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Misdelivery under Forged Bills and Misdelivery in the absence of Original Bills and Exemption Clauses

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Introduction

A transport document has two basic functions. The first is to evidence receipt of the goods by the carrier. The second is to evidence the terms of the contract of carriage. In the case of a negotiable bill of lading, it also has a third function of acting as a document of title. The last is most important where a bank intends to look to its possession of documents for security.

A bill will only operate as a document of title if it is drafted as an 'order' bill, ie a bill order which the carrier agrees to deliver the goods at their destination to a named consignee or to his 'order or assigns'. A negotiable bill of lading¹ is attractive as security for a commercial credit and the holder of the bill may transfer a good title to the goods during transit. This article will focus on the issues of misdelivery under 'order' bills.

While 'order' bills are transferable by endorsement, they are not technically negotiable instruments, since a bona fide transferee gets no better title to the goods covered by the bill than was held by the transferor. The bill merely 'represents' the goods and possession of the bill of lading is treated as equivalent to possession of the goods covered by it – no more,

¹ A brief consideration of what is a bill of lading is found in *Sasoon on CIF and FOB Contracts* ((3rd edn) British Shipping Laws Vol 5, para 132) which states: 'A bill of lading is a document which is signed by the carrier or his agent acknowledging that goods have been shipped on board a particular vessel bound for a particular destination and stating the terms on which the goods so received are to be carried.'

no less. In the colourful words of Bowen LJ in *Sanders v Maclean*²

‘A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading, by the law merchant, is universally recognised as its symbol and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods... it is the key which, in hands of the rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.

There are three purposes for which possession of the bill may be regarded as equivalent to possession of the goods covered by it:

- a) The holder of the bill is entitled to delivery of the goods at the port of discharge.
- b) The holder can transfer the ownership of the goods during transit merely by endorsing the bill.
- c) The bill can be used as security for a debt.³

It is of the essence of the nature of a bill of lading contract that a shipowner is both entitled and bound to deliver the goods against production of an original bill of lading, provided he has no notice of any other claim or better title to the goods.⁴ Once a bill of lading has been issued, only a holder of the bill can demand delivery of the goods at the port of discharge ‘because of the existence of this principle that a bill of

² (1883) 11 QBD 327 at 341.

³ Wilson JF, *Carriage of Goods by Sea*, 3rd Edn, Pitman Publishing, 136.

⁴ See *Glyn Mills Currie & Co. v. East and West India Dock Company*, 1882, 7 App Cas 591; *The Stettin*, 1899 14 PGD 142; *Carlberg v. Wemyss*, [1915] SC 616 at 624; *Sze Hai Tong Bank Ltd, v Rambler Cycle Co Ltd*, [1959] 2 Lloyd’s Law Report 114; [1959] AC 576; *Barclays Bank Ltd. v Commissioners of Customs and Excise* [1963] 1 Lloyd’s Law Report 81, and most recently *Kuwait Petroleum Corporation v KD Oil Carriers Limited, (The Houda)* [1994] 2 Lloyd’s Law Report 541, see especially at 550, 552-553 and 556.

lading can be used as a document of title so that the transfer of the document transfers also the right to demand the cargo from the ship at discharge.⁵

Once the master has signed a bill of lading and parted with it, he has subjected the shipowners to a contractual obligation enforceable at the suit of any person to whom the bill of lading has been negotiated to deliver the cargo to any person to whom the bill of lading has been negotiated or any other persons so direct.⁶ The master takes an obvious risk if he delivers the goods without production of the bill of lading. He does not obtain a good discharge unless the person to whom he delivers is the person entitled to them. However, the master has no means of satisfying himself that that person is so entitled unless that person produces the bill of lading. As Lord Denning said in *Sze Hai Tong Bank v Rambler Cycle*,⁷

‘It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under bill of lading... The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected.’

A true owner cannot in the absence of some special arrangement *oblige* a shipowner to deliver his goods to him without presenting his bill of lading: either he must have agreed in his contract with the shipowner that an indemnity will suffice, or he must persuade the shipowner to deliver

⁵ *Kuwait Petroleum Corporation v I & D Oil Carriers Limited, (The Houda)* [1994] 2 Lloyd’s Law Report 541 Lord Justice Neill at 550.

⁶ *Kuwait Petroleum Corporation v I & D Oil Carriers Limited (The Houda)* [1994] 2 Lloyd’s Law Report 541, Lord Justice Millet at 556.

