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M.L.A.A.N.Z.

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PAPER ON -

"The impact of the decision in Port Jackson Stevedoring Pty. Limited -v- Salmond & Spraggon (Australia) Pty. Limited (the "New York Star") on the "Eurymedon" doctrine - The New Zealand Shipping Company Limited -v- A.M. Satterthwaite & Company Limited (the "Eurymedon")

C.R. Carruthers
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Introduction

1. I begin by setting out what I suggest is the keystone to this paper -

"There [is] something commercially unreal in the way legal principle could be applied to give a sea carrier an immunity but at the same time to deny it to his servant or his agent even though an immunity in their favour was intended".

(The "New York Star" p.41 per Mason and Jacobs JJ.)

2. To develop the topic, I have extracted the following propositions which I think fairly set out all of the considerations necessary to formulate a philosophy on the issues involved in the two cases.

3. The propositions are -

3.1 the bill of lading with its "Himalaya" or exemption clause is the result of the commercial bargain between the shipper and the carrier;

3.2 the freight rate is geared to the liabilities of the carrier assessed on the basis of the bill of lading;

3.3 stevedoring charges (properly so called) are geared similarly. I emphasise the word stevedoring. One criticism which I shall make of the "New York Star" case is that no real distinction seems to have been drawn between stevedoring and

wharfingering. Thereis no satisfactory analysis as to when one ends and the other begins. I do not suggest that this is a simple distinction but it is a relevant and necessary one to draw.

3.4 The shipper's and consignee's insurer will have taken a premium on the basis of the limitations of liability arising under the bill of lading. Presumably, a limitation on the right of recovery against the carrier or its servants or agents will result in a higher premium.

3.5 The absence of liability on the part of the carrier results in a lack of incentive to insist upon reasonable diligence in the handling of cargo. As a corollary, the sanction of increased premiums or possible liability will promote such an incentive.

3.6 Negligent people should be responsible for the normal consequences of their negligence.

3.7 The public interest is against extending the period for which the carrier is able to exclude its liability for damage to or loss of cargo. Accordingly, the exemption available to a servant or agent of the carrier should not extend

beyond the period of the obligations of the carrier under the bill of lading.

3.8 The attitude of the Courts to the issues involved in these cases is so disparate that international comity is unlikely to be achieved by the Courts.

4. I have given no emphasis nor preference to any of these propositions. At this stage, I have advanced them simply for your consideration.

5. I have divided up the topic under the following headings for the purposes of discussion.

5.1 Analysis of the areas where the "Eurymedon" is susceptible to attack or impact;

5.2 Discussion of the impact of the "New York Star";

5.3 Assessment of the impact of the "New York Star".

Analysis of the areas where the "Eurymedon" is susceptible to attack or impact

6. It is a flattering description to describe the principle as the "Eurymedon" doctrine. The origin is, of course, in Lord Reid's judgment in Midland Silicones Limited -v- Scruttons Limited [1962] A.C. 446 where he left open the situation where one of the parties to a bill of lading contracts as agent for a third person.

In his now famous dictum he set out (p.474) the criteria which would have to be satisfied before the third person, the stevedore, could rely on an exemption in the bill of lading. One can only muse on whether Lord Reid had any conception of the stimulus which he would provide to the fertile legal imagination of the maritime lawyer.

7. The criteria have been accepted generally as correct. Indeed, they were not challenged in either of the two cases under discussion. The criterion which has provided the greatest obstacle is the fourth one, namely consideration.

8. The analysis which found acceptance with the majority in the Privy Council was that the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shipper and the stevedore, made through the carrier as agent. This became a full contract when the stevedore performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the stevedore should have the benefit of the exemptions and limitations contained in the bill of lading.

9. This is the basis of the "Eurymedon" doctrine.

10. I interpolate that the majority regarded its

approach as very close to if not identical with that accepted by Beattie J. in the Supreme Court of New Zealand. He had analysed the transaction as one of an offer open to acceptance by action such as was found in Carlill -v- Carbolic Smoke Ball Company [1893] 1 Q.B. 256. In the context of the case, the distinction was dismissed as a matter of semantics: either analysis was equally valid.

