

# BANKING ON THE HOUSE: FREIGHT FORWARDER BILLS OF LADING AND THE CRO CASE

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## 1 Introduction

A decision of the New South Wales Court of Appeal handed down in July 2018, *Cro Travel Pty Ltd v Australia Capital Financial Management Pty Ltd*,<sup>1</sup> illustrates liabilities that can arise when bills of lading issued by a freight forwarder are provided to a financier of international trade as security. The Court reviewed the implications of the issuing of ‘house’ bills of lading by a forwarder, long an uncertain area under Australian law. The case should cause freight forwarders to reflect on the architecture and mechanics of their existing documentary management processes.

The case is significant because it is the first decision of a higher Australian court for more than two decades to explore in depth the nature and effect of house bills of lading. Freight forwarders engaged in international export transactions face a complex web of potential liabilities. This web has been widened by the CRO case, which demonstrates the operation of two causes of action that have now become well-established, and which supplement the usual contractual, tortious and bailment remedies that attend cargo loss litigation: a) breach of warranty of authority; and b) actions for ‘misleading or deceptive conduct’ under the *Australian Consumer Law*.<sup>2</sup>

This article begins with a brief outline of those usual remedies and their interaction with rules of agency, and a description of the factors which bear on whether the role of a forwarder in a given transaction has been that of an agent or a principal (Sections 2 and 3). Section 4 reviews the leading Australian authorities, prior to CRO, on the ramifications of the issue of house bills by freight forwarders: *Carrington Slipways Pty Limited v Patrick Operations Pty Limited (The Cape Comorin)*<sup>3</sup> and *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd*.<sup>4</sup> Section 5 describes the facts in CRO, and the discussion of house bills of lading in the case. The Court of Appeal’s findings on breach of warranty of authority and misleading or deceptive conduct are explained in Sections 6 and 7 respectively. Sections 8, 9 and 10 explore some potential implications of CRO for freight forwarders.

## 2 The Usual Causes of Action against Forwarders

A shipper or consignee, having entrusted its goods to a freight forwarder to arrange a transit but subsequently discovering that the goods were lost or damaged in transit, would traditionally consider three main alternative avenues of recourse: for breach of contract; in tort; and in bailment.

An action for breach of the contract of carriage raises the challenge of identifying who is the actual ‘carrier’ to be sued. Where a contract has been arranged per medium of a forwarder, determination of this issue will depend on whether the forwarder acted as a mere agent or, by virtue of its contract and the surrounding circumstances, placed itself in the position of a carrier. This requires analysis of the wording of documentation issued by the various transport operators, the characteristics of the modes of transport used and the particular facts of a given case. The precise terms of the contract need to be ascertained. It is also necessary to consider the effect of exclusion clauses which relieve the carrier from liability.<sup>5</sup> A *Himalaya* clause can provide that the carrier contracts as agent on behalf of independent contractors such as stevedores and inland carriers and ensure those parties become principals to the contract and are protected by the exclusion clauses.<sup>6</sup>

There are a range of reasons for pursuing claims in tort. It may not be clear who the contract of carriage has been made with, and if there is an insolvency, a particular defendant may be a better target to sue. It may be desirable

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<sup>1</sup> [2018] NSWCA 153, 13 July 2018. The case is hereinafter referred to as “CRO”.

<sup>2</sup> This legislation, under the *Competition and Consumer Act 2010* (Cth), is referred to in footnotes below as the “ACL”.

<sup>3</sup> (1991) 24 NSWLR 745.

<sup>4</sup> (1993) 113 ALR 677.

<sup>5</sup> In *Nissho Iwai Australia Ltd v Malaysian International Shipping Corporation, Berhad* (1989) 63 ALJR 468 a clause exempted a carrier from any liability whatsoever. The High Court held that a well-worded exclusion clause can protect a party even where the exempted events would defeat the object of the contract if they occurred.

<sup>6</sup> *Continental Seagram Pty Ltd v ABC Containerline NV Pty Ltd*, Unreported Supreme Court NSW (No 12 of 1989).

to obtain the liability of a carrier which has participated in the carriage but is not a party to the forwarder's contract of carriage. A subcontracting sea carrier may be unable to raise a defence arising out of its own bill of lading against a claim of negligence.

However, there are a couple of potential difficulties with the tort pathway. If there is a *Himalaya* clause an action in tort is likely to be subject to the exclusions and limitations in the contract, and circular indemnity clauses may cause a tortious action to be struck out, since the shipper will have agreed to sue only the forwarder.<sup>7</sup> Shippers also need to overcome the problem of establishing the existence of a sufficient duty of care.<sup>8</sup>

Alternatively, a cargo interest may sue a sub-contracting sea-carrier directly in bailment. The classic definition of a bailment is "a delivery of goods from one person (bailor) to another (bailee) upon a condition, express or implied, that when the period or purpose for which the goods were bailed has terminated or been fulfilled, they will be returned to the bailor or delivered according to his instructions."<sup>9</sup> Since the bailee has been given the physical possession of the goods, it must account for their whereabouts and condition. Where a suit in bailment is brought against a sea-carrier which has made its arrangements with the cargo owner through a freight forwarder, ascertaining the applicable terms may be a matter of some complexity. The carrier will seek to rely upon either the exclusion clauses in its own contract with the forwarder or those in the forwarder's contract with the cargo owner, whichever afford it the greatest protection.

### 3 Status of the Forwarder as Agent or Principal

In litigation involving a freight forwarder, it is necessary to determine whether the forwarder participated in the transaction as a principal carrier or a 'mere agent'. Because many of the issues in *CRO* centred on the application of agency principles, it is important at the outset of this article to review the nature of agency, as it applies to forwarders.

In the event a freight forwarder is found to have been acting as an agent and not as a principal, its liability will be governed by the normal rules of agency.<sup>10</sup> The traditional view has been that it is in a freight forwarder's interests for it to maintain, wherever possible, a role as an agent, rather than a carrier because a forwarder held to be a mere agent will generally have only limited exposure for loss of or damage to cargo.<sup>11</sup>

The precise duties of a 'forwarding agent' in a given case will depend upon the terms of the documents it has exchanged with the shipper, the nature of the contracts between the parties and the surrounding circumstances. Where there is agency, the contract of carriage created will usually be established between the forwarder's principal and the contracted carrier, and the contractual terms governing the cargo owner's recourse will typically be those in the contract issued by the contracted carrier.

The forwarder's principal, normally the cargo owner, and not the forwarder, will be liable for any wrongful acts or omissions which are committed within the scope of the forwarder's authority. For example, should a forwarder underpay wharfage charges, the application of agency principles will mean the cargo owner will (subject to statute) be liable to the port authority, even though the cargo owner may have placed the forwarder in funds to pay the correct charges. The forwarder is entitled to be indemnified against all expenses incurred on behalf of the nominated principal, and to be paid proper charges for its services, even if these were not originally contemplated.<sup>12</sup>

A forwarding agent has a duty to exercise reasonable care in employing the persons who are to perform the carriage,<sup>13</sup> but having made the arrangements, will be under no duty to supervise the actions of carriers which it may reasonably and properly expect to perform their normal obligations competently.

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<sup>7</sup> *BHP v Hapag-Lloyd* [1989] 2 NSWLR 572; *Sidney Cooke v Hapag-Lloyd* [1980] 2 NSWLR 587.

<sup>8</sup> *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd* ("The Aliakmon")<sup>8</sup> is authority for the proposition that a buyer of goods damaged during shipment which had not yet acquired property in the goods at the time of damage and had no right to sue under [s.1 of the UK Bills of Lading Act 1895] does not have title to sue a negligent shipowner in tort.

<sup>9</sup> Vermeesch R and Lindgren K, *Business Law of Australia* (6<sup>th</sup> Edition, Butterworths, Sydney, 1990) 763.

<sup>10</sup> *Ibid* 486-525. As to the general liabilities of a forwarder as an agent, see Eder B et al, *Scrutton on Charterparties* (Twenty-Third Edition, Sweet and Maxwell, London, 2015) 93-6.

<sup>11</sup> Davies M, 'The Elusive Carrier: Whom Do I Sue and How?' [1991] *ABLR* 230, 233.

<sup>12</sup> *Marston Excelsior v Arbuckle Smith & Co. Ltd* [1971] 2 Lloyd's Rep 306, 310.

