LAW WATCH

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The Starsin: House of Lords sheds light on cargo claims

The judgment in the case of The Starsin, handed down by the House of Lords on 13 March, deals with a number of important questions concerning cargo claims. In particular, it addresses three issues: whether a bill of lading is a charterers' or an owners' bill; the effect of a Himalaya clause; and claims in tort against shipowners.

The claim

On 8th December 1995 the *Starsin* sailed from the Far East bound for ports in Western Europe. The cargoes included a number of parcels of timber and plywood. The condition of these cargoes deteriorated progressively during the voyage because they had been negligently stowed before the voyage began. There had been inadequate dunnage and inadequate ventilation due to tightness of the stow. Ventilation was further decreased by use of plastic or polythene rather than permeable sheeting. In addition, air dried timber or wet-damaged timber was stowed in the same compartment as kiln-dried timber or plywood, which should not have been done in the absence of better ventilation.

On outturn, widespread damage by wetting was found. The damage was to be attributed in part to initial pre-shipment rain damage, but mostly to condensation damage occurring during the voyage.

The claimants were the buyers of the cargoes, who had become the holders of the bills of lading. They sued the shipowners for breach of the bills of lading contract and/or in tort. The claim in tort was relied on if the bills were held to be charterers' bills, and therefore not binding on the shipowners. The vessel was, at the relevant time, time-chartered to Continental Pacific Shipping ("CPS").

The bills of lading

There were 17 different bills of lading but the differences between them were not significant. The bills of lading were in a common layout, with boxes for shipper, consignee, etc. They were headed "liner bill of lading", and at the top right hand side they bore a prominent logo of CPS and in large type the words "Continental Pacific Shipping". In the signature box were typed the words "As agent for Continental Pacific Shipping (the carrier)". Below these words was a rubber stamp "United Pansar Sdn Bhd". This company acted as port agent for CPS at the load port. Across the box were two manuscript signatures.

On the reverse of the bill was a prominent heading "Company's standard conditions". These included:

"1. Definitions

In this Bill of Lading both on the front and on the back the following expressions shall have the meanings hereby assigned to them … (c) "carrier" means the party on whose behalf this Bill of Lading has been signed.

2. Basis of Contract

This Bill of Lading shall have effect subject to the provisions of Articles I to VIII of the International Convention for the Unification of certain Rules relating to Bills of Lading at Brussels on 25 August 1924 (hereinafter called the Hague Rules) unless otherwise provided for in this Bill of Lading.

33. Identity of Carrier

The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the Vessel named herein (or substitute) and it is therefore agreed that said Ship Owner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from liability provided for by law or by this Bill of Lading shall be available to such other. It is further

understood and agreed that as the Line, Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction and the said Line, Company or Agents shall not be under any liability arising out of the contract of carriage, nor as Carrier nor bailee of the goods.

35. If the ocean vessel is not owned by or chartered by demise to the Company or Line by whom this Bill of Lading is issued (as may be the case notwithstanding anything that appears to the contrary) this Bill of Lading shall take effect only as a contract of carriage with the Owners or Demise Charterer as the case may be as Principal made through the Agency of the said Company or Line who act solely as Agents and shall be under no personal liability whatsoever in respect thereof."

Charterers' or owners' bills?

A crucial issue between the parties was whether the bill of lading contracts were made on behalf of the shipowner or on behalf of CPS (the time charterers). This was particularly significant because CPS had subsequently become insolvent.

In construing the bills of lading, Lord Bingham made a number of points:

- Business sense will be given to business documents. The business sense is that which business men, in the course of their ordinary dealings, would give the document.
- Greater weight should attach to terms which the particular contracting parties have chosen to include in the contract than to pre-printed terms, probably devised to cover very many situations.
- The courts must seek to give effect to the contract as intended: to seek perfect consistency and economy of draftsmanship in a complex form of contract which has evolved over many years is to pursue a chimera.
- In all mercantile transactions the great object should be certainty.

It was plain that the bills were drafted to evidence a contract between the shipper and the owner of the vessel, as conditions 33 and 35 stated. But the Master had not signed the bill: instead, it had been signed by agents for CPS, which was described as "the carrier". A shipper (or transferee of a bill of lading) would not expect to have to resort to the detailed conditions on the reverse of the bill in order to discover who he was contracting with, especially when the bill of lading contained on its face an apparently clear and unambiguous statement of who the carrier was. This view of market practice has been adopted in a number of cases and is also reflected in banking practice for the purpose of letters of credit: banks do not examine terms and conditions on the back of the bill of lading.