⁷ [1959] 2 Lloyd’s Rep 114; [1959] AC 576

against an indemnity, or he must seek the assistance of the Court. In practice, where the goods' owner has a reasonable explanation for the absence of his bill of lading plus a suitable indemnity provided by a bank, it will likely satisfy the shipowner.⁸

Misdelivery under forged bills of lading

A forged bill of lading is in the eyes of the law a nullity. It is simply a piece of paper with writing on it, which has no effect whatever. Delivery of the goods upon production of a forged bill of lading is therefore in exchange for a worthless piece of paper and not for the original bill of lading. Two forms of questions will arise from misdelivery under a forged bill of lading: first, is a shipowner entitled to deliver against a forged bill of lading?; second, can a shipowner be obliged to deliver against a forged bill of lading?

If the forgery is known or suspected or if the shipowner is on notice of the possibility of forgery, the answer to both questions must be 'no'. If the forgery cannot reasonably be detected, it was held, *in obita*,⁹ that should a shipowner obstinately refuses to deliver against the forged bill, despite his ignorance of the deception, he cannot be liable for that refusal to the holder of the forged bill. He may have acted in ignorance, but he acted correctly. He is justified in his refusal by the fact of forgery.

If the forgery cannot reasonably be detected and the shipowner has released the goods upon production of a forged bill of lading, will the shipowner be liable? It was held¹⁰ that the shipowner will be liable. The issue is one of risk: a shipowner issues bills of lading to serve as the key to the goods and ought usually to be well-placed to recognize his own bills of lading. A bill of lading serves an important general role in representing and securing both title to and physical possession of goods.

Has the shipowner a defence in delivering, against a forged bill, in

⁸ *Motis Exports Limited v Dampskibsselskabet AF 1912* (The Motis), [1999] 1 Lloyd's Rep 837 at 842 (Mr Justice Rix)

⁹ [1999] 1 Lloyd's Rep 837 at p842 (Mr Justice Rix)

¹⁰ [2000] 1 Lloyd's Rep 211 at p217, Mance LJ

ignorance of the forgery? If a shipowner was entitled to deliver goods against a forged bill of lading, then the integrity of the bill as the key to a floating warehouse will be lost. Moreover, as between shipowner and the goods' owner, it is the shipowner who controls the form, signature and issue of his bills, even if as a matter of practice, he may delegate much of that to his charterers or their agents. If one of two innocent people must suffer for the fraud of a third, it is better that the loss falls on the shipowner, whose responsibility it is both to look to the integrity of his bills and to care for the cargo in this possession and to deliver it aright, rather than on the true goods' owner, who holds a valid bill and expects to receive his goods in return for it.

It is therefore, no defence for a shipowner to be deceived innocently into releasing a cargo by the production of a forged bill of lading.

In *Motis Exports Limited v Dampskibsselskabet AF 1912*¹¹ the plaintiff was the shipper of various consignments of goods under a number of Maersk Line bills of lading at ports in China and Hong Kong in July and August, 1996 and January, 1997. The goods were carried to Cotonou and Abidjan in West Africa on the vessels owned or operated by the two defendants who together ran a liner service under the name of 'Maersk Line'. The issue for the court to decide was whether the defendants were liable for the loss of the goods after discharge from their vessel, where the cause of the loss was the use of forged bills of lading to obtain delivery orders in respect of and thus delivery of the goods at the discharge ports.

The defendant relied upon an exclusion clause which provided as follows:

5 Carrier's Responsibility

...3. Carriage to and from Countries other than USA...

(b) Where the carriage called for commences at the port of loading and/or finishes at the port of discharge, the Carrier shall have no liability whatsoever for any loss or damage to the goods while in its actual or constructive possession before loading or after discharge over ship's rail, or if applicable, on the ship's ramp, however caused.

The necessary defence was, if the goods were lost to the plaintiffs, the

¹¹ Ibid 211 [1999] 1 Lloyd's Rep 837

losses occurred some time after the goods had been passed over the ship's rail at the port(s) of discharge when they were delivered against the aforesaid delivery orders as a result of the criminal deception and fraud practised upon the defendants' agents. As the goods had been lost by such deception and/or theft, by virtue of Clause 5 (3)(b) of the Bills of Lading, the defendant submitted that they were under no liability whatsoever in respect of such loss of the goods. The defendant submitted that this was 'loss' of the goods within the same clause just as much as if the goods had been stolen out of the possession of the shipowners after discharge and indeed it could have been regarded as theft.

