Privy Council Appeal No. 5 of 1979

Port Jackson Stevedoring Pty. Limited – – – – *Appellant*

v.

Salmond and Spraggon (Australia) Pty. Limited – – *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH JULY 1980

Present at the Hearing:

LORD WILBERFORCE
LORD DIPLOCK
LORD FRASER OF TULLYBELTON
LORD SCARMAN
LORD ROSKILL

[*Delivered by* LORD WILBERFORCE]

This is an appeal, by special leave, from a judgment of the High Court of Australia dated 3 April 1978 which, by majority, dismissed an appeal from the Court of Appeal of the Supreme Court of New South Wales. That Court had allowed an appeal from a decision of Sheppard J. sitting in Commercial Causes by which he dismissed the action.

The action was brought by the respondent in respect of a consignment of razor blades in 37 cartons, shipped from Canada to Australia on the " New York Star " a ship of the Blue Star Line. The relevant bill of lading dated 27 March 1970 was issued in Montreal, Quebec: the port of loading was St. John, New Brunswick; and the port of discharge was Sydney. The shipper, named in the bill of lading was Schick Safety Razor Company Division of Eversharp of Canada Ltd.; the respondent was named as consignee. The bill of lading was issued to the consignor and was transmitted to and accepted by the consignee.

The appellant carried on business as stevedore in the port of Sydney. 49% of its capital was owned by Blue Star Line Australia Ltd. and it commonly acted as stevedore in Sydney for the Blue Star Line.

The " New York Star " arrived at Sydney on 10 May 1970. On her arrival—and there was evidence that this was in accordance with the normal practice in the port—the packages of razor blades were discharged from the ship and placed by the stevedore in part of a shed (called " the dead house ") on the wharf which was under its control. Later the goods were stolen from the wharf, having been delivered by servants of the stevedore to persons who had no right to receive them, so that when the consignee presented the bill of lading they were unavailable. The

consignee brought this action against the stevedore and against the ship's agent—Joint Cargo Services Pty. Ltd.—alleging negligence in failing to take proper care of the goods, delivery of the goods to an unauthorised person and non-delivery to the consignee. The action against the ship's agent failed at first instance and has not been the subject of appeal. The trial judge however found that the stevedore had been negligent in the care of the goods and that there had been a misdelivery: these findings have not been disputed.

The bill of lading contained a " Himalaya clause " extending the benefit of defences and immunities conferred by the bill of lading upon the carrier to independent contractors employed by the carrier, and also a time bar (similar to that contained in the Hague Rules) barring any action if not brought within one year after the delivery of the goods or the date when the goods should have been delivered: this action was not so brought. These provisions were in substance identical with those considered by this Board in *New Zealand Shipping Co. Ltd. v. Satterthwaite & Co. Ltd.* [1975] A.C. 154, an appeal from the Court of Appeal in New Zealand. The appellant relied upon these provisions as affording a defence to this action.

It is now necessary to state in detail the issues which were contested, and the decisions which were given in the three Courts in Australia.

Before Sheppard J. it was contended by the consignee:

(i) that there had been a fundamental breach by the appellant of its obligations as bailee of the goods (the " fundamental breach " point);

(ii) that one of the necessary conditions for applying the " Himalaya clause " had not been satisfied, in that it had not been shown that the carrier had authority to act on the stevedore's behalf in accepting the bill of lading (the " agency " point);

(iii) that the bill of lading ceased to have any operation after the goods passed over the ship's rail (the " capacity " point).

Sheppard J. rejected all these contentions, though he found that the necessary agency was established only by ratification. He gave judgment for the appellant.

In the Court of Appeal: the same three contentions were put forward, and were rejected by the Court. The Court found that the necessary agency was directly established by the evidence, so that reliance on ratification was not necessary. In addition, however, the consignee was given leave to take a fresh point, namely:

(iv) that there was no proof of consideration moving from the stevedore so as to entitle it to the benefit of defences and immunity clauses in the bill of lading (the " consideration " point).

The Court of Appeal accepted that contention, allowed the appeal and gave judgment for the consignee for $14,684·98 damages.

In the High Court of Australia: the " agency " point and the " consideration " point were again argued, but rejected by the majority of the Court (Barwick C.J., Mason and Jacobs JJ.). There was also argument upon the " fundamental breach " point, but this was not dealt with in the judgments.

As to the "capacity " point, senior counsel for the consignee expressly disclaimed reliance upon it (not surprisingly since Glass J.A. had described it as " without substance ") and argument upon it was not heard. However, the majority of the Court, (Barwick C.J. dissenting) decided the appeal in favour of the respondent upon this point.