Accordingly, the House of Lords held (overturning the Court of Appeal) that the bill contained a contract of carriage made with CPS as carrier.

Himalaya clause

So any action against the shipowners had to be in tort, raising the question of whether the shipowners could rely upon the Himalaya clause in the bills of lading.

The Himalaya clause (clause 5) in the bills was a single long paragraph, closely modelled on the Conlinebill clause; in the judgments it was set out in numbered sub-paragraphs as follows, for convenience of reference.

"[1] It is hereby expressly agreed that no servant or agent of the carrier (including any person who performs work on behalf of the vessel on which the goods are carried or of any of the other vessels of the carrier, their cargo, their passengers or their baggage, including towage of and assistance and repairs to the vessels and including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment and,

[2] without prejudice to the generality of the provisions in this Bill of Lading, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available to and shall extend to protect every such servant or agent of the carrier [*acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier*] is or shall be deemed to be acting on behalf of and for the benefit of all persons who are or might be his servants or agents (including any person who performs work on behalf of the vessel on which the goods are carried or of any of the other vessels of the carrier, their cargo, their passengers or their baggage, including towage of and assistance and repairs to the vessels and including every independent contractor from time to time employed by the carrier)

[3] and all such persons shall to this extent be deemed to be parties to the contract contained in or evidenced by this Bill of Lading.

[4] The shipper shall indemnify the carrier against any claim by third parties against whom the carrier cannot rely on these conditions, in as far as the carrier's liability would be accepted if said parties over [*sic*] bound by these conditions."

It was clear that the printing of the clause left something to be desired. The word "over" in the last sentence should obviously read "were". In addition, words had clearly been omitted from para [2]. The House of Lords held that the words set out in italics in para [2] above had been omitted, and the clause should be construed as if they had been included.

"Independent contractor"

The first question on the clause was whether the shipowner was an "independent contractor" within the clause. At first instance the Judge said:

> "Where a carrier has chartered a vessel to perform the sea carriage which that carrier has contracted with the shipper to perform, he has in effect employed the shipowners to carry out the substantial part of his own contractual obligations. He has therefore employed the shipowner as an independent contract just as if he had employed a stevedore to carry out the handling of the goods … The defendants are independent contractors in this case."

The Court of Appeal unanimously agreed that the shipowner was an independent contractor, and the House of Lords agreed.

Blanket exemption?

So the shipowners fell within the clause. But how did the clause operate? The Court of Appeal unanimously rejected the argument that para [1] conferred a blanket immunity on the shipowners. They interpreted para [1] as a covenant in favour of the carrier not to sue any other party. The covenant could be enforced by the carrier by injunction. Para [2] conferred on third parties (including the shipowners) the protection enjoyed by the carrier under the bills of lading, no more and no less. Since the carrier would have no exemption for negligent stowage, neither would the shipowners.

The House of Lords did not agree with this argument. They held that para [1] conferred wide-ranging immunity on any servant, agent or independent contractor of the carrier: it was impossible to spell a covenant not to sue out of the language used. The words "in any circumstances whatsoever be under any liability whatsoever" were unqualified and para [2] was prefaced by the words "without prejudice to the generality of the provisions in this bill of lading". So what followed was not intended to restrict the effect of the earlier provisions. (This, of course, would render paragraph [2] unnecessary, but that was not an objection to this construction, given how common it was to find repetition and surplusage in instruments of this kind.) Para [1] conferred on the shipowners a general exemption from liability.

Effect of Hague Rules

Was this general exemption affected by the Hague Rules? The Rules were expressly stipulated to be the basis of the contract of carriage by clause 2 of the bill of lading. Article III, rule 8 of the Rules provides that any clause in a contract of carriage relieving the carrier or the ship from liability for loss or damage shall be null and void.

In the House of Lords, several of the judges commented on the difficulty of this point (and Lord Steyn dissented).

A Himalaya clause operates by the shipper making an agreement through the agency of the carrier with the third party (stevedore, independent contractor, etc). The act of the third party in rendering the services provides the consideration, and brings into existence a binding contract, under which the third party is entitled to the exemptions and immunities.

