

The Bills of Lading and Analogous Shipping Documents Ordinance

Introduction

The law relating to shipping documents covering goods carried by sea has been propelled into the 20th century¹ by the passage of the new Bills of Lading and Analogous Shipping Documents Ordinance.² This area of the law had long been ripe for revision. Its centrepiece, the old Bills of Lading Ordinance,³ was based on an English statute passed in 1855.⁴ Technological developments in the shipping industry,⁵ especially within the last thirty years, had rendered outdated the law constituted at the time of sailing vessels. As delineated in a previous paper,⁶ the archaic wording and concepts enshrined in the Bills of Lading Ordinance meant that the courts could not, or would not, ameliorate the many problems engendered by the law.

The Bills of Lading and Analogous Shipping Documents Ordinance, a near replica of the Carriage of Goods by Sea Act 1924,⁷ came into force on 1 March 1994.⁸ The ordinance expands the category of claimants who can have transferred to them contractual rights of suit against the carrier in respect of goods carried by sea, and makes the following modifications to the law:

(1) The link in s 2 of the Bills of Lading Ordinance between the transfer of contractual rights of suit and the passing of property is abolished: s 4(1) of the ordinance.

(2) The bill of lading is capable of endorsement so as to pass contractual rights of suit even after delivery of the goods has been made, provided that the endorsement was made pursuant to arrangements made before delivery: s 4(2).

(3) The person entitled to delivery under a sea waybill or a ship's delivery order has contractual rights of suit against the carrier: ss 4(1) and (5).

¹ Lord Goff has commented that the UK version of the new ordinance 'will move our law in this area from the middle of the 19th century to well into the 21st' (Hansard, 4 February 1992, p 234). However, the new ordinance has neither anticipated the technological developments which are certain to burgeon in the 21st century nor formulated any guidelines regarding electronic data interchange. See p 188 below.

² No 85 of 1993 (hereafter referred to as 'the ordinance').

³ Now repealed by s 9 of the ordinance.

⁴ The Bills of Lading Act 1855.

⁵ Particularly the dramatic increases in the size (leading to problems relating to undifferentiated parts of bulk cargo) and speed (leading to problems of the transfer of contractual rights along with the transfer of the bill of lading) of vessels.

⁶ S Nossal, 'Revision of the Legislation relating to Bills of Lading and Other Shipping Documents' (1993) 23 HKLJ 115.

⁷ 1924 c 50 (UK), itself a replica of the draft Bill proposed by the Law Commission in its Report entitled 'Rights of Suit in Respect of Carriage of Goods by Sea,' Law Commission Report No 196, 19 March 1991.

⁸ LN 105 of 1994.

(4) The lawful holder of a bill of lading or the person entitled to delivery under a sea waybill or ship's delivery order who has not suffered any loss or damage is entitled to sue the carrier for the benefit of the person who actually suffered loss or damage but has no contractual rights of suit against the carrier: s 4(4).

(5) The link between contractual rights and liabilities is severed, so that contractual liabilities will not be imposed automatically on every holder of a bill of lading or person entitled to delivery under a sea waybill or ship's delivery order: s 5.

(6) The rule in *Grant v Norway*⁹ is abolished: s 6.

(7) The Bills of Lading Ordinance is repealed: s 9.

This note will provide an evaluation of the ordinance through an examination of its ability to resolve the problems which existed under the Bills of Lading Ordinance. It is argued that the ordinance has been highly successful in overcoming the hurdles raised by the concepts of privity and title to goods generated by the Bills of Lading Ordinance, and that its only deficiencies are minor problems of omission.

The Bills of Lading and Analogous Shipping Documents Ordinance

The ordinance has succeeded in overcoming, either expressly or indirectly, the problems with the law governed by the Bills of Lading Ordinance.¹⁰ The solutions instituted by the ordinance will be briefly examined in turn.

