CASE LAW

PRIVITY, EXEMPTION CLAUSES AND BILLS OF LADING

NEW ZEALAND SHIPPING CO. LTD. v. *A. M. SATTERTHWAITE & CO. LTD.*[1]

An expensive drilling machine was shipped from England to New Zealand. The respondent company was the consignee of the machine, and the appellants were the stevedores who unloaded it in Wellington. Owing to their negligence, it was damaged during unloading.

The carriage of the machine was governed by a bill of lading issued by the carrier's agents. This document attempted in two ways to limit the liability of certain persons for loss of or damage to the machine. Firstly, it incorporated the Hague Rules, requiring any suit for damage to the goods to be brought within one year of their delivery. Secondly, clause 11 of the bill limited to £100 the monetary liability of any person claimed against under the bill, unless a special freight surcharge were paid and a declaration made as to the nature and value of the goods.

It was not in dispute that these limitations applied between the immediate parties to the contract of carriage, but by clause 1 of the bill an attempt was made to free from liability persons other than the carrier: namely, every ". . . servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) . . . ."[2] The exact terms of the relevant part of the clause were as follows:

> It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this bill of lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to

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[1] [1975] A.C. 154; [1974] 1 All E.R. 1015; for further comment, see casenotes in (1974) 48 *A.L.J.* 492, and B. Coote, "Vicarious Immunity by an Alternative Route", (1974) 37 *M.L.R.* 453. For a discussion of the first instance decision see P. S. Atiyah, "Bills of Lading and Privity of Contract", (1972) 46 *A.L.J.* 212.

[2] [1975] A.C. 154 at 165.

the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsover nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including all independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this bill of lading.[3]

The machine was unloaded by the appellant stevedores and, in the course of this unloading, damaged because of their negligence. They had acted for several years as stevedores for the carrier and, indeed, not only wholly owned the carrier but were also its shipping agent in New Zealand. They were, therefore, quite familiar with the terms of the bill of lading. The respondent consignee did not sue the stevedores until nearly three years after delivery of the drill. The defendants claimed the benefit of the time limitation, on the basis of the attempt made in clause 1 to extend it to them. The consignee denied that the stevedores were entitled to any such exemption from liability, as they were not party to the contract of carriage.

The obstacle that clause 1 attempted to surmount was the doctrine of privity of contract. The problem was succinctly put by Fullagar, J. in *Wilson* v. *Darling Island Stevedoring & Lighterage Co. Ltd.*:

> . . . the defendant is not a party to the contract evidenced by the bill of lading, . . . it can neither sue nor be sued on that contract, and . . . nothing in a contract between two other persons can relieve it from the consequences of a tortious act committed by it against the plaintiff.[4]

The later case of *Scruttons Ltd.* v. *Midland Silicones Ltd.*,[5] whilst applying the general principles of the *Darling Island* case, suggested one way of overcoming the problem of privity. Some form of agency arrangement between a party to a contract and a third person might allow the third party to claim the benefit of an exemption clause. Lord Reid laid down four conditions for the efficacy of such a contract:

> I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to

[3] *Ibid.*

[4] (1956) 95 C.L.R. 43 at 67.

[5] [1962] A.C. 446.

> contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome. And then to affect the consignee it would be necessary to show that the provisions of the Bills of Lading Act 1855, apply.[6]

This passage formed the basis for one of the appellant's arguments, and seemed to strongly influence the majority of their Lordships in their decision in favour of the appellants.

At first instance, Beattie, J. in the Supreme Court of New Zealand[7] held that clause 1 was effective to exempt the stevedores from liability. Four main arguments were put to him: (i) that there was a binding bilateral contract between the shippers and the stevedores made through the carriers as agents for the stevedores; (ii) that the shippers offered exemption to the stevedores in clause 1, the stevedores accepting this offer by unloading the machine; (iii) that the carrier held the benefit of the exemption in trust for the stevedores; and (iv) that the shippers had, irrespective of the position in contract, consented to the exemption contained in the bill, thereby either nullifying the duty of care owed by the stevedores or modifying their liability for breach of it. Argument (iii) was not strongly pressed, and it was unnecessary to decide on argument (iv).