Clearly the Hague Rules will be of no relevance to an action against a stevedore where a Himalaya clause comes into play: the contract which comes into existence upon the performance by the stevedore of the stevedoring services is not a contract of carriage.

In the present case however the act performed to bring into existence the contract between the shipowner and the cargo owners was the carrying of the goods. Lord Bingham said:

> "If the act performance of which brings a contract into existence between the shipowner and the cargo owners is the carrying of the cargo owners' goods it would seem to me anomalous to give the shipowner the benefit of clause 5 but take no account of Article III rule 8 … Thus the shipowner is not protected by an exemption provision invalidated by Article III rule 8."

Lord Hoffmann said that the effect of clause 5[3] is that the shipowner is a party to the contract evidenced by the bill of lading only for the purpose of taking the benefit of the exemption clause. For that purpose only, the provisions of the bill are relevant to him. The only provision which was

relevant in this case was Art III, rule 8 (applied by clause 5[2]), which applies to exemption clauses.

Dissenting on this point, Lord Steyn held that the exemption in clause 5 protected the shipowners against any liability in tort, in spite of the provisions of the Hague Rules. He held that the exemption was a separate and independent contract, which contained no executory obligations. Although the contract came into existence by the rendering of service by the vessel, it was not to be treated as "a contract of carriage" within the meaning of Article III rule 8. Those words contemplated a contract with the usual incidents and executory obligations of a contract of carriage.

If it were otherwise, the cargo owners of damaged parcels on the *Starsin* would in principle have had contractual remedies not under the bill of lading, but under the Himalaya contract. Lord Steyn said that in the Hague Rules a contract of carriage meant an agreement to carry and not an agreement simply for an exemption (albeit that the consideration for the promise involves performance by the vessel).

But Lords Hobhouse and Millett agreed with Lords Bingham and Hoffmann that the general exemption fell foul of the Hague Rules. Accordingly, the House of Lords reached the same destination as the Court of Appeal (but by a different route), namely that clause 5 only protected the shipowner to the same extent as the carrier was itself protected by the bill of lading provisions under the contract of carriage. Since the carrier would have no exemption for negligent stowage, it followed that the independent contractor could have no exemption either.

Action in tort

So the claimants were not prevented from suing the shipowners in tort. However, a particular problem arose on the facts of this case because of the well-established legal principle that in order for a person to claim in tort for loss or damage to property he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred (*The Aliakmon*). The problem was that under the terms of the relevant sale contracts (most of them CIF or C&F), none of the buyers obtained title to their respective consignments until payment. Only one buyer obtained title before the voyage began. The others obtained title at different stages during the voyage.

The breach of duty – that is, the negligent stowage – occurred at the latest on completion of loading on December 8. But the damage caused by the negligence was progressive throughout the voyage.

At first instance, the Judge held that, because the damage was progressive, each exacerbation of pre-existing damage gave rise to a new cause of action, thus permitting an allocation of causes of action to different shippers and consignees and an apportionment of the resulting damage. (He also held that the claimants could not rely upon the Latent Damage Act 1986, which transfers to the purchaser of goods a right which the seller had to sue in tort: this point was only raised at trial, and had not been pleaded.)

But the Court of Appeal held that "the cause of action in respect of the negligent stowage was … completed once and for all when more than insignificant damage was caused by that negligence to the respective parcels of timber."

The House of Lords agreed with the Court of Appeal on this point. The one claimant who had obtained title to the goods before damage to the goods occurred had a complete cause of action, and was entitled to sue in tort. As the other claimants could not establish that they had obtained title before the damage occured, none of them could bring an action in tort against the shipowners.

Conclusion

The case raises several important issues. Amongst the points to bear in mind are:

- In this case, the wording of the Himalaya clause was not effective to exclude the shipowners' liability. But an appropriately worded clause in a bill of lading can still give complete protection to third parties, and a shipowner can rely on this when the bill is a charterers' bill. (A third party may now be able to rely upon the Contracts (Rights of Third Parties) Act 1999, not in force when the *Starsin* bills were entered into.)
- Whether a bill of lading is a shipowners' or a charterers' bill should be clear on the face of the document; it may not be sufficient to rely upon a clause in the small print on the back of the bill.
- Actions in tort may raise complicated issues concerning title to the goods. In appropriate circumstances, however, a claim could still be brought under the Latent Damage Act 1986, s 3.

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