It was held that the shipowners' construction of Clause 5(3)(b) of that bill of lading would appear to go the extreme of protecting against any misdelivery, however negligent, and to undervalue the importance which both parties must be taken to have attached to the ship's obligation to deliver against presentation of original bills of lading.

So far as the owner of the goods is concerned, there is little difference between theft of the goods by taking them without consent of the bailee and delivery with his consent where the consent is obtained by fraud. It was held by the Court of Appeal in *Motis* that 'the natural subject-matter of Clause 5(3)(b) consists in loss or damage caused to the goods while in the carrier's custody, but not deliberate delivery up of the goods, whether without any bill of lading or against a forged and therefore null document believed to be a bill of lading'. It was further held that Clause 5(3)(b) was 'not apt on its natural meaning to cover delivery by the carrier or his agent, albeit the delivery was obtained by fraud.' Even if the language was apt to cover such a case, it was not a construction which should be adopted since such construction will involve excusing the shipowner from performing an obligation of such fundamental importance: delivery of goods only upon production of original bill of lading. As a matter of construction, the Court lean against such a result 'if adequate content can be given to the clause.' The shipowners' construction of Clause 5(3)(b) appear to go to the extreme of protecting against misdelivery, however negligent, and to undervalue the importance which both the shipowner and the cargo owner must be taken to have attached to the ship's obligation to deliver against presentation of original bills of lading. It was further said *in obitert*, that "... an appropriately worded clause" could have been devised to protect the carrier, but if the shipowner wanted to have protection against production of forged bills, it could seem that an express

reference would almost certainly be necessary. Anything less than an express reference would probably fail because of the court's unwillingness to excuse 'an obligation of such fundamental importance'.¹² However, Clause 5(3)(b) of that Bill of lading 'was not sufficiently clear'.¹³

Misdelivery in the absence of original bills

One of the key provisions of the bill of lading, so far as the shipper is concerned, is the promise not to deliver the cargo other than in return for an original bill of lading. The requirement to deliver the goods only against presentation of an original bill of lading is therefore one of the main objects of the contract. A shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. If the shipping company did not deliver the goods to any such person, they are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. If they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them, they are therefore liable in conversion unless likewise so protected. This principle protects the shipper from fraud and also protects the shipowner.

A shipowner is not bound to deliver goods except in exchange for the bill of lading. He is not bound to take on trust that he knows the consignee and that no intermediate rights had been created. Neither the owner, his agent, nor the master can be called upon to accept a banker's or any other guarantee of an indemnity, though such a thing is not unknown, and in the event of total loss of the bill of lading might have to be resorted to, if necessary at the sight of the court.

In practice, if the bill of lading is not available, delivery is effected against an indemnity. Where the bill of lading is lost, the remedy, in default of agreement, is to obtain an order of the Court upon tendering a sufficient indemnity. The loss of the bill of lading is not to be treated as a defence.

The extent to which an exemption clause may protect shipowners is to

¹² Gaskell N, *Bills of Lading: Law & Contracts*, LLP, 2000, 452.

¹³ *Motis* [2000] 1 Lloyd's Rep 216 and 217, Mance LJ

be examined here. The courts' approach to exemption clauses has always been that clear words would be required for the parties to be held to have contracted out of it. The clause should be construed so as to enable effect to be given to one of the main objects and intention of the contract, namely that the goods would only be delivered to the holder of an original bill of lading. As a matter of construction, it is permissible to limit the ambit of a particular clause in the light of that fact. In *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*¹⁴ the manufacturer shipped from England to Singapore bicycle parts under a bill of lading requiring the goods to be delivered 'unto order or his or their assigns', with the exemption clause therein provided that:

... the responsibility of the carrier... whether as carrier or as custodian or bailee of the goods ... shall be deemed... to cease absolutely after the goods are discharged from the ship. After discharge the carrier's agent released the goods to the consignee....

This is a classical standard 'before and after' clause devised by the shipowner trying to claim exemption from potential liability from shipowners. Lord Denning said¹⁵ :

'The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company complains, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea.... There is, therefore, an implied limitation on the clause, which cuts down the extreme width of it; and, as a matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for...But their Lordships go further.