<sup>13</sup> *C. A. Pisani & Co Ltd v Brown, Jenkinson & Co. Ltd.* (1939) 64 Ll. L. Rep 340 (KBD).

Nonetheless, the forwarder may not exceed its authority. It may be liable, for example, for delay due to its own negligence<sup>14</sup> and vicariously liable for the negligence of another agent which it has employed to perform its functions abroad.<sup>15</sup> Since general agency principles apply, a forwarding agent will, like any other agent, be subject to duties to exercise such care and diligence as are reasonable in the circumstances, to follow the lawful and reasonable instructions of the principal as to the manner of performance of its duties and not to allow its interests to conflict with those of its principal.

The general law duties of an agent may be varied by express agreement between the principal and agent, so forwarders seeking to establish themselves as agents tend to set out in their contracts with shippers terms which give them the broadest possible authority. A Forwarder's Certificate of Transport or other document issued by a forwarder will commonly incorporate by reference a standard set of forwarder's terms such as the 'Model' form of Standard Trading Conditions of the Australian Federation of International Forwarders which have been in existence since June 2000. A forwarder's document is likely to state on its face words to the effect that the forwarder is "authorised to enter into contracts with carriers and others involved in the execution of the transport subject to the latter's usual terms and conditions", that the issuer "does not act as Carrier but as Forwarder" and that it is "not responsible for the acts and omissions of Carriers involved in the execution of the transport or of other third parties".<sup>16</sup>

### 3.1 The Forwarder as Agent for the Shipper

Rowlatt, J. encapsulated the traditional view of the legal position of the freight forwarder in *Jones v European and General Express*, where he said:

It must be clearly understood that a forwarding agent is not a carrier; he does not obtain the possession of the goods; he does not undertake the delivery of them at the other end unless prevented by some excepted cause of loss or something which affords an excuse. All that he does is to act as an agent for the owner of the goods to make arrangements with the people who do carry – steamships, railways and so on – and to make arrangements so far as they are necessary for the immediate steps between the ship and the rail.<sup>17</sup>

Under this view, the forwarder contracts with the sea-carrier *and* any land-based transport operator as agent for the shipper of the goods (or the consignee of the goods if the sale contract is on FOB rather than C&F terms). The shipper is the principal, and there is privity of contract between the shipper and the individual land and sea carriers engaged by the forwarder. The forwarder does not contract to carry and deliver the goods itself. This view was reflected in the definition of forwarders set out in *C.A. Pisani & Co Ltd v Brown, Jenkinson & Co Ltd*.<sup>18</sup> There, it was said forwarders were groups which would

... forward goods for you ... to the uttermost ends of the earth. They do not undertake to carry you, and they are not undertaking to do it either themselves or by their agent. They are simply undertaking to get somebody to do the work, and as long as they exercise reasonable care in choosing the person to do the work, they have performed their contract.<sup>19</sup>

The basis of remuneration of the freight forwarders may be relevant in determining whether it has acted as agent or principal. In *Marston Excelsior Ltd v Arbuckle Smith & Co Ltd*,<sup>20</sup> Lord Denning MR found that, in light of the correspondence passed between the parties, "Arbuckle Smith were forwarding agents in the true sense of those words and not themselves carriers",<sup>21</sup> despite the fact that the forwarder had added ten per cent to the quote received from the barge operator which had arranged the European portion of the trip. The addition of ten per cent for the forwarder's own profit had been argued to be an indication the forwarder was a contractor on its own account as principal (but the defendant's counsel successfully explained this away as being "because of contingencies" since "costs might rise").<sup>22</sup> Lord Denning expressed the view that the remuneration of forwarding agents should be structured so that clients were only charged the actual amounts paid by the forwarders to the principal carriers and "in addition, they could charge an agency fee for their services as forwarding agents".<sup>23</sup>

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<sup>14</sup> *Jones v European and General Express* (1920) 25 Com. Case. 296 (KBD).

<sup>15</sup> *Landauer v Smits & Co* (1921) 6 Ll. L. Rep. 577.

<sup>16</sup> See <http://www.afif.asn.au/model-standard-trading-conditions> (accessed 30 July 2018).

<sup>17</sup> (1920) 25 Com. Cas. 296.

<sup>18</sup> *C. A. Pisani & Co Ltd v Brown, Jenkinson & Co. Ltd.* (1939) 64 Ll. L. Rep 340 (KBD).

<sup>19</sup> *Ibid* 342 (Goddard J).

<sup>20</sup> [1971] 2 Lloyd's Rep 306.

<sup>21</sup> *Ibid* 309-10.

<sup>22</sup> *Ibid* 310.

<sup>23</sup> *Ibid*.

It should be noted that it is common for the forwarder to be named as the ‘shipper’ on a sea-carrier’s bill of lading. However, where a forwarder has entered into a contract with the sea-carrier as agent on behalf of the shipper as principal, this may merely signify that the shipper is an undisclosed principal.

### 3.2 The Forwarder as Principal Contractor

Historically it was unusual for a freight forwarder to be found to have contracted as principal to a contract for sea carriage.<sup>24</sup> In general, the courts were reluctant to ascribe to the freight forwarder the contractual status of carrier vis-à-vis the shipper in the absence of any express terms to that effect. This is no longer the case.

A number of factors have been identified as indicating that a forwarder has contracted as a principal rather than an agent:<sup>25</sup> that it has contracted for a lien in its own name;<sup>26</sup> that the carrying ship is owned by an associated company and managed by the forwarder;<sup>27</sup> that the forwarder agrees ‘to collect’ rather than ‘to arrange for the collection of goods from the shipper’;<sup>28</sup> that the forwarder holds itself out as a ‘haulage, wharfage and lighterage contractor’ although not owning any lighters;<sup>29</sup> that the forwarder takes a bill of lading from the sea-carrier naming itself as shipper;<sup>30</sup> and that it booked space at a concessionary rate of freight for the whole consignment in the hope of finding goods to fill it later.<sup>31</sup> Other cases have based findings that forwarders contracted as principals on considerations such as the absence of an express statement on contractual documents (*such as air waybills and invoices*) that the forwarder was an agent of the shipper.<sup>32</sup>

### 3.3 Mixed Forwarder Roles

Determining the nature of an agency, and establishing *whose* agent a forwarder is, can be complex matters. A freight forwarder can act, in the same transaction, as agent to its customer merchant *and* as a principal to a third party. A forwarder can be a party to the same contract in two capacities, both as agent and principal. It is also possible for a forwarder to have more than one principal in the same transaction.<sup>33</sup>

A forwarder may be both agent and carrier in respect of the same shipment at the same time, retaining the status of agent in respect of its freight forwarding operations and acting as a principal in respect of its ancillary activities. Where part of its operations consist of road transport, a forwarder may perform the road portion of the transit itself and structure its contract with the shipper so that in arranging the other legs, such as the sea leg, it acts as the shipper’s agent.

It is also possible to identify circumstances in which forwarders act as agent for both a carrier and a shipper simultaneously, for example where a shipping company appoints a freight forwarder to act as its agent in a particular area, with the result that the forwarder acts both as a loading broker and a forwarder.<sup>34</sup> As loading broker, the forwarder’s function may be to advertise the shipping company’s services and obtain cargo to fill its vessels to capacity. These activities may be carried on in parallel with conventional freight forwarding activities. It is possible to contemplate a situation in which, in selling cargo space a forwarder is acting as the agent of a shipping company, yet in performing ‘ancillary functions, such as arranging insurance cover, clearing goods through Customs, etc’ the forwarder acts as the shipper’s agent.<sup>35</sup>

## 4 The Australian Precedents on House Bills of Lading

The issue of a forwarder’s house bill can give rise to two ‘live’ sets of bills of lading covering the one shipment of goods, and this can create layers of complexity in determining the liability of the participants in an import or export transaction. Widely different liability outcomes can occur depending on whether a forwarder is held to have been an agent or principal. This is demonstrated by two New South Wales decisions from the early 1990s,

<sup>24</sup> *Langley, Beldon & Gaunt Ltd v Morley* [1965] 1 Lloyd’s Rep 297.

<sup>25</sup> Eder, above n 10, 94-6.

<sup>26</sup> *Troy v Eastern Co of Warehouses* (1921) 91 L.J.K.B. 632.