Argument (i) was squarely based on what Lord Reid had said in *Scruttons' Case*. The first two requirements of Lord Reid's formulation —intention to protect the stevedores, and disclosure of the carrier's role as agent—were clearly met in this situation. Beattie, J. held that the third condition was also satisfied: the carrier/stevedore relationship gave the carrier authority to contract as the stevedores' agent. The question then was whether consideration had been supplied by or for the stevedores. His Honour held that it had not, since a benefit had been conferred on them, in the form of exemption from liability, without their having accepted any disadvantage in exchange for it. He rejected the stevedores' contention that they had given consideration by undertaking an implied obligation to unload the goods, since at no stage could they either sue or be sued on the alleged implied promise to the shipper.

His Honour did find in favour of the stevedores on the basis of argument (ii). He thought that the exemption clause in the bill of lading constituted an offer of exemption made to the stevedores by the shipper, which they accepted and for which they gave consideration by unloading

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[6] *Id.* at 474.

[7] *A. M. Satterthwaite and Co. Ltd.* v. *New Zealand Shipping Co. Ltd.* [1972] N.Z.L.R. 385.

the machine. Following *Scotson* v. *Pegg*,[8] it was irrelevant that the stevedores were already contractually bound to the carrier to unload the cargo. The act of unloading the drill could still be good consideration *vis-à-vis* the shipper. Significantly, his Honour felt that ". . . *in a realistic commercial sense*, . . . there is consideration".[9]

Therefore, there existed between the stevedores and the shipper a unilateral contract similar to that in *Carlill* v. *Carbolic Smoke Ball Co.*,[10] whereby an offer made to all the world by the shipper was accepted by the stevedores' performance of an act.

The consignee appealed successfully against this decision. The New Zealand Court of Appeal[11] agreed with the judge's view that there was no immediately binding shipper/stevedore contract on the bill's signing, since no consideration had passed from the stevedores to the shipper. Even if the carrier were regarded as the stevedores' agent, the only person accepting any obligation as to the carriage of the machine was the carrier, in the capacity of carrier. There was no promise by the stevedores to the shipper that they would unload the drill and, in the event of their refusing to unload it, the carrier had no remedy against them.

The Court of Appeal differed from Beattie, J. in regard to the stevedores' contention that clause 1 was an offer of exemption to the world at large which they had accepted by unloading the machine. Turner, P. and Richmond, J. thought that this argument failed, the clause not being an offer of the *Carlill* type, since it did not make known any method by which it could be accepted. Perry, J. agreed, emphasising that the clause purported to make the stevedores party to the shipper/carrier contract, and therefore, that it was not apt to give rise to a new and independent contract.

Furthermore, Richmond, J. mentioned another hazard to the stevedores' case, recalling the final rider placed by Lord Reid on his four conditions. This difficulty was that of showing that the consignee had in fact succeeded to the alleged shipper/stevedore contract. In fact there was a statute which put the consignee in the place of the shipper and made him ". . . subject to the same liabilities in respect of [the] goods as if the contract . . . had been made with himself".[12] Nevertheless, his Honour pointed out that since the bill was endorsed over to the plaintiff consignee prior to unloading, it was hard to see how the shipper's as yet unaccepted offer could be turned by the statute into an offer by the consignee, no shipper/stevedore contract then being in existence.

[8] (1861) 6 H. & N. 295; 158 E.R. 121.

[9] [1972] N.Z.L.R. 385 at 398. Italics added.

[10] [1893] 1 Q.B. 256.

[11] *A. M. Satterthwaite and Co. Ltd.* v. *New Zealand Shipping Co. Ltd.* [1973] 1 N.Z.L.R. 174.

[12] Mercantile Law Act, 1908 (N.Z.), s. 13.

He further doubted whether the surrender of the bill to the stevedore could constitute an embracing by the stevedore of the terms of the offer allegedly contained in clause 1.

The stevedores appealed from this decision to the Privy Council. They advanced four main arguments:

(i) That there was a binding contract between themselves and the shipper, made through the agency of the carrier, which came into existence on the making of the contract of carriage, and supported by consideration given either by the stevedores or on their behalf.

(ii) That clause 1 constituted a mutual but non-binding bargain between the shipper and the appellants, which became a binding unilateral contract when the latter furnished consideration by unloading the machine.

(iii) That clause 1 contained an offer by the shipper to exempt the stevedores from liability, the act of unloading the cargo constituting both the acceptance of and the consideration for this offer.

(iv) That whether or not there was any contract between the shipper and the appellants, the bill of lading evidenced the consent of the shipper to the performance of services in relation to the goods on terms that the appellants would be free of liability, and that this consent either nullified the duty of care owed by the appellants or modified their liability for any breach of that duty.

