

U K CARRIAGE OF GOODS
BY SEA ACT 1992
GOODBYE TO TITLE
TO SUE PROBLEMS –
OR IS IT?

BY

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UK Carriage of Goods by Sea Act 1992

Goodbye to Title to Sue Problems,

Or is it?

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- ① Title before being received B/Lading
- ② Unascertained goods out of bulk parcel.

- * Does a receiver of goods have title to sue the carrier under a contract of carriage to which he was not initially a party?
- * If the receiver can sue the carrier through some other cause of action, can the carrier plead in mitigation the terms of a contract of carriage which he had originally concluded with the shipper rather than the receiver?

These questions form the foundation of a small, but doubtless lucrative, enclave of litigation known to carriage lawyers throughout the common law world as the "title to sue" question. The purpose of this session will be threefold:

- A. To examine the problems created by section 1 of the U.K. Bills of Lading Act 1855, replicated throughout Australia and in New Zealand through similar statutes.
- B. To examine the provisions of the U.K. Carriage of Goods by Sea Act 1924, which replaced the 1855 Act on the 16th of September of this year, in order to see whether this Act solves all the title to sue

issues which have so far bedevilled cargo claims under English law.

- C. To offer some tentative comments as to whether similar statutory amendments are required in Australia and New Zealand.

A. The Problem and the 1855 Solution

The two questions asked at the start of this paper are caused by the English doctrine of Privity of Contract. Section 1 of the Bills of Lading Act 1855 was enacted so as to give the bill of lading holder the sword, and the carrier the shield, forged by a contract of carriage initially concluded by the carrier with the shipper.

Section 1 of the 1855, the prototype of several sections enacted in Australia and New Zealand, reads as follows:

"Every consignee of goods **named** in a **bill of lading**, and every endorsee of a bill of lading, to whom the **property** in the goods therein mentioned shall pass **upon or by**

reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

Soon after the enactment of the 1855 Act, problems arose with the interpretation of section 1, in particular with the precise meaning of the words highlighted above. Over a hundred years ago, Carver wrote "[P]erhaps the time has arrived when fresh legislation on the subject may be attempted with advantage." (On Some Defects in the Bills of Lading Act 1855, 6 L.Q.R. 289 at 292.)

B. The 1992 Solution in the U.K.

A century later, lobbied by the commodity trades, the Law Commissions in the United Kingdom put a lot of hard work into producing the Carriage of Goods by Sea Act 1992. During its passage through the House of Lords, Lord Goff of Chieveley said:

"It is some considerable time since the enactment of the Bills of Lading Act 1855. There is now strong evidence that commercial practice has moved on and that our law in this area needs to be amended and updated. Indeed, the updating proposed is badly needed and long overdue. Further delay could erode London's international position."

The Act answers central questions raised in litigation under the 1855 Act and others which which had led to costly and complex clauses in contracts of carriage. Thus the new Act addresses the following issues:

- * For the holder of a bill of lading to sue the carrier, must he own the goods?
- * Can the consignee named on a sea waybill, or the attornee of a ship's delivery order, sue the carrier in a cargo claim?
- * Do holders of bills of lading stating goods to have been "received for shipment" have title to sue the carrier in contract?

- * Can the carrier sue any holder of a bill of lading for breach of the contract of carriage?

- * What is the status of so-called "electronic" bills of lading?

C. An Antipodean Problem?

How urgent is amendment of the Australian and New Zealand counterparts of the U.K. Bills of Lading Act 1855?

This depends on whether or not receivers of damaged or short-delivered goods in these jurisdictions have faced the same sort of problems as their colleagues in England.

It is clear that there has not been as much litigation on the Australian and New Zealand versions of the U.K. Bills of Lading Act 1855 as there was on the prototype Act. For this there may be a number of reasons, among them the following three:

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- a] The words "upon or by reason of" in section 1 of the Act, so troublesome in the U.K., may be interpreted rather more sensibly in Australia and New Zealand.

- b] The doctrine of privity of contract, the origin of the problem, may receive rather shorter shrift in some common law jurisdictions than it does in England, and the problem which the 1855 Act and its foreign successors-in-title attempt to solve may not actually exist.