<sup>27</sup> *Landauer v Smits & Co* (1921) 6 Ll. L. Rep. 577 cf *Marston Excelsior Ltd v Arbuckle Smith & Co Ltd* [1971] 2 Lloyd’s Rep 306.

<sup>28</sup> *Harris (Harella) Ltd v Continental Express Ltd* [1961] 1 Lloyd’s Rep 251.

<sup>29</sup> *Elof Hansson Agency Ltd v Victoria Motor Haulage Co Ltd* (1938) 43 Com. Cas. 260.

<sup>30</sup> This wouldn’t of itself make a forwarder liable as a carrier: *Platzhoff v Lebean* [1865] 4 F. & F. 545.

<sup>31</sup> Eder, above n 10, 94.

<sup>32</sup> *Lee Cooper v Jeakins* [1964] 1 Lloyd’s Rep 300. See also *J Evans & Sons v Merzario* [1975] 1 Lloyd’s Rep 162; *Salsi v Jetspeed Air Services Ltd* [1977] 2 Lloyd’s Rep 57; *Chas Davis (Metal Brokers) Ltd v Gilyott & Scott Ltd* [1975] 2 Lloyd’s Rep 422.

<sup>33</sup> Bugden P, *Freight Forwarding and Goods in Transit* (Sweet and Maxwell, London, 1999) 8.

<sup>34</sup> See Hill D, ‘The Freight Forwarder: His Status from a Comparative Viewpoint’ [1975] *LMCLQ* 27.

<sup>35</sup> *Ibid* 28.

discussed below, which have been the leading Australian precedents evaluating the ramifications of the issue of house bills of lading by freight forwarders.

#### 4.1 Carrington Slipways

*Carrington Slipways Pty Limited v Patrick Operations Pty Limited (The Cape Comorin)*<sup>36</sup> concerned a claim by Carrington Slipways against its freight forwarder, the charterers and owners of the carrying vessel and the discharging stevedores for damage which occurred to a large diesel engine during unloading in Sydney. The damage had resulted from the negligence of the stevedores. There was a question as to whether the consignee had title in the goods at the time the engine was damaged on discharge. It was necessary to consider the implications of two separate bills of lading covering the shipment: a house bill of lading issued by the freight forwarder, Pacific Austral, and an ocean bill of lading issued by the time charterer, Simsmetal, on behalf of the owner of the vessel Cape Comorin. In dispute was which set of terms and conditions (in particular, which of two *Himalaya* clauses) applied to protect the stevedore. The issue of whether Carrington Slipways had contracted with Pacific Austral as a principal or engaged it as its agent was important to determining which set of exclusion clauses applied to the carriage.<sup>37</sup>

The freight forwarder was contending that it was a principal, not seeking to argue it was the agent of the consignee. As a principal, its position was protected by the package limitation provisions and exclusions of liability contained in the Hague Rules. One of its co-defendants - the owner of the ship and the employer of the crew - sought to argue the applicability of its own bill of lading which offered it greater protection, and thus needed to establish that Pacific Austral had acted as an agent.

At first instance, Rogers CJ of the NSW Supreme Court held that it was clear Pacific Austral had contracted as a principal. The bill of lading Pacific Austral had procured for its customer was a 'PEACE Line' bill, and 'PEACE Line' was a business name under which Pacific Austral itself operated. The letter of credit which had been obtained by Carrington Slipways from its bankers had directed "PEACE Line of Bill of Lading only acceptable". Thus, the freight forwarder was restricted to negotiating a carriage of goods only with PEACE Line or on a PEACE Line bill of lading, "otherwise the letter of credit could not have its assigned operation". Since the authority of Pacific Austral was quite specific, it was no mere agent. It had no authority to enter into any other bill of lading on behalf of Carrington Slipways and, in fact, had contracted with itself (ie. PEACE Line) as principal. Accordingly, the stevedore was entitled to the protection of the Himalaya clause in the freight forwarder's bill of lading, even though the forwarder had no direct relationship with the stevedore and had taken no steps to arrange for the discharge of the cargo from the vessel.<sup>38</sup> It was found that the forwarder was acting as a principal in the transaction, having issued its own bill of lading as a carrier, but was not authorised to engage the services of another carrier.

When the matter was appealed to the NSW Court of Appeal, a novel re-interpretation of the position was arrived at: the freight forwarder was acting as both an agent and a principal at the same time. It was held that "vis-à-vis its client, the consignee, the freight forwarder was acting as a principal; but that in carrying out its client's instruction to ship the goods, it had acted as an agent".<sup>39</sup> The forwarder was seen to have obtained the issue of the bill of lading from the actual carrier as part of its duties in carrying out its mandate from its client. Handley JA, who delivered the main judgment, concluded that the forwarder's house bill evidenced a contract of carriage between the forwarder and the exporter but not with an ocean carrier. Accordingly:

... it was not a document of title and was not within the Bills of Lading Act 1855 or its New South Wales equivalents. It would follow that the property in the engines did not pass to the appellant before the goods were unloaded but only when its custom agent presented the original Simsmetal bill to the ship's agents in Sydney ... the appellant had neither property nor possession of the engine when it was damaged.<sup>40</sup>

In Hetherington's view the Court of Appeal erred in its analysis of the document of title aspect by making no reference to the Uniform Customs and Practice for Documentary Credit (UCP). He argued that the UCP might be the ultimate determinant as to whether a document is negotiable or not and that reforms made to the UCP in the

<sup>36</sup> (1991) 24 NSWLR 745. This case is hereinafter referred to as "*Carrington Slipways*".

<sup>37</sup> See Hetherington S, 'Case Note on *The Cape Comorin*', 1992 *LMCLQ* 32.

<sup>38</sup> Rogers CJ had referred approvingly to a passage in an article by Ian Holloway where it was said: "The court will impute the intention to assume liability as a carrier whenever the freight forwarder makes representations amounting to a guarantee that the goods will be shipped in a certain manner": I Holloway, "Troubled Waters: The Liability of a Freight Forwarder as a Principal Under Anglo-Canadian Law" (1986) 17 *Journal of Maritime Law and Commerce* 243, 247.

<sup>39</sup> Hetherington, above n 37, 32.

<sup>40</sup> *Carrington Slipways*, above n 36, 752.

early 1980s meant “even documents issued by freight forwarders, where at least they accept the liabilities of a carrier, can be regarded as negotiable.”<sup>41</sup>

*Carrington Slipways* has been extensively critiqued, with Bugden describing it as “a rather strange decision”.<sup>42</sup> Hetherington highlighted the peculiarity of the approach taken by the Court of Appeal in finding that a freight forwarder could simultaneously act as both an agent and a principal.<sup>43</sup> These criticisms are well-founded.

The case raised questions as to whether consignees of cargo from freight forwarders have rights to sue in reliance on house bills they receive from forwarders. *Carrington Slipways* also changed the balance of opinion about the capacity of carriers dealing with freight forwarders to defend claims against consignees where forwarders have issued bills in their own names. Whereas previously the interposition of a forwarder as a carrier had been seen to take away sea-carriers’ capacity to rely on their own bills, the Court of Appeal’s approach had potential to allow carriers to derive a contractual benefit from their own bills of lading as against consignees, if “the forwarder had a mandate from its client to ship the goods and as part of that mandate could obtain a bill of lading from the actual carrier”.<sup>44</sup>

## 4.2 Comalco Aluminium v Mogal Freight Services

*Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd*,<sup>45</sup> a subsequent single judge authority, stands in contrast to *Carrington Slipways* because it offers an example of a freight forwarder held to be acting as a carrier, not an agent. The case has been cited as authority for the proposition a forwarder is more likely to have contracted as carrier, and a house bill of lading more likely to have the status of a ‘true’ bill of lading, where the forwarder provides a ‘door to door’ service involving land carriage to and from the port at either end of the sea carriage.<sup>46</sup> Comalco involved two groups of causes of action – the first groups consisted of breach of contract, breach of Mogal’s obligations as bailee, and negligence; the second group was based on breaches of the *Trade Practices Act 1974* (Cth), now the *Competition and Consumer Act 2010* (Cth).