¹⁴ [1959] 2 Lloyd's Rep 114; [1959] A C 576

¹⁵ Ibid 120-121; 586-588

If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract..., has, as one of its main objects, the proper delivery of the goods by the shipping company, “unto order or his or their assigns,” against production of the bill of lading.

It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract: see *Glynn v Margetson & Co*¹⁶; *GH Renton & Co Limited v Palmyra Trading Corporation of Panama*.¹⁷

To what extent is it necessary to limit or modify the clause? It must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery... deliberately disregarded one of the prime obligations of the contract. No Court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause...’

Lord Denning’s reference to fundamental breach cannot now stand in the light of the subsequent authorities.¹⁸ The ground of the decision, as subsequently explained by Lord Reid in the House of Lords¹⁹ was that:

‘...the clause must be limited and modified to the extent necessary to enable effect to be given to the main object and effect of the contract...’

¹⁶ *Glynn v Margetson & Co* [1893] AC 351 at 357

¹⁷ [1956] 1 QB 462 at 501; [1955] 2 Lloyd’s Rep 722 at 741

¹⁸ *Suisse Atlantique Societe d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1966] 1 Lloyd’s Rep 529; [1967] 1 A C 361 and *Photo Productions Ltd v Securicor Transport Ltd* [1980] 1 Lloyd’s Rep 545; [1980] A C 827

¹⁹ *Suisse Atlantique Societe d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1966] 1 Lloyd’s Rep 529 at 546, col. 1; [1967] 1 A.C. 361 at 401

Most of the delivery clauses in modern container bills of lading give wide rights to the carrier to deal with the goods where they have not been collected. These may well use the language of a 'cesser' of liability and purport to excuse for a wider variety of events than the standard 'before and after' clause. The express clauses often give the right to store the goods and to charge the costs of storage to the cargo interests. In some cases the costs of storage may be set out in the carrier's tariff. In addition to the storage costs, there may well be demurrage claims. Where there is no documentation available, for example, because the bill of lading is delayed in the banking system or no bill of lading has ever been issued, the costs incurred by the carrier (including unpaid freight) could well exceed the value of the goods themselves. The carrier may be faced with claims for delivery from a number of potential claimants in circumstances where it is not clear to whom delivery should be made. In such cases the carrier may decide to interplead and claim relief from the court. In general, the carrier would be entitled to claim that the costs of preserving the cargo and the legal costs of the interpleader relief. The carrier may retain any funds held by the carrier received, for example, where the cargo was sold. The carrier may also require such amount of sums to be paid as a condition of releasing the cargo, for example, to allow the cargo to be sold so as to minimise any future costs. It seems that where a carrier seeks interpleader relief, it can never be at risk of damages for conversion.

The provisions in the contract should be construed as not excluding the responsibility of the shipowners where they or their agents misdeliver the goods regardless of whether did so in deliberate and conscious disregard of the rights of the cargo owners.

The question is thus whether the words in any of the clauses relied upon are sufficient to excuse misdelivery of the goods after discharge.

In *The 'Ines'*²⁰, the exemption clause provides:

3. PERIOD OF RESPONSIBILITY

Goods in the custody of the carrier or his agent... before loading and after discharge... are in such custody at the sole risk of the owners of the goods and thus the carrier has no responsibility whatsoever for the goods prior to the loading on and subsequent to the discharge from the

²⁰ *MB Pyramid Sound MV v Briese Schiffaurts GmbH (The Ines)* [1995] Lloyd's Rep 144

ocean vessel...

5. FORWARDING, SUBSTITUTE OF VESSEL, THROUGH CARGO AND TRANSSHIPMENT

... the Carrier to be at liberty to... store the goods... on shore...

The responsibility of the carrier shall be limited to the part of the transport performed by him in a vessel under his management and no claim will be acknowledged by the carrier for damage or loss arising during any other part of the transport...

7. RECEPTION OF THE GOODS

- (a) The Receiver... must be ready to take delivery of the goods as soon as the vessel is ready to unload...
- (b) Receiver cannot demand delivery of goods direct from ship without special agreement...
- (c) General local clause Landing... of the goods to be arranged by Carrier's agents for the risk and expense of the Shipper whether delivery is taken overside or in the quay.