Finally, it should be mentioned that the Board's decision in *Satterthwaite's* case was followed without question by the trial judge and by the Court of Appeal. Their Lordships understand that there was no argument in the High Court upon the correctness of this decision. However two members of the majority (Stephen J. and Murphy J.) expressed disagreement with it.

It was upon this situation that their Lordships decided, exceptionally, to grant special leave to appeal to Her Majesty in Council.

It will be seen from the foregoing that the point which calls for decision by their Lordships is the " capacity " point. This was fully argued by both sides to the appeal. Before dealing with it, their Lordships must briefly state their position upon the other points, upon which argument was addressed by the respondent.

First, as to the Board's decision in *Satterthwaite's* case. This was a decision, in principle, that the " Himalaya clause " is capable of conferring upon a third person falling within the description " servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) " defences and immunities conferred by the bill of lading upon the carrier as if such persons were parties to the contract contained in or evidenced by the bill of lading. But the decision was not merely a decision on this principle for it is made clear that in fact stevedores, employed by the carrier, may come within it; and moreover that they normally and typically will do so. It may indeed be said that the significance of *Satterthwaite's* case lay not so much in the establishment of any new legal principle, as in the finding that in the normal situation involving the employment of stevedores by carriers, accepted principles enable and require the stevedore to enjoy the benefit of contractual provisions in the bill of lading. In the words of Mason and Jacobs JJ.

> " When the circumstances described by Lord Reid " [sc. in *Scruttons Ltd. v. Midland Silicones Ltd.* [1962] A.C. 446] " exist, the stevedore will on the generally accepted principles of the law of contract be entitled to his personal contractual immunity. The importance of [*Satterthwaite's* case] is the manner in which on the bare facts of the case their Lordships were able to discern a contract between the shipper and the stevedore, and, we would add, to do so in a manner which limited the approach to those commercial contexts in which immunity of the stevedore was clearly intended in form and almost certainly known by both the shipper and the stevedore to be intended."

Although, in each case, there will be room for evidence as to the precise relationship of carrier and stevedore and as to the practice at the relevant port, the decision does not support, and their Lordships would not encourage, a search for fine distinctions which would diminish the general applicability, in the light of established commercial practice, of the principle. As regards its applicability in Australia, their Lordships are content to leave the matter as it was left by the Australian Courts including the High Court. They are the more satisfied to do so in view of the reasoned analysis of the legal principles involved which appears in the judgment of the Chief Justice. Their Lordships find, as his Honour himself declares, this to be in substantial agreement with and indeed to constitute a powerful reinforcement of one of the two possible bases put forward in the Board's judgment.

The applicability of the decision was accepted in their joint judgment by Mason and Jacobs JJ. although their Honours reached a decision adverse to the appellant on the " capacity " point.

Secondly, as to the factual ingredients needed to confer on the stevedore the benefit of the contract. From what has already been said it follows that this issue requires no prolonged discussion. Not only is the factual

situation in the present case in all respects typical of that which the Board, in *Satterthwaite's* case, thought sufficient to confer that benefit, but each relevant ingredient has, in fact, been found to exist. Agency has been found, as a fact, by all three courts, with only the qualification as regards the judgment of Sheppard J. already mentioned. The provision of consideration by the stevedore was held to follow from this Board's decision in *Satterthwaite's* case and in addition was independently justified through the Chief Justice's analysis.

Thirdly, as to " fundamental breach ". The proposition that exemption clauses may be held inapplicable to certain breaches of contract as a matter of construction of the contract, as held by the House of Lords in *Suisse Atlantique S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 and *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] 2 W.L.R. 283 and endorsed in Australia by Windeyer J. in *Thomas National Transport v. May & Baker* (1966) 115 C.L.R. 353, 376 was not disputed. But Mr. Hobhouse Q.C. for the respondent put forward a special, and ingenious, argument that, because of the fundamental nature of the breach, the appellants had deprived themselves of the benefit of clause 17 of the bill of lading—the time bar clause. A breach of a repudiatory character, which he contended that the breach in question was, entitles the innocent party, unless he waives the breach, to claim to be released from further performance of his obligations under the contract—so far their Lordships of course agree. One of these obligations, learned counsel proceeded to argue, was to bring any action upon the breach within a period of one year, and the innocent party was released from this obligation. An alternative way of putting it was that the bringing of suit within one year was a condition with which the innocent party was obliged to comply: the repudiatory breach discharged this condition. A further point made was that clause 17 applied at most to actions for breach of contract: the appellant's negligence as bailee, however, gave rise to an action in tort which was not governed by the time bar.