The first plaintiff was the shipper of aluminium coils from the port of Sydney to Auckland, to consignees which were related entities. The first plaintiff entered into a contract with Mogal, a freight forwarder, which was evidenced by a consignment note, but which was essentially a house bill of lading. This document named the first plaintiff as shipper and the consignee was specified as ‘to order’. The terms of the consignment note required Mogal to perform or arrange every stage of transportation from door to door.<sup>47</sup> The coils arrived severely damaged, and this was attributed to negligent acts which occurred prior to loading.

Sheppard J analysed the nature of house bills, referencing Hill’s description of them as “documents of control” which forwarders did not issue in the capacity of carrier, but with the intention of substituting their own documents of control for a carrier’s bill.<sup>48</sup> He noted:

... certain of the larger forwarding companies issue documents of control which are commonly called house bills of lading. They differ from orthodox bills of lading in that the forwarder does not issue a house bill in the capacity of a carrier, but with the intention of substituting his own documents of control for a carrier’s bill of lading ... [O]ne of the disadvantages of a house bill to a shipper is that it is not issued by the actual carrier but merely by a forwarder who has neither the means nor the intention to perform any part of the operation. Virtually all the obligations entered into by the forwarder will be performed by a third party ... By issuing his own house bill of lading, a forwarder can restrict his liability regarding the transit ... [and] obtain the benefits of acting as carrier without necessarily suffering any of the disadvantages thereof. Where, however, the contract of carriage is effected subject to the actual carrier’s bill of lading, the forwarder must introduce his own trading conditions as a separate contractual document to limit his liability.<sup>49</sup>

In his judgment, Sheppard J referred to the three essential elements of a bill of lading (the receipt, evidence of contract and document of title functions) and found that the multimodal consignment note issued by the forwarder

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<sup>41</sup> Hetherington, above n 37, 33.

<sup>42</sup> Bugden, above n 33, 105.

<sup>43</sup> Hetherington, above n 37, 32.

<sup>44</sup> *Ibid* 32-3.

<sup>45</sup> [1993] FCA 180 (hereinafter referred to as “*Comalco*”).

<sup>46</sup> Davies M, *Shipping Law* (4<sup>th</sup> Edition, Lawbook Co, Sydney, 2014) 360, 365.

<sup>47</sup> These facts are elaborated by Bristow G, “Freight Forwarder: Principal or Agent? What Difference does it Make?” (1999) 27 *ABLR* 196, 205.

<sup>48</sup> Hill D, *Freight Forwarders* (Sweet & Maxwell, London, 1972) 197-8.

<sup>49</sup> *Comalco*, above n 45, [90].

exhibited all three elements<sup>50</sup> and was both a bill of lading and a document of title.<sup>51</sup> The matters which were said to point to an intention by the parties to make the consignment note a document of title were as follows:

It is described as a negotiable delivery order. There is a box ... which provides for endorsements. More importantly the box headed "Consignee-Receiver" has the words "TO ORDER" inside it. The name of the consignee ... does not appear otherwise than as the party to be notified of the arrival of the goods.<sup>52</sup>

This decision placed emphasis on the need to analyse the negotiability characteristic in order to determine whether a particular (so-called) house bill actually has the status of a bill of lading. The authorities regarding negotiability of a bill of lading were usefully summarised in *Hilditch Pty Ltd v Dorval Kaiun KK (No 2)*.<sup>53</sup> It is important to take account of the interaction of the case law in this area with the Articles of the UCP, including the maxim set out in *Sewell v Burdick* that, under the law merchant, an endorsement in blank of a negotiable instrument made out to order converts the instrument to a bearer instrument.<sup>54</sup>

## 5 Cro Travel v Australia Capital Financial Management

The CRO case was heard on appeal by three justices of the New South Wales Court of Appeal, Meagher JA, Ward JA (who delivered the judgment) and Barrett AJA. At first instance the matter had been before Judge Russell of the District Court in *Australia Capital Financial Management Pty Ltd v Freight Solutions (Vic) Pty Ltd*.<sup>55</sup>

The appeal was dismissed, with costs awarded against the appellant. The defendant freight forwarder (originally named Freight Solutions, later changing its name to Cro Travel) was held liable to the plaintiff finance company for both breach of warranty of authority, and for misleading or deceptive conduct within the meaning of s 18 of the *Australian Consumer Law* for, without authority from the ocean carriers, issuing house bills of lading which were taken by the finance company to be negotiable 'bearer' bills. The freight forwarder was held to be acting as an agent.

### 5.1 The Facts

The plaintiff in *CRO* lent money to an exporter (which subsequently became insolvent) to fund its purchase of sheep skins and cow hides for export. A term of the Loan Agreement between the plaintiff and the exporter required that all original shipping documents, including bills of lading, relating to proposed advances of funds by the plaintiff to the exporter would be deposited with the plaintiff as security for various loan drawdowns. The exporter engaged the defendant freight forwarder to arrange shipment of the goods to ports in China.

The defendant created documents characterised as house bills of lading which were provided by the exporter to the plaintiff, and which purported to evidence a contract of carriage between the shipper and the defendant freight forwarder, as an agent for various ocean carriers (each house bill was signed by the defendant "as agent only" for the relevant carrier). The exporter defaulted on its obligations to the plaintiff but when the plaintiff went to enforce its securities (in respect of three drawdowns) to obtain possession of the cargo it discovered that the house bills issued by the defendant were not valid securities, that they could not be used to obtain delivery of the goods and furthermore that Chinese consignees had already collected the goods by presenting sea-carriers' bills of lading.

The defendant forwarder had received from each of the sea-carriers sets of original 'ocean' bills of lading which it had provided to the exporter "for its own purposes, including obtaining delivery of the goods in China." The defendant did not have authority to execute each bill as agent for the sea-carriers.<sup>56</sup>

The evidence showed that the principal of the plaintiff finance company, a Mr Chen, had an inadequate and incomplete understanding of the processes of international trade. Mr Chen's ability in the English language was limited. He was found not to have understood "the legal nuances of the documents offered"<sup>57</sup> and had quite a low level of "knowledge of the mercantile law concerning bills of lading."<sup>58</sup> At first instance it was found that the bills of lading issued by the defendant appeared to the plaintiff to be the only original negotiable bills but, because the

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<sup>50</sup> Ibid [94].

<sup>51</sup> See Bugden, above n 33, 106.

<sup>52</sup> *Comalco*, above n 45, [96].

<sup>53</sup> (2007) 245 ALR 125, 132-134 (Rares J).

<sup>54</sup> *Sewell v Burdick* (1884) 10 App Cas 74, 83 (Earl of Selborne). See also *Lickbarrow v Mason* (1787) 2 Term Rep 63.

<sup>55</sup> [2017] NSWDC 279 (16 October 2017) District Court of NSW (hereinafter referred to as "*Freight Solutions*").

<sup>56</sup> See *Freight Solutions*, above n 55, [7] - [12], [16].

<sup>57</sup> Ibid [149].

<sup>58</sup> Ibid [162].

bills were not endorsed, they were not actually ‘bearer bills’.<sup>59</sup> The plaintiff’s scrutiny of the house bills presented to it focused largely on ensuring they satisfied the requirement of being marked ‘original’.<sup>60</sup> The plaintiff was apparently unaware of the need for each of the “TO ORDER” bills of lading it had been provided with to be further endorsed by the exporter in order to “perfect its security interest”<sup>61</sup> although the view of Judge Russell was that, under the Loan Agreement, it could have (and would have) required such an endorsement, if it had become aware of the need.<sup>62</sup>

Mr Chen was labouring under a series of mistaken beliefs: that each bill of lading issued by the defendant was an original negotiable bill of lading which gave the holder a right to demand delivery from the carrier holding the goods in China;<sup>63</sup> that by his firm acquiring possession of the bills of lading provided to it by the exporter the plaintiff was acquiring security over the goods the subject of each particular bill of lading;<sup>64</sup> that while the plaintiff firm held the original bills of lading, no other person could pick up the goods from the discharge port;<sup>65</sup> and that by holding the original bills his firm was in a position to collect the goods and realise the value of the goods to achieve repayment of the exporter’s debts.<sup>66</sup> Judge Russell at first instance also found that “Mr Chen assumed that [the house bills of lading] passed property in the goods to the plaintiff.”<sup>67</sup>

The defendant forwarder was highly cooperative with its exporter customer, ensuring delivery of house bills which met the requirements of the plaintiff. For example, on one occasion when a copy of a bill stamped “COPY NON-NEGOTIABLE” was rejected by the plaintiff as a basis for a drawdown, the forwarder cooperated with its client to deliver a replacement set of bills which were instead stamped “ORIGINAL” and which enabled a drawdown.