The defendant shipowner submitted that the effect of those clauses was that the responsibility of the carrier was to cease on discharge from the ship and that any loss caused by any event occurring thereafter is not recoverable. In particular, they said that by Clause 3 the carrier was to have no responsibility whatsoever for the goods subsequent to their discharge from the ocean vessel. It follows, they submitted, that they were not liable to the plaintiff cargo owners on the facts of this case because the misdelivery occurred some days after discharge when the goods were delivered without production of an original bill of lading. They relied upon a number of authorities and said that the only circumstances in which they would have been liable would have been where they acted either in deliberate disregard of the rights of the plaintiff cargo owners or dishonestly.

It was held by Clarke J, that Clause 3 "concerned with loss of or damage to the goods and may well include the case where the goods are

stolen, but it is not concerned with misdelivery.”²¹ It was also held that Clause 5 “does not seem to be concerned with misdelivery.” There is however no hint in the wording of Clause 7 that carrier is to be entitled to deliver otherwise than in return for an original bill of lading or even that he is not to be liable if he does do. Thus Clause 7 also does not concern with misdelivery. Although the plaintiffs were in breach of Clause 7 because they were not ready to take delivery as soon as the vessel was ready to discharge, any loss suffered by them was not caused by that breach but by the delivery of the goods without presentation of an original bill of lading.

In a recent Hong Kong case *Center Optical (Hong Kong) Limited v Jardine Transport Services (China) Limited and Pronto Cargo Corporation (Third Party)*,²² the goods consisted of two consignments of optical frames and sunglasses. Both consignments were shipped from Shanghai to Miami in mid-1998. The first consignment of 248 cartons of optical frames was carried under bill of lading No SHA472927 dated 25 May, 1998 on the vessel *Alligator Wisdom*. The second consignment of 348 cartons of sunglasses was carried under bill of lading No SHA472986 on the vessel *Hanjin New York*. The two shipments were part of a sequence of nine such shipments whereby the plaintiff exported spectacle frames and sunglasses which had been manufactured in China by an affiliated company, Wenzhou Centre Optical Co. Limited to an related third party in Miami, Center Optical HK Inc (Miami Center Optical). The first six shipments were sent by the plaintiff to Miami ex Hong Kong.

In March, 1998, the plaintiff suggested to the buyer that it should ship direct from Shanghai to Miami. This was agreed with the buyer suggesting the use of Jardine Freight Services (HK) Ltd. This company referred the plaintiff to Jardine Transport Services (China) Limited (JTSC), the defendant in Shanghai.

On 25 May 1998, JTSC issued the *Alligator Wisdom* bill which was in ‘Dynamic Container Line’ (DCL) form, named the plaintiff as shipper, the consignee as ‘To Order’ and the notify party as ‘Center Optical HK Inc’. The third party in the proceedings Pronto was named as ‘F/Agent’; Shanghai in China was named as the load port and Miami in the United States was named as the port of discharge. The number of packages represented by this bill was stated to be 248 cartons and the bill itself was

²¹ Ibid at 144 Mr Justice Clark

²² [2001] Lloyd’s Rep 678

marked 'freight collect'.

The issuance of this bill led to a chain of sub-bills which named JTSC as shipper and Pronto as consignee and notify party. A like sequence occurred with regard to the eight shipment of 348 sunglasses on *Hanjin New York*. On arrival at Long Beach, the seventh and eighth shipments were railed from Long Beach to Miami at which point the relevant containers were destuffed. Thereafter, facilitated by presentation in each case of the respective bills, Pronto was able to gain possession of these goods and via a power of attorney issued by Miami Center Optical, to clear these shipments through the United States' Customs.

On the evidence, the two shipments were released from storage by Pronto to Miami Center Optical without the production of the original DCL bills of lading in respect of each shipment. Attempts were made by the plaintiff to obtain payment for the goods from Miami Center Optical but without much success.

The plaintiff sought to recover the invoice value of the 596 cartons of optical frames and sunglasses contained in the seventh and eight shipments. Recovery was sought against the defendant in contract arising from the defendant's acceptance of the plaintiff's instruction to the defendant to ship these goods to Miami to the plaintiff's order, naming as notify party Miami Center Optical, such contract being evidenced or partly evidenced by the bills of lading issued for the seventh and eighth shipments. The plaintiff also sought recovery in conversion arising from the wrongful misdelivery of those goods.