The linkage of the transfer of contractual rights of suit with the passing of property
The effect of ss 2(2) and 4(1) of the ordinance, breaking the link in s 2 of the Bills of Lading Ordinance between the transfer of contractual rights of suit and the passing of property, means that the buyer of an undifferentiated part of a bulk cargo,¹¹ and parties in the position of the plaintiffs in *The Delfini*,¹² are able to assert contractual rights against the carrier for loss of or damage to the goods. And this is so even if no goods at all were delivered.¹³

The Bills of Lading Ordinance was applicable to 'bills of lading' only

⁹ (1851) 10 CB 665; 138 ER 263.

¹⁰ This part tracks the discussion set out in, and may be read in conjunction with, part II of Nossal (note 6 above).

¹¹ For example, the plaintiff in *The Aramis* [1989] 1 Lloyd's Rep 213, where under bill of lading number 6 property in the goods passed after the endorsement or consignment of the bill.

¹² [1990] 1 Lloyd's Rep 252, where property in the goods passed before the endorsement or consignment of the bill of lading.

¹³ As in bill of lading number 5 in *The Aramis* (note 11 above).

Under s 4(1) and (5) of the ordinance, persons named in a sea waybill¹⁴ and a ship's delivery order¹⁵ have been given contractual rights of suit against the carrier. Before the passage of the ordinance, persons named in sea waybills and ship's delivery orders fell outside the protection of the Bills of Lading Ordinance and were able to assert contractual rights of suit against the carrier only if they could establish an implied contract with the carrier based on the principles set out in *Brandt v Liverpool*.¹⁶ Now, a party in the position of the plaintiff in *The Dona Mari*¹⁷ would be entitled to sue the carrier in contract. This section thus affords increased protection to a greater number of claimants, the major beneficiary being the buyer of an undifferentiated part of a bulk cargo.

Restriction on the right of a party to a contract of carriage to sue the carrier for the benefit of another

Section 4(4) allows the person with contractual rights of suit against the carrier to exercise those rights and recover substantial damages for the benefit of the person who has actually suffered loss or damage.¹⁸ This section is a departure from the normal common law rule that a person with rights of suit will recover no, or only nominal, damages if he has suffered no loss or damage,¹⁹ and has the effect of abrogating *The Albazero*²⁰ and endorsing the approach taken by Hobhouse J in *The Sanix Ace*²¹ in the context of the carriage of goods by sea.²²

The rule in Grant v Norway

The rule in *Grant v Norway*,²³ applicable to the law of the carriage of goods by sea (although long out of step with modern principles of agency), stipulates that a master has no authority to sign a bill of lading on behalf of the carrier for goods which were not actually loaded on board the vessel. The rule has permitted carriers to avoid liability to consignees and endorsees of the bills of lading who in good faith purchased the goods on the strength of the statement in the bill

¹⁴ A sea waybill is similar to a non-negotiable bill of lading and is evidence of the contract of carriage whereby the carrier undertakes to deliver the goods to a named consignee or to whomever the shipper directs.

¹⁵ A ship's delivery order is a document issued by the carrier which contains an undertaking by the carrier to the person identified in the document that the carrier shall deliver the goods to which the document relates to that person.

¹⁶ [1924] 1 KB 575.

¹⁷ [1985] 1 Lloyd's Rep 107.

¹⁸ J Cooper, 'Carriage of Goods by Sea Act 1992' [1992] Current Law Statutes Annotated 50.1, 50.5.

¹⁹ M Brooks, 'A Review of the Bills of Lading and Analogous Shipping Documents Ordinance,' unpublished paper presented at the 'Bills of Lading: The New 1994 Legislation' conference, Hong Kong, 25 April 1994.

²⁰ [1977] AC 774.

²¹ [1987] 1 Lloyd's Rep 465.

²² Some commentators have argued on the basis of *The Sanix Ace* (note 21 above) that this section does not alter the law. Nonetheless, it was prudent to provide expressly for this point in the ordinance: F Reynolds, 'The Carriage of Goods by Sea Act 1992' [1993] LMCLQ 436, 441; R Evers, 'Carriage of Goods by Sea Act 1992,' unpublished paper.

