Steyn’s minority view (para 62), that the Himalaya clause was effective according to its plain meaning and exempted the shipowners of all liability in tort, is to be preferred. It is consistent with the framework of the Hague Rules, is loyal to the conceptual advances achieved in the earlier Himalaya clause decisions, and “results in a readily predictable scheme, viz all claims in contract and tort have to be channelled to the charterers. That gives effect to what the parties intended to achieve.”