11. I suggest that the doctrine really amounts to a matter of approach. The majority adopted an unashamedly practical approach rather than a rigid legal analysis to achieve the result. But, the approach is not disguised in any way. In fact, it is highlighted in the judgment of Lord Wilberforce (who delivered the judgment of the majority) -

"If the choice, and the antithesis, is between a gratuitous promise, and a promise for consideration, as it must be in the absence of a tertium quid, there can be little doubt which, in commercial reality, this is. The whole contract is of a commercial character, involving service on one side, rates of payment on the other, and qualifying stipulations as to both. The relations of all parties to each other are commercial relations entered into for business reasons of ultimate profit. To describe one set of promises, in this context, as gratuitous, or nudum pactum, seems paradoxical and is prima facie implausible. It is only the precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many situations of daily life, for example, sale at auction; supermarket purchases; boarding an omnibus; purchasing a train ticket; tenders for the supply of goods; offers of rewards; acceptance by post; warranties of authority by agents; manufacturers' guarantees; gratuitous bailments; bankers' commercial credits. These are all examples which show that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach,

often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.

In their Lordships' opinion the present contract presents much less difficulty than many of those above referred to."

([1975] A.C. 154, 167 C - F)

"In the opinion of their Lordships, to give the appellant the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat these intentions. It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get round exemptions (which are almost invariable and often compulsory) accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in the rates of freight. They see no attraction in this consequence".

(p.169 B - D)

12. The minority were far from deterred by the practical approach adopted by the majority.

13. They supported the unanimous decision of the New Zealand Court of Appeal. Essentially, their conclusion was that however the argument of the stevedore was formulated it involved reading the relevant clause as if it was or contained an offer and that no such offer could be spelled out of the clause.

14. Viscount Dilhorne attacked the approach of the majority in two particular passages -

"Cl.1 of the bill of lading was obviously not drafted by a layman but by a highly qualified lawyer. It is a commercial document but the fact that it is of that description does not mean that to give it efficacy, one is at liberty to disregard its language and read

often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.

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into it that which it does not say and could have said or to construe the English words it contains as having a meaning which is not expressed and which is not implied".

(p.170 F - G)

"Anxiety to save negligent people from the consequences of their negligence does not lead me to give an unnatural and artificial meaning to the clause and a meaning which the words it contains do not bear. To give effect to the appellants' contentions appears to me to surrender to the anxiety to which Fullagar J. referred, a surrender which cannot be justified simply by labelling the bill of lading a commercial document. It is no more a commercial document than a consignment note for the carriage of goods by rail or road and it should not be forgotten that ordinary members of the public as well as those engaged in commerce send goods by sea as well as overland".

(p.173 B - C)

15. Each of the dissenting law lords made it quite clear that if the clause had contained an offer in clear and unequivocal language they would have been in favour of accepting the argument advanced by the stevedore. Lord Simon summed up their approach in the following passage -

"In so concluding I must not be taken to be doubting that a suitably drawn instrument could bring a consignor and a stevedore into a relationship of obligation and meet Lord Reid's five conditions in such a way that a stevedore could claim the benefit of an exemption clause even against a consignee. In this connection I note that the clause instantly in question appeared in bills of lading before the Midland Silicones case and was not drawn in the light of that case. Alternatively, no doubt, exemption could in practice be secured by a suitably drawn indemnity clause. Finally, there seems no reason to question that, as Turner P. thought, a bill of lading could, if appropriately drafted, contain an offer giving rise to a unilateral contract with a stevedore."

(p.183 A - B)

16. The areas of susceptibility to attack which emerge from the analysis to this point may be summarised as follows -

16.1 The case had a chequered history and the appeal succeeded by the narrowest possible majority. Although the stevedore succeeded at first instance before Beattie J., the Court of Appeal, which was a strong Court, unanimously overturned the decision. In the Privy Council, the majority was three to two.

16.2 The decision has not met with universal acceptance: in Herrick -v- Leonard and Dingley Ltd [1975] 2 N.Z.L.R. 566 a consignee of a motorcar which was being carried under an automobile carriage contract sued a stevedorein respect of damage which occurred while unloading the car. The Supreme Court of New Zealand distinguished "Eurymedon" as the automobile carriage contract did not make it clear that the stevedore was intended to be protected by its provisions; in The "Suleyman Stalskiy" [1976] 2 Lloyd's Rep. 609, the case was distinguished and as a result, the stevedore failed because the Supreme Court of British Columbia held that the carrier had no authority to contract as agent for the stevedore. Apparently, no evidence had been led in this respect and no inference was drawn; the "New York Star" case itself is an example where the New

South Wales Court of Appeal distinguished the "Eurymedon" on the grounds that there was insufficient proof that the stevedore relied on the Himalaya clause (even though the stevedore knew of it); in Eisen und Metall A.G. -v- Ceres Stevedoring Co Ltd and another [1977] 1 Lloyd's Rep. 665, the case was distinguished by the Court of Appeal in the District of Montreal and the stevedore failed because in the province of Quebec, it was illegal to contract out of liability resulting from gross negligence; in Lummus Co Ltd -v- East African Harbours Corporation [1978] 1 Lloyd's Rep . 317, the High Court of Kenya refused to follow the "Eurymedon" on the basis of contrary decisions of the East African Court of Appeal which ante-dated the "Eurymedon" but which were regarded as binding. Although there is no specific disagreement evident from these cases, the impression which emerges is one of reluctance to adopt the "Eurymedon" as a strong precedent.