²³ Note 9 above.

of lading that the goods had indeed been shipped.

Section 6 statutorily abrogates the rule in *Grant v Norway*. The section states that a bill of lading which represents that goods have been shipped or received for shipment, and is signed by the master or a person with the express, implied, or apparent authority of the carrier, will be conclusive evidence of shipment of the goods as against the carrier.

The action in tort

The ordinance does not specifically deal with actions in tort. However, it may be argued that in general it has the effect of reducing the employment of the tort action in carriage of goods by sea disputes.²⁴ The combination of the ordinance and *The Aliakmon*²⁵ will serve to channel claims through contractual actions, thus providing the carrier with the protections and limitations afforded by the Hague or the Hague-Visby Rules,²⁶ and to limit the role of the tort action by means of restricting the claimant in a tort action to those persons who are not in any contractual relationship (either actually or constructively under the ordinance) with the carrier *and* who had the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred.²⁷ Thus, the party in the position of the plaintiff in *The Aliakmon* would be provided with a contractual right of action against the carrier under the ordinance and would not be entitled to sue in tort.²⁸

Deficiencies of the ordinance

The ordinance, while solving the problems under the old law through the eradication of artificial impediments to the transfer of contractual rights of suit, creates a number of new problems. It must be stressed, however, that these deficiencies are relatively minor and are heavily outweighed by the advantages provided by the new legislation.

Multiplicity of actions against the carrier in both contract and tort

While increasing the number of potential claimants possessing contractual rights of suit against the carrier, the ordinance does not protect the carrier from multiple claims. The carrier can now be faced with (1) claims in contract brought by persons provided with rights of suit by the ordinance, and (2) a claim in tort brought by the owner of the goods, all arising from the same transaction.

²⁴ It will be argued later (see p 185 below) that the ordinance could have taken bolder steps with respect to regulating tort actions where a claimant has contractual rights of suit against the carrier arising from loss of or damage to goods carried by sea.

²⁵ [1986] 2 WLR 902.

²⁶ The Hague-Visby Rules are applicable in Hong Kong by virtue of the Carriage of Goods by Sea (Hong Kong) Order 1980.

²⁷ *The Aliakmon* (note 25 above).

²⁸ *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] 1 AC 80.

For example, the shipper of a bulk cargo receives from the carrier a bill of lading and transfers to his buyers ship's delivery orders with respect to undifferentiated parts of the bulk. In the event of loss of or damage to the cargo, the shipper cannot sue the carrier in contract,²⁹ yet the persons named in the ship's delivery orders are now entitled to sue the carrier in contract,³⁰ and the shipper can sue the carrier in tort, both recovering substantial damages.³¹

Further, the ordinance, concerned with contractual rights of suit, does not regulate tort actions in any way. Most shipping documents covering goods carried by sea are subject to the Hague or the Hague-Visby Rules. The purpose of these Rules is to standardise, throughout the world, the code regulating the responsibilities of the sea carrier. It is submitted that the domestic law of a jurisdiction ought not to provide an alternative and wider remedy than that contemplated by the Rules.³² Thus, whenever a jurisdiction permits a claimant to sue the carrier in tort for loss of or damage to his goods, the authority of the Rules in general is weakened since the carrier is deprived of the protections and exemption clauses set out in the Rules and incorporated into his contract of carriage evidenced by the bill of lading.³³

The approach taken by the ordinance with respect to these problems of multiplicity of actions and actions in tort appears to be that the courts will not allow any abuse of process or double recovery.³⁴ However, the ordinance would have been stronger if it had dealt expressly with these matters. Such omissions in the legislation are likely to create uncertainty and to encourage needless litigation.