## 5.2 The Findings on House Bills of Lading

The generally understood position prior to *CRO* was that, where the freight forwarder merely acted as agent for the goods owner in arranging transport, a document which it might describe as its house bill (or ‘certificate of transport’) would not have the force of a bill of lading (or be a ‘true’ bill of lading)<sup>68</sup> but would be, at most, a receipt for the goods coupled with an authority to enter into a contract of carriage on behalf of the shipper.<sup>69</sup>

By contrast, where a forwarder was held to be a contractual carrier, a house bill issued by a forwarder to a cargo owner was usually taken to represent the contract between the forwarder and the shipper, and presumed to be both the operative document in determining the rights of the shipper in contract, and a negotiable document of title to the goods. In this circumstance, the shipper is not a party to the contract between the forwarder and the sea-carrier evidenced by the sea-carrier’s bill of lading. The issuance by a freight forwarder of its own house bill of lading has been regarded as an indicator the forwarder has contracted as a principal rather than an agent.<sup>70</sup>

The NSW Court of Appeal in *CRO* took its analysis one step further and firmly suggested that if a forwarder is acting as an agent, its transport document cannot be regarded as a house bill. The bills of lading in issue in *CRO* had been signed ‘For the Carrier’ and the words ‘Signed as Agent Only’ appeared following *CRO*’s stamp. According to Ward JA this indicated “they were not house bills of lading ... because they purported to evince a contract with the carrier (not a contract binding the freight forwarder as principal).”<sup>71</sup> Ward JA went on to say:

The primary judge may have taken the view that a house bill and a bill issued by a freight forwarder as agent are the same. They are not. The nature of a house bill issued by a freight forwarder is that it is issued by the freight forwarder as principal. A house bill is *not* a bill of lading because in the usual case, the freight forwarder is not a carrier, but is engaged to do other things such as arrange delivery and effect customs clearance.”<sup>72</sup>

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<sup>59</sup> Ibid [150], [151].

<sup>60</sup> Ibid [30], [32], [147].

<sup>61</sup> Ibid [152].

<sup>62</sup> Ibid [153].

<sup>63</sup> Ibid [138].

<sup>64</sup> Ibid [125].

<sup>65</sup> Ibid [126].

<sup>66</sup> Ibid [127].

<sup>67</sup> Ibid [161].

<sup>68</sup> Davies, above n 46, 360.

<sup>69</sup> *A Gagniere & Co v Eastern Co of Warehouses* (1921) 7 L.L.R. 188, 189. This principle has been repeatedly quoted by authors writing on freight forwarder liabilities: see Bristow, above n 47, 204; Eder, above n 10, 457. The words were also cited by Judge Russell in *Freight Solutions*, above n 55, [81], referencing Davies, above n 46, [12.840].

<sup>70</sup> *Troy v Eastern Co of Warehouses* (1921) 91 L.J.K.B. 632; but cf *A Gagniere & Co v Eastern Co of Warehouses*, above n 69, 189.

<sup>71</sup> *CRO*, above n 1, [48].

<sup>72</sup> Ibid [49].

This proposition was supported by referencing, with approval (and with emphasis added), passages from Girvin's text *Carriage of Goods by Sea* addressing factors relevant to determining the status of a document of carriage: "the fact that a freight forwarder is described in a document of carriage as an agent will not, as a matter of law, prevent him from being regarded as the principal party to the contract" and "mere description as 'freight forwarder', 'principal', 'agent', or 'forwarding agent' is not determinative; it is the substance of the obligation undertaken which is often pivotal in determining the legal status of the relationship".<sup>73</sup>

Ward JA distinguished the position in *CRO*, where the forwarder was found to be acting as an agent, from the position in both *Comalco* and *Carrington Slipways*. He emphasised that in the end the PEACE Line bill in *Carrington Slipways* was held to be issued by the freight forwarder as principal.<sup>74</sup>

It should be noted that the expert witnesses who gave evidence at trial saw no commercial utility in a forwarder issuing house bills of lading in identical terms to the ocean bills and ventured that the practice of signing a house bill of lading 'as agent only' for a named ocean carrier, without authority from the carrier, was "not standard practice in the freight forwarding industry."<sup>75</sup>

The first instance judgment contained a useful description of 'usual practice' in the China trade when a negotiable house bill is issued by a freight forwarder, based on the consensus of those expert witnesses. The elements of usual practice were said to be: a) the forwarder names the consignee as 'to order' in the house bill; b) 3 copies of the house bill are stamped 'original' and handed by the forwarder to the shipper (together with 3 non-negotiable copies); c) the 3 original house bills are then endorsed by the seller/shipper and either negotiated through the banking system or released to the consignee after payment is made for the goods; d) the buyer/consignee then presents one of the 'original' copies of the house bill to the forwarder or its agent in China; e) the forwarder or its agent then presents the original ocean bill of lading to the ocean carrier, who issues a delivery order to the party presenting the ocean bill; f) the delivery order is used to collect the goods at the terminal.<sup>76</sup>

## 6 The Breach Of Warranty Of Authority Findings

One of the causes of action pleaded by the plaintiff in *CRO* was breach of warranty of authority. This remedy was seen in operation in an Australian shipping law context in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd*.<sup>77</sup> There, a shipbroker falsely warranted that it had authority to negotiate and conclude a charterparty on behalf of a particular charterer. Finkelstein J described the cause of action as follows:

... where a person (the first person) falsely represents that he has authority to act on behalf of another person in a particular transaction and the person to whom the representation is made (the second person) is induced to act on the faith of the representation and suffers loss, the second person may recover the amount of the loss from the first person in an action for breach of a collateral contract.<sup>78</sup>

At first instance in *CRO* the defendant forwarder was held liable on the breach of warranty of authority cause of action because its bills of lading "purported to evidence a contract of carriage between the shipper and the defendant as an agent for the various ocean carriers"<sup>79</sup> and it "purported to execute each bill of lading as agent for the ocean carrier, without having authority from any of the ocean carriers."<sup>80</sup>

The forwarder argued that the normal operation of breach of warranty of authority is that the person to whom the warranty is given must be the other party to the purported contract. However, reference was made to a principle established in *Firbank's Executors v Humphreys* where Lord Esher said:

It is not necessary for the plaintiff to enter into a transaction with the supposed principal in order to establish an action for breach of warranty of authority. The cause of action is established even if the plaintiff enters into a transaction with another person.<sup>81</sup>

<sup>73</sup> Girvin S, *Carriage of Goods by Sea* (2<sup>nd</sup> Edition, Oxford University Press, Oxford, 2011) [3.19], cited by Ward JA in *CRO*, above n 1, [50].

<sup>74</sup> *CRO*, above n 1, [47].

<sup>75</sup> *Ibid* [61].

<sup>76</sup> *Freight Solutions*, above n 55, [87].

<sup>77</sup> [2009] FCA 1087. This case is hereinafter referred to as "*BHPB Freight*".

<sup>78</sup> *Ibid* [40] (Finkelstein J). Note that the remedy is available even if the first person acted in good faith.

<sup>79</sup> *Freight Solutions*, above n 55, [176].

<sup>80</sup> *Ibid* [177].

<sup>81</sup> *Ibid* [113], referencing *Firbank's Executors v Humphreys* (1886) 18 QBD 54, 60.