Their Lordships' opinion upon these arguments is clear. However adroitly presented, they are unsound, and indeed unreal. Clause 17 is drafted in general and all-embracing terms:

> " In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear."

The reference to delivery of the goods shows clearly that the clause is directed towards the carrier's obligations as bailee of the goods. It cannot be supposed that it admits of a distinction between obligations in contract and liability in tort—" all liability " means what it says.

Moreover it is quite unreal to equate this clause with those provisions in the contract which relate to performance. It is a clause which comes into operation when contractual performance has become impossible, or has been given up: then, it regulates the manner in which liability for breach of contract is to be established. In this respect their Lordships find it relevantly indistinguishable from an arbitration clause, or a forum clause, which, on clear authority, survive a repudiatory breach (*Heyman v. Darwins* [1942] A.C. 356, *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] 2 W.L.R. 283, 295). Mr. Hobhouse appealed for support to some observations by Lord Diplock in *Photo Production Ltd. v. Securicor Transport Ltd.* (u.s. at p.294–5) where reference is made to putting an end " to all primary obligations remaining unperformed ". But these words were never intended to cover such " obligations " to use Lord Diplock's word, as arise when primary obligations have been put an end to. There

then arise, on his Lordship's analysis, secondary obligations which include an obligation to pay monetary compensation. Whether these have been modified by agreement is a matter of construction of the contract. The analysis, indeed, so far from supporting the respondent's argument, is directly opposed to it. Their Lordships are of opinion that, on construction and analysis, Clause 17 plainly operates to exclude the respondent's claim.

Their Lordships now deal with the " capacity " argument. This rather inapposite word has been used, for convenience, in order to indicate the general nature of the submission. More fully, this was that at the time when the loss occurred, the goods had been discharged and were no longer in the custody of the carrier. Consequently, the appellant was acting not as an independent contractor employed by the carrier to perform the carrier's obligations under the bill of lading but as a bailee. His liability, in that capacity, was independent of and not governed by any of the clauses of the contract. This point enables a distinction to be made with *Satterthwaite's* case for there, since the goods were damaged in the course of discharge, the capacity of the stevedore as a person acting on behalf of the carrier was not contested.

Their Lordships can at this point dispose of one question of fact. It appears to have been the view of both Stephen J. and of Mason and Jacobs JJ. that the stevedore was remunerated for his services in stacking and storing the goods on the wharf by the consignee: this, if correct, might be an argument for finding that it was not, in respect of these matters, acting in the course of employment by the carrier. In fact, however, the evidence, including the actual account, showed that these charges were paid by the ship's agent on behalf of the carrier, thus, if anything, giving rise to an inference the other way. Their Lordships put this matter aside and proceed to deal with the point on the construction of the relevant provisions of the bill of lading.

On its face, the document stated that delivery would be effected " by the carrier or his agents " in exchange for the bill of lading, and the preamble provided that the goods were

> " to be transported subject to all the terms of this bill of lading . . . . to the port of discharge . . . . and there to be delivered or transhipped on payment of the charges thereon . . . ."

and further

> " It is agreed that the custody and carriage of the goods are subject to the following terms on the face and back hereof which shall govern the relations, whatsoever they may be, between the shipper, consignee, and the Carrier, Master and ship in every contingency, wheresoever and whatsoever occurring . . ."

Clause 5 was as follows :—

> " The Carrier's responsibility in respect of the goods as a carrier shall not attach until the goods are actually loaded for transportation upon the ship and shall terminate without notice as soon as the goods leave the ship's tackle at the Port of Discharge from Ship or other place where the Carrier is authorised to make delivery or end its responsibility. Any responsibility of the Carrier in respect of the goods attaching prior to such loading or continuing after leaving the ship's tackle as aforesaid, shall not exceed that of an ordinary bailee, and, in particular, the Carrier shall not be liable for loss or damage to the goods due to—flood: fire, as provided elsewhere in this bill of lading: falling or collapse of wharf, pier or warehouse: robbery, theft or pilferage: strikes, lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: any of the risks or causes mentioned in paragraphs (*a*), (*e*) to (*l*) inclusive and (*k*) to (*n*)

inclusive, of subdivision 2 of Section 4 of the Carriage of Goods by Sea Act of the United States; or any risks or causes whatsoever, not included in the foregoing, and whether like or unlike those hereinabove mentioned, where the loss or damage is not due to the fault or neglect of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any non-delivery or mis-delivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier."