It is submitted that the ordinance ought to have stipulated that, where a contractual right of action exists in a party who is on risk or has actually suffered loss or damage and that party has actually commenced legal proceedings against the carrier, the carrier is immune from any other independent legal proceeding based either in contract or tort arising from the same transaction. This section would have had the effect of giving statutory recognition to the principle against multiplicity of actions and the rule in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*.³⁵

Extinguishment of rights of suit

Section 4(5) stipulates that the original shipper under a bill of lading and all persons who were at one time, although no longer, entitled to delivery of goods under the bill of lading (that is, the intermediate consignees or holders of the

²⁹ Unless he is also the charterer, see s 4(5) and the definition of 'contract of carriage' in s 2(1).

³⁰ s 4(1)(c).

³¹ P Todd, 'Problems still Unresolved,' paper presented at the IBC Legal Studies conference, 11 February 1993, p 5.

³² S Todd, 'Remedies of the Buyer for Damage to Goods carried by Sea' (1986) 3 Canterbury LR 86, 99.

³³ R Bradgate and F White, 'The Carriage of Goods by Sea Act 1992' (1993) 56 MLR 188, 193.

³⁴ See Law Commission Report (note 7 above), pp 15 and 18.

³⁵ Note 28 above.

bill) lose their rights of suit when the bill of lading is endorsed or delivered to someone else. There is an exception where the shipper is the charterer who endorses the bill of lading to someone else. Under the ordinance, the endorsement by the shipper/charterer does not affect the rights of suit of the charterer. The reason is that s 3 makes it clear that the ordinance does not apply to charterparties. Thus, when s 4(5) extinguishes the rights of the original party to 'the contract of carriage,' this term is defined in s 2(1) and refers to the contract contained in or evidenced by the bill of lading, not the charterparty.³⁶

However, even though in general the bill of lading shipper has his rights of suit extinguished upon the transfer of the bill, he still remains liable to the carrier under the original contract of carriage.³⁷ The problem is highlighted where loss actually fell on the bill of lading shipper³⁸ who has been sued for outstanding freight under the original contract of carriage. The shipper³⁹ would not be able to bring a counterclaim against the carrier for the loss that he has suffered. This appears to have been the case under old legislation.⁴⁰

The treatment of sea waybills and ship's delivery orders is different. Section 4(5)(b) stipulates that those persons who were at some stage, though no longer, entitled to delivery under a sea waybill⁴¹ lose their rights of suit when someone else acquires them. However, the sea waybill shipper does not lose his rights of suit against the carrier.⁴² Under a sea waybill or a ship's delivery order, then, there is potential for both the shipper and the consignee or final receiver to possess contractual rights of suit against the carrier.

The rationale for the difference in treatment of the bill of lading shipper and the sea waybill shipper is that, unlike the bill of lading shipper who transfers his title to the goods when he transfers the bill of lading, the sea waybill shipper retains his right to dispose of the goods until they are actually delivered in accordance with his instructions. It is argued that it would impair the flexibility of the sea waybill if the shipper lost his rights of suit at a time when he still retained his right of disposal.⁴³

It is submitted that this differential treatment is illogical and unnecessary.⁴⁴ The extinguishment of the bill of lading shipper's contractual rights of action against the carrier ought not to depend on whether the relevant contract of

³⁶ Cooper (note 18 above), pp 50–6.

³⁷ s 5(3).

³⁸ For example, where the loss has been caused by a delay in loading: see Bradgate and White (note 33 above), p 198.

³⁹ Assuming he was not also the charterer or the bill of lading was not a 'straight' bill of lading, to be discussed at note 45 below.

⁴⁰ s 2 of the Bills of Lading Ordinance referred to the endorsee of the bill of lading having 'transferred' to him all rights of suit, yet being 'subject to the same liabilities' as if he were an original party to the contract of carriage.

⁴¹ The position is the same for the ship's delivery order.

⁴² The tailpiece to s 4(5).

⁴³ J Beatson and J Cooper, 'Rights of Suit in respect of Carriage of Goods by Sea' [1991] LMCLQ 196, 205; Cooper (note 18 above), pp 50–6.