By a majority, the Privy Council allowed the stevedores' appeal: Lords Wilberforce, Hodson and Salmon found for the appellants, and Viscount Dilhorne and Lord Simon of Glaisdale dissented.

As a preliminary point, it should be noted that their Lordships dismissed Richmond, J.'s doubts as to whether the consignee could be subjected to the liabilities imposed by an offer of exemption made by the shipper to the stevedores and accepted by them only after the consignee had taken the bill of lading. Even if the relevant statute did not apply in such a situation, the pre-existing case law did. *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co. Ltd.*[13] had established, in regard to holders of bills of lading not being endorsees of the bills, that the act of presenting a bill and accepting goods under it implied a contract in the terms of the bill. Thus, the consignee, by presenting the bill of lading, succeeded to any liabilities under that bill of the shipper not already imposed on him by statute.

That the majority of their Lordships found in favour of the stevedores is clear. What is not entirely plain is the basis on which they so decided.

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[13] [1924] 1 K.B. 575.

Their Lordships stated that "... [t]here is possibly more than one way of analysing this business transaction into the necessary components ..."[14] of a contract under the "... rather technical and schematic doctrine of contract"[15] adopted by English law. In fact, there seems to be three possible analyses in their Lordships' judgment, jostling one another for supremacy under the all pervasive shadow of commercial convenience. Nowhere did their Lordships specifically reject any of the arguments put forward by the stevedores. Rather, they chose to somewhat ambiguously "accept" one of the appellants' analyses, and then to equate it with another and germane proposition argued by the stevedores.

The first possible explanation for the decision is that their Lordships accepted the stevedores' first argument, that an agency contract, complying with Lord Reid's test, had come into existence between themselves and the shipper. Early in their judgment, their Lordships said in relation to Lord Reid's test that the "... question in this appeal is whether the contract satisfies these propositions".[16] Later, they were even more specific: "The only question was, and is, the fourth question presented by Lord Reid, namely that of consideration".[17]

A second explanation appeared later in the judgment. Their Lordships seemed to approve the stevedores' third argument, accepted at first instance by Beattie, J., that by performing services in relation to the goods they had accepted an offer of exemption made to them by the shipper. In reference to the stevedores' second and third arguments their Lordships said that "... either analysis may be equally valid".[18]

If this was in fact the basis for their Lordships' decision, then Lord Reid's conditions are quite irrelevant. The majority seemed nowhere to differentiate between, on the one hand, the appellants' agency-based argument, and on the other, their offer-based argument. What the stevedores were proposing in their third submission was not a contract made by the carrier as their agent, but one made directly between themselves and the shipper. The stevedores themselves were said to have accepted an offer made to all the world by the shipper, and to have themselves provided consideration for it. This was done without the intervention or agency of the carrier, except in the limited and mechanical sense that the offer to all the world was contained in a contract which happened to be between the shipper and the carrier.

What seems to be a blurring of the differences between the appellants' various arguments can be seen throughout their Lordships' judgment. For example, they explained as follows the decision of the Court of Appeal:

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[14] [1975] A.C. 154 at 167.

[15] *Ibid.*

[16] *Id.* at 166.

[17] *Id.* at 167.

[18] *Id.* at 168.

> The only question was, and is, the fourth question presented by Lord Reid, namely that of consideration.
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> It was on this point that the Court of Appeal differed from Beattie, J., holding that it had not been shown that any consideration for the shipper's promise as to exemption moved from the promisee, i.e., the appellant company.[19]

This, it is respectfully suggested, was a misinterpretation of what the Court of Appeal decided. Both Beattie, J. and the Court of Appeal were in agreement that no consideration had been supplied by the stevedores in the context of the appellants' first argument, which was based on Lord Reid's propositions, and that the argument should therefore fail. As for the stevedores' offer-based argument, the Court of Appeal found it unnecessary for themselves to decide whether Beattie, J. had been correct in stating that by unloading the machine the stevedores had given good consideration for the alleged offer of exemption. This was because the crucial difference between their Honours and Beattie, J. was whether or not clause 1 should be read as an offer. Beattie, J. thought that it should, and accordingly found for the stevedores; the Court of Appeal thought the contrary, and found against the stevedores on this basis. The question of consideration was, therefore, quite irrelevant to their Honours' decision on this argument of the appellants. Indeed, it was to counter this view of the Court of Appeal that the stevedores devised what was their second argument in the Privy Council.