Judge Russell saw that it was appropriate to significantly extend this principle by applying the cause of action to a person who later comes into possession of a negotiable bill of lading, which constitutes a document of title for goods. It was observed that one of the characteristics of a bill of lading is that its “creation, issuing and delivery” mean that “a commercial document is put into the world which can end up in the hands of third parties”.<sup>82</sup>

A person who is given possession of a bill of lading, even though they did not have the warranty of authority conveyed directly to them, has a document of title purportedly signed by an agent for the carrier, and execution in that fashion carries with it a warranty of authority which is made not only to the original recipient of the bill, but to any person who subsequently comes into possession of the bill.<sup>83</sup>

The District Court held that “a cause of action for breach of warranty of authority is available even if the plaintiff enters into a transaction with another person, rather than with the agent who misstated the extent of their authority.”<sup>84</sup>

One of the grounds of appeal in *CRO* was that the judge at first instance erred in finding breach of warranty of authority was a cause of the respondent ACFM lending moneys (which it would not have lent but for the breach). The appellant forwarder argued that it was not this breach that had caused the respondent loss.<sup>85</sup>

A feature of the law relating to breach of warranty of authority is that it is necessary to ask, for the purposes of assessing damages for breach, “what would have happened if the purported agent had the authority it held itself out to have?”<sup>86</sup> The normal measure of damages for breach of warranty of authority is the contractual measure: “the difference in the position the plaintiff would have been in had the representation been true and the position he is actually in, in consequence of it being untrue.”<sup>87</sup> There can be no finding of loss if the transaction is unenforceable against the principal.<sup>88</sup>

The primary judge had found, as a matter of fact, that it was probable ACFM would have received the required endorsement if it had called for it.<sup>89</sup> Therefore it was necessary for the Court of Appeal to consider whether the ocean carrier would have had a defence to a claim for delivery of the goods had ACFM presented *CRO*’s original bill of lading to it (assuming authority existed).

The consideration of these grounds of appeal gave rise to complex questions as to whether the respondent held a possessory pledgee’s lien;<sup>90</sup> whether ACFM had complied with the statutory precondition, under the *Sea Carriage Documents Act 1997* (NSW), for it to become the lawful holder of the bills of lading;<sup>91</sup> whether ACFM would have sought and obtained endorsement had it proceeded with a claim for misdelivery at an earlier relevant time (and whether the sea carrier could have been susceptible to an action for misdelivery of the goods based on lack of endorsement);<sup>92</sup> whether a financier has a claim in conversion in respect of bills which became bearer bills by endorsement in blank;<sup>93</sup> and whether the transfer of possession of the *CRO* bills of lading from the exporter ASSH to ACFM was enforceable in equity (under circumstances where the statutory conditions for transfer of the rights of a holder of a bill of lading have not been satisfied).<sup>94</sup>

The Court of Appeal ultimately held that “if the *CRO* bills of lading had been issued with authority, ACFM would have had a sufficient interest in the goods to sue the carrier, by reason of its possession of the bills (as the holder of a possessor pledgee’s lien)”<sup>95</sup> and saw this as sufficient to support the primary judge’s award of damages for breach of warranty of authority.

It accepted that, if the *CRO* bills had been issued with authority, ACFM would have had a perfected pledge of the goods,<sup>96</sup> and that the respondent would have been entitled to demand delivery of the goods from carriers who

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<sup>82</sup> Ibid [115].

<sup>83</sup> Ibid [116].

<sup>84</sup> Ibid [178].

<sup>85</sup> *CRO*, above n 1, [85].

<sup>86</sup> *V/O Rasnoimport v Guthrie & Co Ltd* [1966] 1 Lloyd’s Law Rep 1, 14.

<sup>87</sup> *Firbank’s Executors v Humphreys*, above n 81, 60.

<sup>88</sup> Reynolds F, *Bowstead and Reynolds on Agency* (21<sup>st</sup> Edition, Sweet & Maxwell, London, 2018) cited at *CRO*, above n 1, [164].

<sup>89</sup> *Freight Solutions*, above n 55, [167], [152-4].

<sup>90</sup> *CRO*, above n 1, [236], [237].

<sup>91</sup> Ibid [174].

<sup>92</sup> Ibid [174], [175].

<sup>93</sup> Ibid [182].

<sup>94</sup> Ibid [202].

<sup>95</sup> Ibid [235].

<sup>96</sup> Ibid [236].

would have been a party to the appellant's bill of lading (assuming that the appellant had authority to bind the ocean carriers).<sup>97</sup> It was also concluded that ASSH "intended to pledge the CRO bills of lading as security for its drawdowns; and, if CRO had had the authority which it warranted it had, ACFM would have been able to sue the carrier based on its possessory interest in the goods."<sup>98</sup>

It is difficult to feel entirely comfortable with the chain of logic applied in the findings on breach of warranty of authority in *CRO* given the stack of hypotheticals upon which liability was constructed. Nevertheless, the analysis of the Court of Appeal is in line with the established precedents in this area of law. As a result of the Court of Appeal's decision, the breach of warranty of authority remedy has been strengthened as a weapon in Australian maritime law disputes.

## 7 The Misleading or Deceptive Conduct Findings

The second cause of action successfully argued in *CRO* was misleading or deceptive conduct under the *Competition and Consumer Act 2010* (Cth), entitling the plaintiff to recover the amount of its loss or damage against the defendant under s 236 of the *Australian Consumer Law*.<sup>99</sup> The provision breached was s 18(1) of the *Australian Consumer Law* which provides: "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

At first instance, the District Court found that, by issuing bills of lading which purported to evidence a contract of carriage between the shipper and the defendant as an agent for various ocean carriers, "the defendant represented that each bill of lading was a negotiable instrument providing an entitlement to each successive lawful holder of the bill to present the bill of lading to obtain delivery of the goods."<sup>100</sup> Liability was grounded on three key findings: in fact, the house bills were issued without actual authority from the ocean carriers;<sup>101</sup> on the evidence, the plaintiff relied upon the bills as original negotiable bills of lading (as they appeared to be on their face);<sup>102</sup> and the conduct of the defendant in issuing the bills was the dominant cause of loss suffered by the plaintiff.<sup>103</sup>

When the matter was considered by the Court of Appeal, Ward JA summarised three key conclusions of Judge Russell at first instance with respect to the misleading and deceptive conduct claim:

... that the CRO bills of lading conveyed a representation that gave the holder a right to delivery of the goods from the carrier, which representation was conveyed by each bill of lading stating that it was original and because the cargo was assigned 'To Order'; that the form of the bills of lading represented that they could be held by a third party as security; and that CRO placed into the world two negotiable bills of lading which purported to confer a right to obtain delivery of the same goods by presentation of either document to the carrier.<sup>104</sup>

The conduct held to be misleading and deceptive at first instance was "the issue of the CRO bills, expressly as agent for the carriers, with the knowledge that persons in the commercial world would rely on them taking effect in that way, and at the same time also circulating ocean bills of lading for the same cargo."<sup>105</sup> Ward JA expressed the finding of the primary judge as follows:

... a false meaning was conveyed by the bills of lading issued by CRO: first, that they were ocean bills of lading issued by CRO in its capacity as authorised agent of each ocean carrier; and second, that by being specifically stated to be 'ORIGINAL' and 'TO ORDER' they purported to be ocean bills of lading which would have entitled the lawful holder to possession of the goods the subject of the bill.<sup>106</sup>

One of the grounds of appeal to the Court of Appeal asserted that the trial judge had erred in making this finding. This was rejected. Whether conduct is misleading or deceptive in the sense of inducing or being capable of inducing error was said to be a question of fact to be determined in the context of the conduct and the surrounding facts and circumstances, with a focus on the impact of the impugned conduct on the person alleged to have been

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<sup>97</sup> Ibid [86].

<sup>98</sup> Ibid [249].

<sup>99</sup> The *ACL* is contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

<sup>100</sup> *Freight Solutions*, above n 55, [164].

<sup>101</sup> Ibid [78], [87].

<sup>102</sup> Ibid [172].

<sup>103</sup> Ibid [172], [173].

<sup>104</sup> *CRO*, above n 1, [78], referring to [156], [164], [165], [169] and [170] of *Freight Solutions*, above n 55.

<sup>105</sup> *Freight Solutions*, above n 55, [132].

<sup>106</sup> *CRO*, above n 1, [80], referring to *Freight Solutions*, above n 55, [169].

misled or deceived.<sup>107</sup> Ward JA saw that the misrepresentation in this case was not merely by the documents alone, “it was the conduct involved in putting two sets of bills of lading into the commercial system.”<sup>108</sup>

## 8 Implications of the Widening Web

Causes of action under the *CCA* are now routinely pleaded in Australian maritime litigation.<sup>109</sup> The *CRO* case clearly demonstrates how actions of a forwarder can breach the Act’s misleading or deceptive conduct provisions. Claims against forwarders under s 18(1) of the *Australian Consumer Law* can be expected to become commonplace. The broad application of the misleading or deceptive conduct remedy<sup>110</sup> has potentially significant implications for freight forwarders, and could prove to be commercially problematic.