16.3 The approach which was adopted by the majority in the Privy Council must be described as a controversial legal approach. This is evident from the diverging opinions which have been expressed and which must lessen the strength of the case making it more vulnerable to attack.

16.4 Many who have disagreed with the decision point out the possibility of re-drawing the clause so as to remove the objections of legal principle which they have raised. For so long as this alternative is available, the "Eurymedon" decision may not command complete respect. The critics will only be silenced if the clause is re-drawn.

17. There is a further area of susceptibility which arises from the facts in "Eurymedon". There was an unusual relationship between the carrier and the stevedore. The carrier was a wholly-owned subsidiary of the stevedore. The stevedore carried out all stevedoring work in Wellington, New Zealand, where the case arose, in respect of ships owned or operated by the stevedore itself or its associated companies of which the carrier in this case was one.

18. These unusual facts leave open the possibility of a critic of the "Eurymedon" distinguishing the case on its facts. Indeed, this formed the basis for the approach adopted by the New South Wales Court of Appeal in the "New York Star". Similarly, in the "Suleyman Stalskiy", the Court distinguished the case on the basis that there was no evidence that the carrier had contracted as agent for the stevedore.

Discussion of the impact of the "New York Star"

19. There are two aspectsof the decision which require discussion in order to evaluate the impact of this case on the "Eurymedon".

19.1 The attitude to the "Eurymedon".

19.2 The basis for the decision.

The attitude to the "Eurymedon"

20. Although the correctness or otherwise of the decision in the "Eurymedon" was not in issue on the approach adopted by the majority, most (if not all) of the members of the Court took the opportunity to comment on it.

21. Barwick C.J., who dissented from the majority, accepted in principle the "Eurymedon" doctrine but he analysed his own approach in rather different terms. He considered that the shipper and the stevedore had reached an arrangement through the carrier's agency upon the acceptance by the shipper of the bill of lading as to the protection the stevedore should have in the event that it stevedored the cargo. The arrangement lacked the essential of consideration. But, the performance of the act or acts by the stevedore at the one moment satisfied the need for consideration and attracted the agreed terms (p.9).

22. In what must be acknowledged as a very skilful and compelling judgment, Stephen J. disagreed with the

"Eurymedon" doctrine. He acknowledged that it was not necessary for the purposes of his decision to do so. But that did not deter him for a moment.

23. He agreed with the dissenting law lords in the "Eurymedon" and with the members of the New Zealand Court of Appeal in deciding that the words of the clause must be read as recording a contract then and there concluded which in relation to the stevedore necessarily fell foul of the doctrine of consideration (p.21).

24. He went on to examine questions of international commercial comity and public policy but found that there was nothing in the Australian context which warranted an interpretation favourable to the stevedore (pp.21-23). I am sure it will not have escaped your attention that several of the propositions which I have set out at the beginning of this paper were taken from his judgment.

25. In their joint judgment, Mason and Jacobs JJ. took the matter no further than concluding that the "Eurymedon" was an authority binding on the New South Wales Court of Appeal and one which ought to have been followed on the relevant common issues between the cases.

26. They have neither accepted nor rejected specifically the "Eurymedon". The inference which I have drawn from the tenor of their judgment is that they

agree with the decision. Perhaps this inference cannot be drawn at all strongly. However, I suggest that unless they accepted the decision, they would not have said that they regarded it as binding on the New South Wales Court of Appeal.

27. Finally, Murphy J. disagreed strongly with the "Eurymedon". The basis for his decision seems to have been that if adoption of the theory was beneficial to Australian interests then it should be adopted otherwise it should be avoided.

28. In the result, it is difficult to evaluate the impact of the various judgments on the "Eurymedon" doctrine. However, the majority of judges, in which I include necessarily Mason and Jacobs JJ., would support the "Eurymedon".

29. Nevertheless, the disagreement among the members of the High Court of Australia must give cold comfort to the advocates of the "Eurymedon" doctrine. Again, the decision has failed to command universal respect. Strong dissenting judgments such as those delivered particularly by Stephen J. but also by Murphy J. and the non-committal approach of Mason and Jacobs JJ. can only detract from the strength of the "Eurymedon" doctrine.