This second argument is the most likely explanation for their Lordships' decision. Despite their earlier statements that the dominant issue in the appeal was whether consideration existed sufficient to satisfy Lord Reid's fourth requirement, their Lordships claimed to decide the case on the basis of the appellants' second argument, the relevance to which of Lord Reid's conditions is not clear. Lord Wilberforce said:

> . . . their Lordships would accept . . . that the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shipper and the appellant, made through the carrier as agent. This became a full contract when the appellant performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading.[20]

This passage requires comment. The basis of the argument which it accepted was that an agreement failing for want of consideration subsisted as an offer to the original promisee which he could accept by supplying consideration at a later date, thereby giving binding force to the original non-binding agreement.

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[19] *Id.* at 167.

[20] *Id.* at 167-68.

Counsel for the stevedores had hoped by so arguing to counter the objection of the Court of Appeal that clause 1 could not be an offer of exemption to the appellants since its language was that of an agreement. The non-binding agreement had to be between the shipper and the stevedores, so that the latters' unloading of the ship would be in response to the offer which the agreement allegedly contained. Therefore, it was argued that the carrier had contracted with the shipper as the stevedores' agent, as well as on its own behalf. It may well be that this point of similarity between the otherwise quite different first and third arguments was responsible for the element of ambiguity which found its way into the majority judgment.

Having declared their preference for the appellants' second argument, their Lordships then said that it was essentially the same as their third argument:

> But whether one describes the shipper's promise to exempt as an offer to be accepted by performance or as a promise in exchange for an act seems in the present context to be a matter of semantics.[21]

In this regard, the majority and the minority were in accord. For example, Lord Simon said of the second and third arguments that ". . . both require an offer, and one stipulating a mode of performance";[22] and Viscount Dilhorne said:

> . . . I do not myself see any material difference between A offering B money if B does work for A and a bargain between A and B that A will pay B money if B does work for A.[23]

Therefore, the decision may be explained in terms of offer. The majority of their Lordships considered that the clause was an offer of exemption made to the stevedores by the shipper. Their Lordships gave no specific reasons in support of such a decision, other than to say that "[o]n the main point in the appeal, their Lordships are in substantial agreement with Beattie, J."[24] In view of their earlier statements as to the nature of the main question on appeal, what their Lordships meant by this sentence must remain somewhat uncertain. However, the suggested interpretation is supported by the sentence's context, coming as it does directly after their Lordships' statement that Bowen, L.J., in *Carlill's Case*, drew ". . . no distinction between an offer which matures into a contract when accepted and a promise which matures into a contract after performance".[25]

The dissentients accepted the reasoning of the Court of Appeal in rejecting the appellants' second and third arguments. Clause 1 was not an offer of exemption: it was not couched in the language of offer;

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[21] *Id.* at 168.
[22] *Id.* at 181.
[23] *Id.* at 172.
[24] *Id.* at 168.
[25] *Ibid.*

it purported to make the stevedores party to the contract of carriage, not to provide the basis for a new and independent contract; and, unlike true *Carlill* style offers, it did not stipulate the method by which it was to be accepted.

They rejected the stevedores' first argument for varying reasons. Viscount Dilhorne thought that it foundered on Lord Reid's fourth requirement—the need for consideration. Lord Simon did not even think that there was any *pactum* between the stevedores and the shipper, ". . . quite apart from nudum pactum".[26] His Lordship did, nevertheless, indicate his view that the stevedores had given no consideration to satisfy the fourth of Lord Reid's requirements.

Their Lordships also rejected the appellants' fourth argument, describing it somewhat disapprovingly as providing, if valid, ". . . a revolutionary short cut to a jus quaesitum tertio".[27]

It is to be noted that both their Lordships expressly stated that a suitably drawn instrument could have conferred exemption on the stevedores in this case, either by way of Lord Reid's conditions or through a clearly and unequivocally phrased offer of exemption.

The majority of their Lordships placed considerable emphasis on the commercial nature of the transaction, and the demands of commercial convenience:

> . . . to give the appellant the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles.[28]

The minority were not unaware of the document's nature, but saw this as no reason for disregarding established principles:

> It is a commercial document, but the fact that it is of that description does not mean that to give it efficacy, one is at liberty to disregard its language . . . .[29]

If the majority view can be said to take into account the commercial realities of the contract, then the minority must be considered as attempting to balance these commercial considerations against the very weighty issues of legal precision and certainty. For this reason, the minority views of Viscount Dilhorne and Lord Simon are to be preferred.

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[26] *Id.* at 179.
[27] *Id.* at 182.
[28] *Id.* at 169.
[29] *Id.* at 170.