The defendant relies upon the definition of 'port to port' shipment in Clause 1 of the bills, Clause 6(2) relating to 'port to port' shipment and Clause 14 relating to delivery, to contend that obligations under the bills ceased on discharge or on storage of the goods after such discharge. The particular clauses in question read as follows:

'1. DEFINITIONS ...

'Port to Port Shipment' arises where the Place of Receipt and the Place of Delivery are not indicated on the front of this Bill of Lading or if both the Place of Receipt and the Place of Delivery indicated are ports and the Bill of Lading does not in the nomination of the Place of Receipt or the Place of Delivery on the front hereof specify any place or spot within the area of the port so nominated.

6. CARRIER'S RESPONSIBILITY ...

(2) PORT TO PORT SHIPMENT

The responsibility of the Carrier is limited to that part of the Carriage from and during loading onto the vessel up to and during discharge from the vessel and the Carrier shall not be liable for any loss or damage whatsoever in respect of the goods or for any other matter arising during any other part of the Carriage even though Charges for the whole Carriage have been charged by the Carrier. The Merchant constitutes the Carrier as agent to enter into contracts on behalf of the Merchant with others for transport, storage, handling or any other services in respect of the Goods prior to loading and subsequent to discharge of the Goods from the vessel without responsibility for any act or omission whatsoever on the part of the Carrier or others and the Carrier may as such agent enter into contracts with others on any terms whatsoever including terms less favourable than the terms in Bill of Lading.

14. DELIVERY OF GOODS

If delivery of the Goods or any part thereof is not taken by the Merchant at the time and place when and where the Carrier is entitled to call upon the Merchant to take delivery thereof, the carrier shall be entitled without notice to remove from a Container the Goods or that part thereof if stuffed in or on a Container and to store the Goods or that part thereof ashore afloat, in the open or under cover at the sole risk and expense of the Merchant. Such storage shall constitute due delivery hereunder, and thereupon the liability of the Carrier in respect of the Goods or that part thereof shall cease.'

The learned Judge Stone J. held that, the established English jurisprudence in this area being to protect to integrity of the bill of lading as 'the key to the floating warehouse' was to be followed. Stone J. declined to hold that the plain wording of Clause 14 was sufficiently clear to 'impinge upon the cardinal principle requiring delivery by the (ship) owner or his agent only against production of an original bill of lading' although he accept that 'this particular clause purportedly is drawn in terms of cesser of responsibility.' Reference was made by the learned judge to

the observations made by the authors in *Gaskell, Bills of Lading: Law and Contracts*²³

‘Many of the clauses [as to due delivery] put obligations on receivers to be ready to take delivery of goods and such receivers would be in breach, eg if they are not ready to take delivery as soon as the vessel is ready to discharge. Still, it would seem that a court is unlikely to hold that this breach was a cause of the loss where the carrier puts the cargo into storage and later delivers without production of a bill.’

It was held that Clause 14, when taken either alone or in conjunction with Clause 6(2), was insufficient to ‘empower the carrier intentionally to deliver the goods without notice to anyone he wishes, and without subsequently being called to account for such action’, the same of which, in effect, being the defendant’s contention in that case. There was further support for this view in *Gaskell* wherein the authors, in commenting on *The Antwerpen*,²⁴ note that,

‘... It is debatable whether an English court would hold that such a general clause should excuse a deliberate decision to make delivery without production of a bill ...’

It may be, as Lord Justice Mance commented in *Motis*, that a clause can be designed to achieve this aim. However, his judgment, Clause 14 does not so succeed.

Conclusion

The Hong Kong Commercial Court has preserved the long well-established principle that a carrier is having the prima facie fundamental obligation to deliver goods upon presentation of original bills of lading, failing which any misdelivery will be at the carrier’s own risk and peril. Any exemption clause attempting to exempt the carrier’s liability for deliberate or even conscious misdelivery whether without any original bill of lading or against a forged bill of lading will be construed strictly against the

²³ Gaskell, op cit at 12 at 449.

²⁴ [1994] 1 Lloyd’s Rep. 213

carrier. The attitude of the Hong Kong Court is unsympathetic to any exemption clause which may have the effect of allowing a carrier to be exempted from liability upon deliberate or even conscious misdelivery of goods. This is in accordance to common sense in that the commercial value of a bill of lading to its holder has to be fully respected and protected by the law in order that both international trade and its financing may be facilitated.

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