Stated simply the problem is this: an experienced financier of international trade, receiving as security for a loan a set of house bills issued by a freight forwarder purporting to be negotiable documents of title, might reasonably be expected to inquire “what happened to the original bills issued by the sea carrier?” and to bear some consequence for failing to make such inquiries.

The NSW Court of Appeal saw things differently. It saw “that it is reasonable for a commercial party to assume that an original negotiable bill of lading is the only such bill of lading and controls the right to delivery of the goods.”<sup>111</sup> The Court concurred with a submission of the respondent ACFM that “no commercial party would contemplate the existence of two original negotiable bills of lading on different forms in circulation in respect of the same goods” and rejected the forwarder’s submission that “no reasonable person” would have made the assumptions that Mr Chen made relating to the bills of lading.<sup>112</sup>

With respect, the law reports are replete with examples of different versions of original negotiable bills of lading on different forms finding their way into circulation.<sup>113</sup> Experienced practitioners in the logistics, freight forwarding and banking sectors might be expected to be alert to this possibility, especially given the known complexity (demonstrated in Section 3 of this article) of determining whether a forwarder should be regarded as agent or principal.

The outcome in *CRO* is an illustration of increased exposure that forwarders face, by virtue of the application of the misleading or deceptive conduct remedy, to inexperience, lack of diligence or straight incompetence on the part of parties they issue documents to (or subsequent assignees of negotiable documents). As *CRO* shows, freight forwarders’ exposure to risk increases where an eventual possessor of a house bill of lading is as lacking in knowledge of the technicalities of international trade as was the plaintiff financier in this case. They must take their “subsequent bill possessor” as they find them.

In the first instance decision, Judge Russell bolstered his findings by reference to a dictum of Gleeson CJ in the High Court case *Henville v Walker*: that the purpose of the legislation now contained in the *Australian Consumer Law* “is not restricted to the protection of the careful or the astute.”<sup>114</sup>

A prudent and experienced trade financier should have been able to recognise documentary risks associated with the house bills issued in this case. Davies and Dickey’s frequently relied-upon text on Australian shipping law plainly states that “a consignment note or a house bill of lading ... is not a true bill of lading when the forwarder acts merely as an agent”<sup>115</sup> and there are similar comments in the maritime law ‘bible’ in this field, *Scrutton*.<sup>116</sup> The house bills presented to ACFM by its exporter customer under the contract between them (to which the forwarder was not a party) did not constitute bearer bills of lading entitling the holder to call for possession of the

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<sup>107</sup> *CRO*, above n 1, [121].

<sup>108</sup> *Ibid* [124].

<sup>109</sup> See, for example, *BHPB Freight*, above n 77 where s 52 of the then *Trade Practices Act 1974* (Cth) (hereinafter referred to as the “*TPA*”) was successfully made out based on the defendant’s false representation it had authority to negotiate a charterparty. This provision was also in issue in *Comalco*, above n 45, where there was extensive analysis of the forwarder’s competence to do the job properly.

<sup>110</sup> This may be viewed as an example of the kind of ‘one way ratchet’ of legislative creep vis a vis traditional common law remedies Stevens warns of, speculating that “although it may occasionally slip backward in the face of particularly vocal public protest, over the course of time [this creep] remorselessly tightens its grip”: Stevens R, *Torts and Rights* (Oxford University Press, Oxford, 2007) 1.

<sup>111</sup> *CRO*, above n 1, [139].

<sup>112</sup> *Ibid* [114], [139].

<sup>113</sup> For example, *The Lycaon* [1983] 2 Lloyd’s Rep 39; *Victor Sohne v British and Africa Steam Navigation Co* (1888) W.N. 84.

<sup>114</sup> *Henville v Walker* [2001] HCA 52; 206 CLR 459 [13], cited in *ACFM*, above n 1, [105].

<sup>115</sup> Davies and Dickey, above n 4, 360.

<sup>116</sup> Eder, above n 10, 457.

goods,<sup>117</sup> nor had the plaintiff appreciated at the time of its extending loan funds to the exporter that it had need to “perfect” the negotiability of bills by obtaining endorsements on the documents from the exporter.<sup>118</sup>

The courts in *CRO* did not require the plaintiff ACFM, even though it was in the business of trade finance, to be alert to the subtleties associated with freight forwarder bills of lading. Although it was common ground in the case that the forwarder was acting as an agent rather than a principal, and a root cause of the losses experienced by ACFM was a series of mistaken beliefs it held about the legal status of the house bills issued, the forwarder was liable for the consequences of the third party financier relying on its bills of lading as negotiable documents.

It would appear that forwarders have become exposed to the vagaries of a fast-developing laissez-faire lending market, in which many lenders have not set themselves up with access to the kind of well-seasoned trade finance expertise which once attended major institutional banks and trading houses. This is a potentially precarious position, because forwarders are powerless to influence or control where their exporter customers go to obtain trade finance.

A potential avenue for mitigating these exposures is s 137B of the *Competition and Consumer Act 2010* (Cth). This provides that where a claim is made for economic loss caused by the defendant’s contravention of s 18 of the *Australian Consumer Law*, damages “may be reduced to the extent to which a court thinks just and equitable having regard to the claimant’s share in the responsibility for the loss or damage.” The rationale for this provision is similar to that for common law contributory negligence.<sup>119</sup> The provision was not invoked in *CRO*.<sup>120</sup> It would have had limited effect, in any event, because no equivalent reduction in liability was available in relation to the alternate breach of warranty of authority claim.

The finding of complete liability for the forwarder in *CRO* was onerous, given the inadequacies of the plaintiff lender’s inquiries, which were highlighted in the District Court judgment. Damages of in excess of \$800,000 were awarded (inclusive of interest) for each of the warranty of authority and misleading or deceptive conduct breaches.<sup>121</sup>

However, the courts which heard this matter took the view that it was the agent forwarder which should bear the financial consequences of the financier’s naivety and the apparent misdeeds of a rogue commercial party, due to the forwarder’s loose documentary practices. A critical factor in the outcome of *CRO* appears to have been the courts’ disapproval of the commercial conduct of the forwarder in its interactions with its customer. Judge Russell noted that “the purpose of the defendant in issuing its bills of lading remains unexplained”<sup>122</sup> and that “the defendant knew that its bills were going to be used for banking purposes.”<sup>123</sup> The Court of Appeal took a dim view of the forwarder’s action in “putting into the world two sets of negotiable documents in respect of the same goods,” one set of which purported to have - but actually lacked - the authority of the ocean carrier.<sup>124</sup>

The courts’ disapproval of the specific conduct of the forwarder shaped the outcome of this case, but the resulting precedent will drive a commercially inconvenient need for freight forwarders in general to, in the future, exercise greater documentary vigilance.

## 9 A Side Issue: Section 60 of the Australian Consumer Law

In the case of consumer transactions (for services valued under \$40,000),<sup>125</sup> there is potential for s 60 of the *Australian Consumer Law* to be pleaded in actions against freight forwarders. This provides that “if a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with

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<sup>117</sup> *Freight Solutions*, above n 55, [75]. Nor was it a “proper negotiable bill” – Ibid [77].

<sup>118</sup> Ibid [170].

<sup>119</sup> The High Court contributory negligence authorities have been applied in the interpretation of s 137B. See *Valcorp Australia Pty Ltd v Angas Securities Ltd* [2012] FCAFC 22, discussed in Clarke G, ‘Misleading or Deceptive Conduct Cases – Remedies,’ October 2014, viewable at the *List A Barristers* website: <http://barristers.com.au/wp-content/uploads/2014/11/Misleading-or-Deceptive-Conduct-Cases-Remedies.pdf> (accessed 20 November 2017).

<sup>120</sup> Note, however, that the predecessor provision, s 82(1B) of the *TPA* was invoked in *BHPB Freight*, above n 77, [57].

<sup>121</sup> *Freight Solutions*, above n 55, [199]. It was made clear the plaintiff was only entitled to one recovery, as there was overlap between the two damages figures

<sup>122</sup> Ibid [146].

<sup>123</sup> Ibid [160].

<sup>124</sup> Ibid [111].