- c] The receiver's right to sue the carrier in tort or bailment may be doing as good a job, or an even better job, for cargo receivers in Australia and New Zealand, than his right to sue the carrier in contract. If this is right, then establishing privity between the receiver and the carrier would be undesirable from the former's point of view and futile from the second's.

This last issue merits some examination because it involves the carrier's right to exclude or limit tort liability through contract.

There is no doubt that in English law, a carrier sued in tort can plead his contract, such that a contracting party cannot be fixed with liabilities more burdensome than those he has undertaken through contract. This results both from the general rules of the common law (Tai Hing Ltd v. Liu Chong Hing Bank [1986] AC 80) and, where the Carriage of Goods by Sea Act 1971 applies, from article IV-bis 1 of the Hague Visby Rules. Given that a tort defendant can plead a contract if the plaintiff is in privity with him, the contract created by the 1855 and 1992 Acts is as useful to the carrier as it is to the receiver. The resulting contract of carriage prevents the receiver from taking tactical advantage through tort or indeed through bailment: better the contract the carrier knows than the tort he doesn't.

It would appear that the view has been taken, at any rate by some Australian writers, that a tort action should be treated as completely independent from a contract action, such that a tort defendant cannot plead contractual terms in exclusion or limitation of his tort liability. (See Davies and Lawson, Limiting Shipowners'

Liability for Economic Loss 1988 ABLR (16), 271, particularly 275-7 and Davies and Dickie, Shipping Law, 286,7.) If this is the case, then it would profit the receiver to sue in tort, and it would avail the carrier nothing to establish a contract.

The dearth of case law on foreign counterparts of the 1855 Act may be explained by any or all of these factors, and doubtless by other commercial reasons. The coming into force in the U.K. of the Carriage of Goods by Sea Act 1924 may, therefore, be seen as little more than an English solution to an English problem, both rather quaintly created and indulged in on the other side of the world. On this analysis, receivers of damaged or short-delivered cargo claiming in Australia and New Zealand would continue to sue in contract where a more relaxed interpretation of the doctrine of privity or of the relevant statute allows them to; or in tort where this affords them a tactical advantage over contract.

There are at least three reasons why such a sanguine approach might be inappropriate.

- a] With the wording of the 1855 Act still in place, it will always remain possible for judges in foreign jurisdictions to adopt the restrictive interpretation illustrated in England by the decision in the Delfini [1990] 1 Lloyd's Rep. 252.

- b] Title to sue in contract may still be important to a plaintiff who finds it difficult to prove a direct causal link between a specific act of negligence and a specific loss.

- c] Since the coming into force of the Hague-Visby Rules in Australia through the Australian Carriage of Goods by Sea Act 1991, any tactical advantage which an action in tort might have had over one in contract will vanish, given the effect of article IV-bis 1 of the Rules. In terms of that article, the carrier can plead the defences and limits to liability set out in the Rules whether the cargo claim is brought in contract or in tort. Even if the existence or otherwise of a contract might earlier have been insignificant where the plaintiff succeeded in tort, it will now be very much in the interest of the carrier to establish the existence of a

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contract between himself and the receiver, thus bringing the Rules, including article IV-bis 2 and all the resulting defences, into operation.

Conclusion

It would be strange if a troublesome statutory section, much litigated and now happily repealed in its indigenous territory, were to survive in jurisdictions which appear to have avoided the problems it was devised to solve in their own way. Foreign counterparts of section 1 of the U.K. Bills of Lading Act 1855 should follow the fate of their progenitor and be repealed, with replacements where necessary which respond to local principles of contract and tort law, rather than with inappropriate imitations of the U.K. Carriage of Goods by Sea Act 1924.

Rights of货 in Carriage, UK Law Commission White Paper on
Mar-1992 Act law & discussion of problems

**Carriage of Goods by Sea Act
1992**

1992 CHAPTER 50

An Act to replace the Bills of Lading Act 1855 with new provision with respect to bills of lading and certain other shipping documents. [16th July 1992]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

1.-(1) This Act applies to the following documents, that is to say-

Shipping documents etc. to which Act applies

- (a) any bill of lading;
- (b) any sea waybill; and
- (c) any ship's delivery order.

(2) References in this Act to a bill of lading-

Container truck
"received for shipment"
bill of lading

- (a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but
- (b) subject to that, do include references to a received for shipment bill of lading.