The basis for the decision

30. The facts in the two cases are significantly different. The negligent act in the "Eurymedon" occurred during

the course of unloading: the drill was dropped and damaged. In the "New York Star", the negligent act occurred at a time when the goods were being stored after discharge and prior to delivery.

31. This difference gave rise to the second of two major issues in the "New York Star" and the second main impact on the "Eurymedon".

32. I wish to make it clear at the outset that I consider the "New York Star" was correctly decided. Furthermore, I suggest that if the New Zealand Courts were confronted with the facts in the "New York Star", they would make short work of the issue, possibly as a result of clearer definition or demarcation of work on the wharf in New Zealand. I shall refer to this in a moment.

33. Even on this issue, there was disagreement in the High Court of Australia.

34. Although Barwick C.J. noted the distinction between the two cases on the facts, that did not deter him from applying the "Eurymedon". His approach is summed up in the following two passages -

"I must notice that the event which gave rise to liability in the stevedore in The Eurymedon occurred before the ship's obligation to deliver had been performed. Thus the stevedore at the time of that event was executing on behalf of the carrier part of the contract of carriage. Here the event giving rise to liability in the stevedore occurred after the carriage by the ship was complete (at least

theoretically) but before the consignee had obtained delivery of the consignment. Thus it can properly be said that their Lordships' decision related in terms only to the period of carriage. But their Lordships in expressing themselves did not use any language which would confine the principle of their decision to the activities of the stevedore up to the time the goods became free of the ship's tackle".

(p.14)

"Their Lordships' decision in The Eurymedon was of great moment in the commercial world and, if I may say so, an outstanding example of the ability of the law to render effective the practical expectations of those engaged in the transportation of goods. It is not a decision of its nature to be narrowly or pedantically confined".

(p.14)

35. His reasoning is then summarised in the following passages -

"But, in general, a stevedore is engaged to unload the ship and stevedore the cargo into store".

(p.15)

"It was, in my opinion, in the contemplation therefore of the consignor that if the ship did not itself stevedore the cargo into store it was certain that a stevedore would be engaged to perform that operation".

(p.16)

"To confine the scope of the agreement with the stevedore to a period ending with the discharge of the goods from the ship's tackles is not only seriously to limit the efficacy of the clauses of the bill of lading and to defeat the reasonable commercial expectation of the consignor and carrier, but it is in my opinion an unwarranted interpretation of the language of the bill of lading. I am unable to discover any reason why it should not cover the independent stevedore in the on-movement of the cargo".

(pp.16-17)

"Thus, in my opinion, the principle on which The Eurymedon was decided and the clauses of the bill properly construed covered the situation in this case and required that the judgment of the primary judge be supported".

(p.17)

36. The Chief Justice was the sole voice in favour of this interpretation. All of the other judges

concluded that the protection provided by the bill of lading ended at discharge and as the protection given to the stevedore was coincidental with that of the carrier, it terminated similarly at discharge.

37. The approach of the majority is summarised in the following passages -

37.1 Stephen J.

> "So interpreted, the carrier's obligations under the bill of lading determine once and for all when, by discharge ex ship's rail, the carrier effects due delivery of the goods". (p.25)
>
> "If the carrier's obligations under the bill determineupon due delivery over the ship's rail the relevant employment of the stevedore referred to in clause 2 will be co-extensive and the immunities conferred by that clause will also determine at that point. They will therefore have no operation at the later time when the goods are lying in storage in the stevedore's custody awaiting collection by the consignee". (p.25)

37.2 Mason and Jacobs JJ.

> "In our opinion, the reasoning underlying the implication in The Eurymedon of a contract between shipper and stevedore is that there can be found to exist an agreement between shipper and stevedore that where in particular circumstances the carrier has the benefit of a clause giving immunity or limitation, then in those circumstances the stevedore shall be entitled to rely on that same immunity or limitation to which the circumstances have given rise. The reasoning underlying the finding of a contract between shipper and stevedore is that the immunity or limitation is transferred, that what has been called a vicarious immunity or limitation of action arises in favour of the stevedore. It would be a great extension of The Eurymedon doctrine to apply it to a case where the immunity or limitation of action is not one which the carrier, its servants and agents

> (including independent contractors) all could claim, but is one where no liability would arise in the circumstances in the carrier. It is not an extension which in our opinion ought to be made". (p.41)

37.3 Murphy J. concluded that the view was fairly open that the exemptions and immunities extended beyond the discharge of the cargo but he regarded the document as confused enough to treat it as ambiguous. Against the considerations of public policy set out earlier in his judgment he read the document strongly against the carrier and the stevedore and held that the exemptions and immunities ceased on discharge of the cargo.