<sup>125</sup> The dollar limit applies by virtue of ss 4B(1) and (2) of the *Competition and Consumer Act 2010* (Cth). Section 60 can potentially apply where the freight payable under a contract is less than \$40,000.

due care and skill”.<sup>126</sup> Attempts to exclude this duty are potentially void by virtue of s 64(1) of the *Australian Consumer Law*<sup>127</sup> which purports to take away a contracting party’s ability to rely on any exclusion of liability within its own terms and conditions if there has been a failure to render services with due care and skill.

However, it is likely the “due care and skill” provision will be generally inapplicable to the context of freight forwarding, based on an interesting tussle in the *Comalco* case about the interpretation of s 74(3)(a) of the former *TPA*. This provision said that:

A reference in [the due care and skill provision] to services does not include a reference to services that are, or are to be, provided, granted or conferred under a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored.

Counsel for Mogal submitted that the due care and skill provision had no application to the circumstances of the case because the contract between the parties was a contract for or in relation to the transportation of goods for the purpose of a business or trade. In response, Comalco argued that the contract between Comalco and Mogal was not one essentially or solely for the transportation of goods, that it was a contract that had “a number of aspects” one of which was that Mogal would securely pack the coils into containers and that the agreement was accordingly not “a contract for the transportation of goods” but “a contract for packing them”.<sup>128</sup>

Sheppard J rejected Comalco’s submissions and found that the proper approach to the construction of the words “a contract for or in relation to the transportation ... of goods for the purposes of a business, trade” was “to construe the expression broadly and in a commonsense and commercial way.” The purpose of the contract was to secure the movement of aluminium coils from Sydney to Auckland; the picking up of the coils from Comalco’s premises, the carriage of them to Mogal’s depot, the packing of them into containers and the carriage of the containers to the wharf for loading were “necessary incidents” of the contract. Therefore, it was “not right to split the contract up” and it was plainly a contract for the transportation of goods and such contracts were excluded from the operation of the due care and skill provision.<sup>129</sup>

Section 74(3)(a) of the *TPA* has been transplanted into the *Australian Consumer Law*<sup>130</sup> but there is some potential for the issues debated in *Comalco* to be re-litigated in a circumstance where a forwarder has provided services which are at the periphery of activities that can be described as “transportation”. This would present an interesting opportunity to test the robustness of statutory liability principles around “due care and skill” which were originally developed in the context of everyday consumer transactions, when applied to the context of international sale of goods.

## 10 Conclusion: Documentation and Blockchain

A number of lessons can be drawn from the *CRO* case. The first lesson concerns documentary management processes and systems. It is vitally important that strict processes are implemented around the issue of house bills by forwarders, and adhered to. One perspective, that of the firm of solicitors which represented the successful party in *CRO*, is that “freight forwarders should *never* issue separate house bills of lading if the ocean carriers have issued negotiable bills for the same shipment.”<sup>131</sup> This would be a highly precautionary approach.

Some forwarders will prefer to avoid the issue of house bills altogether, if according to their preferred business model they seek to act only as agents in relation to their customers (avoiding the risk of being found to have acted as a principal). However, as was discussed in Section 2 above, the generally wide operation which the courts give to contractual exclusion clauses can mean that, by including appropriately crafted clauses in documents issued to clients, a forwarder may elect to act as a principal carrier and yet avoid any substantial exposure for loss of or damage to cargo. From a marketing perspective, some forwarders will continue to see competitive advantage in issuing ‘combined transport’ documents and being seen to have embraced the contractual responsibilities of a principal throughout the entire transit of their customers’ cargoes.

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<sup>126</sup> The precursor of this section was s74 of the *TPA*, the potential application of which (in the context of bailment) was discussed in Lewins K, ‘Sub-Bailment on Terms and the Australian Consumer’ [2002] *MurUEJL* 37, [27]-[30].

<sup>127</sup> Formerly s 68 of the *TPA*.

<sup>128</sup> *Comalco*, above n 45, [49].

<sup>129</sup> *Ibid* [50].

<sup>130</sup> The provision is now s 63(a) of the *Australian Consumer Law*.

<sup>131</sup> See Hunt F, ‘The elephant in the room – a cautionary tale for freight forwarders’ in *Daily Commercial News*, October 20, 2017, viewable at <http://www.thedcn.com.au/industry-opinion-the-elephant-in-the-room-a-cautionary-tale-for-freight-forwarders/> (accessed 30 July 2018).

A second, quite obvious, lesson is the need for freight forwarders to ensure they obtain explicit carrier authority for their actions as agents, and that records be kept of this authority. This can be easily achieved utilising modern means of communication and record-keeping. The forwarder in *CRO* left itself wide open to liability by virtue of its inattention to sound documentary practices, and in particular its preparedness to sign house bills marked ‘for and on behalf of the carrier’ when it had not in fact taken steps to secure authority from the sea carriers to sign in this way.

Third, it is imperative to avoid the simultaneous and competing circulation of two sets of bills of lading – one set issued by an ocean carrier, and another issued by a forwarder – covering the same cargo. Prudent forwarders issuing potentially negotiable house bills will pay careful attention to maintaining the security of ocean bills in their possession.

Finally, it can be observed that the misadventures experienced in cases such as *CRO* will add momentum to the push for new documentary systems utilising ‘smart’ contract systems and blockchain<sup>132</sup> and distributed ledger technology systems.<sup>133</sup> Operators of e-bill of lading products<sup>134</sup> have reported strong growth in the use of their platforms over recent years, promising to provide “open, quick, secure and cheap solutions to the mass of documents that accompany each container load of goods.”<sup>135</sup>

There is a need for new legal infrastructure to enable, and to regulate, blockchain in a shipping context. Development of an internationally uniform legal framework is required to enable the secure use of e-bills, and equip them with the same functions as paper bills of lading<sup>136</sup>. A myriad of issues remain to be overcome. For example, key trading nations including India and Indonesia currently require high degrees of formality in shipping documentation.

A major impediment is the fact the *Hague* and *Hague-Visby Rules*, which dictate the main cargo liability regimes in international carriage documentation, pre-dated e-commerce. The more recently drafted UN *Convention on Contracts for the International Carriage of Goods by Sea 2008* (the *Rotterdam Rules*) were drafted with electronic commerce and e-bills in mind and offer a potential alternative regime, but only four nation states have ratified them to date. A concerted effort is needed by participants across the transport chain to encourage additional ratifications by national governments.<sup>137</sup>

The rewards from attending to these issues are potentially great. Blockchain can be a means of overcoming a range of risks inherent in paper-based documentary processes, including the risk of circulation of competing sets of bills of lading.

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<sup>132</sup> “A blockchain is a digital, distributed ledger, with identical copies maintained on multiple computer systems controlled by different entities”: Schatsky D and Muraskin C, *Beyond Bitcoin: Blockchain is Coming to Disrupt Your Industry* (Deloitte University Press, 2015).

<sup>133</sup> See the following publications of law firm Norton Rose Fulbright (accessed 30 July 2018): <http://www.nortonrosefulbright.com/knowledge/publications/163699/emhouse-v-oceanem-the-complexities-of-bills-of-lading> and <http://www.nortonrosefulbright.com/knowledge/publications/163594/e-bills-of-lading>

<sup>134</sup> For instance, ess-DOCS and BOLERO are examples of “closed systems for the secure transport of electronic shipping documents between subscribing parties”: Eder, above n 10, 98.

<sup>135</sup> See <https://fairplay.ihs.com/technology/article/4297901/blockchain-is-shipping-prepared> (accessed 30 July 2018).

<sup>136</sup> The capacity to fulfil the first two functions of a bill of lading – as the receipt for goods shipped and evidence of the contract of carriage – seems well established, but much work remains to be done to securely endow the document of title function. See Van Maanen M and Regtien I, *E-bills of lading* at <https://www.lexology.com/library/detail.aspx?g=453d225f-ca8b-404f-9b39-f39f4f0a7b90> (accessed 30 July 2018). See also Gaskell N, *Bills of Lading in an Electronic Age* [2010] LMCLQ 233.

<sup>137</sup> See *Letters to Presidents of Maritime Law Associations* from the President of the Comité Maritime International dated 21 May 2018 at <http://www.comitemaritime.org/Uploads/Correspondence%20President/May%202018/Letter%20to%20Presidents%20re%20Rotterdam%20Rules%20-%20210518.pdf> (accessed 30 July 2018).