(3) References in this Act to a sea waybill are references to any document which is not a bill of lading but-

- (a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and
- (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.

(4) References in this Act to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which-

- (a) is given under or for the purposes of a

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who can not sue
non-negotiable bill of lading (eg third)
straight non-negotiable bill of lading not governed by act (eg not "to order")
- Law Commission says that is a heavy bill.

Shipper of the Waybill does not have to sue.
No-one has to sue in tort.

contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and

- (b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person.

(5) The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to -

- (a) the issue of a document to which this Act applies;
- (b) the indorsement, delivery or other transfer of such a document; or
- (c) the doing of anything else in relation to such a document.

(6) Regulations under subsection (5) above may-

- (a) make such modifications of the following provisions of this Act as the Secretary of State considers appropriate in connection with the application of this Act to any case mentioned in that subsection; and
- (b) contain supplemental, incidental, consequential and transitional provision;

and the power to make regulations under that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

Rights
under
shipping
documents

2. -(1) Subject to the following provisions of this section, a person who becomes-

- (a) the lawful holder of a bill of lading;
- (b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or
- (c) the person to whom delivery of the goods to which a ship's delivery order relates is to be

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2 (a) (*) + 5 (c) / *Ins - 8/1/1964 L.P. doc*
must be issued by carrier, not another party

made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill-

- (a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or
- (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

(3) The rights vested in any person by virtue of the operation of subsection (1) above in relation to a ship's delivery order-

- (a) shall be so vested subject to the terms of the order; and
- (b) where the goods to which the order relates form a part only of the goods to which the contract of carriage relates, shall be confined to rights in respect of the goods to which the order relates.

(4) Where, in the case of any document to which this Act applies-

- (a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but
- (b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,

is a forwarding agent, who is not a party to the contract of carriage - intended to give rights of suit in behalf of injured party.

the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.

(5) Where rights are transferred by - virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives-

- (a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or
- (b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document;

but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.

3. -(I) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection-

Liabilities
under
shipping
documents

- (a) takes or demands delivery from the carrier of any of the goods to which the document relates;
- (b) Makes a claim under the contract of carriage against the carrier in respect of any of those goods; or
- (c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,

*rights
from liabilities*

that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract.

(2) Where the goods to which a ship's delivery order relates form a part only of the goods to which the contract of carriage relates, the liabilities to which any person is subject by virtue of the operation of this section in relation to that order shall exclude liabilities in respect of any goods to which the order does not relate.

(3) This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract.

4. A bill of lading which-

- (a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and
- (b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading,

shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.

5.-(1) In this Act-

"bill of lading", "sea waybill" and "ship's delivery order" shall be construed in accordance with section 1 above;

"the contract of carriage" -

- (a) in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill; and
- (b) in relation to a ship's delivery order, means the contract under or for the purposes of which the undertaking contained in the order is given;

"holder", in relation to a bill of lading, shall be construed in accordance with subsection (2) below;

"information technology" includes any computer or othertechnology by means of which information or

other matter may be recorded or communicated without being reduced to documentary form; and

1984 c.12.

"telecommunication system" has the same meaning as in the Telecommunications Act 1984.

(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say-

to allow bank holding B/L in pledge, to make

(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

[transfer] bank need to be named as consignee or to be indorser 1 full set of B/L

(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;

(c) a person with possession of the ^{bill}~~bill~~ as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

(3) References in this Act to a person's being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue; and the reference in section 1(3)(b) of this Act to a document's identifying a person shall be construed accordingly.

(4) Without prejudice to sections 2(2) and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which a document relates-

- (a) cease to exist after the issue of the document; or
- (b) cannot be identified (whether because they are mixed with other goods or for any other reason);

and references in this Act to the goods to which a document relates shall be construed accordingly.

(5) The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules) which for the time being have the force of law by virtue of section I of the Carriage of Goods by Sea Act 1971.

1971.c.19.

6.- (1) This Act may be cited as the Carriage of Goods by Sea Act 1992.

Short title, repeal, commencement and extent. 1855 c.111.

(2) The Bills of Lading Act 1855 is hereby repealed.

(3) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed; but nothing in this Act shall have effect in relation to any document issued before the coming into force of this Act.

(4) This Act extends to Northern Ireland.