38. I revert for a moment to what I have described as the keystone to this paper. It follows that any attempt by the carrier to extend the period of immunity beyond the contract of carriage should be rejected in principle as commercially unreal for the same underlying reason. Following discharge, the obligations of the carrier are complete as far as the contract of carriage is concerned. Therefore, the stevdore ceases to be relevantly employed by the carrier.

39. The position is summed up, I suggest, in the following passage from the judgment of Mason and Jacobs JJ.

> "However, it does not follow that the appellant was acting as the agent of the carrier when it stacked and stored the goods on the wharf. The appellant stacked and stored the goods on the wharf on behalf of and at a charge to the holder of the bill of lading. The

obligation to stack and store pending delivery was not imposed by the bill of lading upon the carrier or upon anyone else".
(p.40)

40. In New Zealand the line is clearly defined. The freight rate is calculated from hook to hook. The carrier is liable for stevedoring charges which (in the case of unloading) cease as soon as the cargo has been taken off the hook. The general liability of the carrier is limited accordingly.

41. Although the same company may be involved in performing the work, the charges for work beyond the hook are debited to a separate account - the wharf handling account. Such work is wharfingering and not stevedoring. Any loss or damage which occurs to the goods beyond the hook is the responsibility of the wharfinger and not the stevedore.

42. For those who agree with the approach of the Chief Justice, the impact is a restriction on the "Eurymedon" doctrine. For my part, the impact is that the decision clarifies the scope of the "Eurymedon" doctrin if such clarification was necessary.

43. There is one area of possible impact which I suggest has yet to be worked out satisfactorily. There is a very brief discussion of it in the judgment of Mason and Jacobs JJ. (p.42). Mis-delivery.

44. Delivery is not an obligation imposed on the carrier by the Hague Rules. Indeed, the concept of delivery is relevant in the context of the Rules only to determine the commencement of the limitation period. Some bills of lading scarcely acknowledge the concept of delivery.

45. However, the bills of lading in the two cases under discussion do refer to delivery and they make it clear that there is some obligation on the part of the carrier in this respect.

46. To the extent that a carrier takes on the obligation of delivery, some agency will be created necessarily for this purpose. In that case, the wharfinger would I suggest be able to take advantage of the Himalaya clause in respect of a mis-delivery.

Assessment of the impact of the "New York Star".

47. While the "Eurymedon" deserves the fitting tribute which the Chief Justice paid in describing it as "of great moment in the commercial world" and "an outstanding example of the ability of the law to render effective the practical expectations of those engaged in trans-portation of goods" (p.14), the debate and dispute about the decision which is exemplified by two of the judgmentsin the "New York Star", detracts significantly from its strength as a settled doctrine. The High Court of Australia is a strong and well respected Court.

The ripples of criticism are unlikely to go unnoticed.

48. The supporters of the doctrine must wonder with some foreboding whether it will be given full recognition or whether it will be whittled away so as to become practically ineffective.

49. The "Eurymedon" illustrated and the "New York Star" emphasised the need for steps to be taken to create certainty in this area. I suggest that it does not matter very much whether the stevedore is protected or not, provided the legal position is made certain so that all parties can govern their relationships and protect their liabilities on clearly defined and settled principles.

50. This need for certainty is the main impact of the case. There are a number of available alternatives to achieve it. The first alternative is by amendment of the relevant clause in the bill of lading to meet the objections of the critics. The second alternative is to adopt the suggestion of Stephen J. and attain uniformity by means of international conventions and subsequent national legislation rather than by the adoption of any deliberate direction in the judicial interpretation of documents in particular cases (p.23). This move is already evident.

51. One can point to the Hague-Visby Rules Article IV

bis Rule 2 which extends to the servants and agents (but not independent contractors) of a carrier the same defences and limits of liability as are available to the carrier under the Rules (subject to the limitations of Rule 4 relating to intentional or reckless damage). As independent contractors are excluded from the benefit of the Rule, a Himalaya clause is still necessary to protect the stevedore. Further, in view of the specific provision of the Hague-Visby Rules and the trend in recent cases which indicates some reluctance to allow reliance on a Himalaya clause, the clause should be careful to set out a clear intention to protect a stevedore who is an independent contractor.

52. A more striking example is the Hamburg Rules which of course are in their very early stages. But they represent a bold step towards making the carrier liable from the moment it has taken over the goods until it has delivered them - see Articles 4 and 5. I suggest that this is a reflection of what Stephen J. pointed to as a powerful movement among trading nations towards extension of the period during which both the ocean carrier and its land based agents are to be denied the ability freely to exclude themselves from liability for damage to or loss of cargo (p.22).