Clause 8 was as follows:—

"Delivery of the goods shall be taken by the consignee or holder of the Bill of Lading from the vessel's rail immediately the vessel is ready to discharge, berthed or not berthed, and continuously as fast as vessel can deliver notwithstanding any custom of the port to the contrary. The Carrier shall be at liberty to discharge continuously day and night, Sundays and holidays included, all extra expenses to be for account of the Consignee or Receiver of the goods notwithstanding any custom of the port to the contrary. If the Consignee or holder of the Bill of Lading does not for any reason take delivery as provided herein, they shall be jointly and severally liable to pay the vessel on demand demurrage at the rate of one shilling and sixpence sterling per gross register ton per day or portion of a day during the delay so caused: such demurrage shall be paid in cash day by day to the Carrier, the Master or Agents. If the Consignee or holder of the Bill of Lading requires delivery before or after usual hours he shall pay any extra expenses incurred in consequence. Delivery ex ship's rail shall constitute due delivery of the goods described herein and the carrier's liability shall cease at that point notwithstanding consignee receiving delivery at some point removed from the ship's side and custom of the port being to the contrary. The Carrier and his Agents shall have the right of nominating the Berth or Berths for loading and discharging at all ports and places whatsoever any custom to the contrary notwithstanding. The Carrier shall not be required to give any notification of disposition or arrival of the goods."

Clause 14 was as follows:—

"Neither the carrier nor any corporation owned by, subsidiary to or associated or affiliated with the Carrier shall be liable to answer for or make good any loss or damage to the goods occurring at any time and even though before loading on or after discharge from the ship, by reason or by means of any fire whatsoever, unless such fire shall be caused by its design or neglect."

These provisions must be interpreted in the light of the practice that consignees rarely take delivery of goods at the ship's rail but will normally collect them after some period of storage on or near the wharf. The parties must therefore have contemplated that the carrier, if it did not store the goods itself, would employ some other person to do so. Furthermore a document headed "Port Jackson Stevedoring Pty. Ltd. Basic Terms and Conditions for Stevedoring at Sydney, N.S.W." showed that it was contemplated that the appellant would be so employed. These practical considerations, which are developed in the judgment of the Chief Justice, explain the somewhat intricate interrelation of clauses 5 and 8.

It is convenient to start with Clause 8. This, in the first sentence, creates an obligation on the consignee to take delivery from the ship's rail the moment that the ship is ready to discharge: if he does not he must pay demurrage. This provision, which is in line with the decision in *Keane's* case, (*Keane v. Australian Steamships Pty. Ltd.* (1929) 41 C.L.R. 484), is a valuable protection for the carrier, which he may, or may not, insist upon. The bill of lading takes account of both possibilities. The first

sentence of Clause 5, quite consistently, provides that the carrier's responsibility *as a carrier* terminates as soon as the goods leave the ship's tackle. But, since the carrier may not have insisted that the consignee take delivery at this point, the rest of Clause 5 continues by recognising that the carrier may continue to have some responsibility for the goods after discharge. He cannot after all dump them on the wharf and leave them there. So to suppose would be commercially unreal and is not contemplated by the bill of lading. Clause 5 in terms attributes responsibility to the carrier as bailee and defines the period in express terms as " continuing after leaving the ship's tackle ". There is nothing in the latter part of Clause 8 that is inconsistent with this. It merely provides that *delivery* ex ship's rail shall constitute *due delivery* and that the carrier's liability shall cease at that point. But this leaves open the option not to insist on delivery ex ship's rail, and leaves, to be governed by Clause 5, his responsibility if he does not.

The question may be asked, what is the carrier's position if he acts as his own stevedore and himself stacks and stores the goods. In the High Court, Stephen J. did not provide an answer to this but, in view of the provisions referred to above, their Lordships think that the answer is clear —namely that he would be liable for them, as bailee, under the contract. If that is so, it seems indisputable that if, instead, the carrier employs a third party to discharge, stack and store, that person would be acting in the course of his employment, performing duties which otherwise the carrier would perform under the bill of lading, and so would be entitled to the same immunity as the carrier would have. Their Lordships would add that both Clause 5, in references to theft or pilferage (which may be expected to occur, if it does occur, on the wharf) and Clause 14, referring to fire occurring after discharge, also recognise that the carrier may have responsibilities after this event. It is made clear by Clause 5 that, irrespective of the period of carriage defined by the contract, the immunity of the carrier is not coextensive with this period but extends both before and after it. The stevedore's immunity extends, by virtue of Clause 2, over the same period.

On this point (and indeed on the appeal as a whole) their Lordships are in agreement with the judgment of the Chief Justice. They will humbly advise Her Majesty that the appeal be allowed. The costs order of the High Court of Australia will remain undisturbed and the costs of this appeal will be borne by the appellant in accordance with the undertaking which it gave.

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