⁴⁴ This issue was the subject of a Note of Partial Dissent by E M Clive in the Law Commission Report (note 7 above), p 41. See also Bradgate and White (note 33 above), pp 197–200.

carriage is the bill of lading or the charterparty or whether the relevant shipping document is a bill of lading or a 'straight' bill of lading⁴⁵ or a sea waybill.

Thus, it would have been more satisfactory for the ordinance to have taken a consistent approach to the extinguishment of the shipper's rights and to have drawn a parallel between s 4(5) (dealing with the rights of suit of the original contracting parties) and s 5(3) (dealing with the liabilities of the original contracting parties) and hold that the original contracting parties are always bound by both the rights and obligations set out in the original contract of carriage.

Ambiguity with the word 'claim' in s 5(1)(b)

Section 5(1) imposes liabilities on those persons with contractual rights of suit by virtue of s 4(1) only where that person takes or demands delivery from the carrier, or makes a claim under the contract of carriage against the carrier. There is ambiguity with the word 'claim' in the phrase 'claim under the contract of carriage' in s 5(1)(b) of the ordinance. While it could be defined more formally as 'the institution of legal proceedings,' it is more likely that it will be more loosely defined: an assertion that the carrier is responsible for the loss of or damage to the cargo, or a request that the carrier who had sold goods loaded on board the vessel to account for all sums received over and above the outstanding freight.⁴⁶ It has been suggested that a 'claim' may have been made in these latter examples under s 5(1)(b),⁴⁷ thus triggering the transfer of liabilities to the party who acquired contractual rights of suit under s 4(1). Finally, it is submitted that a mere complaint or a request for further information regarding the loss or damage should not be considered as a claim.⁴⁸ The rationale for this submission is that s 5(1) should transfer the burden (the liabilities under the contract of carriage) only upon the transfer of the benefit (the contractual rights of suit). Where the cargo interest (other than the original shipper)⁴⁹ does not take active steps to acquire or enforce those contractual rights of suit, then the liabilities under the contract of carriage ought not to be imposed upon him.

Procedural mechanisms

⁴⁵ A 'straight' bill of lading (ie, one made out to a named consignee without the addition of such words as 'or order' and therefore not transferable) is not a bill of lading under the ordinance (s 3(2)), but rather a sea waybill.

⁴⁶ This latter example is derived from *Sewell v Burdick* (1884) 10 App Cas 74, which held that, since the bank had not acquired full property in the goods, it was not liable for the outstanding freight. See D Yates (ed), *Contracts for the Carriage of Goods* (London: Lloyd's of London Press Ltd, 1993), para 1.6.5.1.28.

⁴⁷ Reynolds (note 22 above), p 443.

⁴⁸ Yates (note 46 above), para 1.6.5.1.28.

⁴⁹ s 5(3).

The ordinance does not provide for the procedural mechanisms required for its implementation. For example, under the ordinance, a party who has not personally suffered any loss or damage will be permitted to sue the carrier on behalf of another person.⁵⁰ However, the wording of the section is permissive only.⁵¹ It does not stipulate that the party with contractual rights of suit but who has not sustained any loss or damage *must* institute proceedings against the carrier for the benefit of the person who suffered the loss. Further, it does not proceed to direct the court or the party to the action, when successful, to hold the damages awarded against the carrier for the benefit of the other person.

This is a significant omission. When sued under s 4(4), the onus will be on the carrier to search out the person who actually suffered the loss or damage and to ensure that that person is fully advised of the suit brought by the party with the contractual rights of suit but who had suffered no loss. These protective steps will have to be taken to ensure that (1) any award of damages ordered by the court ultimately reaches the person who in fact suffered the loss, and (2) the carrier is not sued a second time by the person who actually suffered the loss on some other basis (for example, an action in tort).⁵² This risk of a misdirection of any damages award and of a multiplicity of actions could have been avoided simply by a requirement in s 4(4) that the person on whose behalf the action is being taken is made a party to the proceedings.

Electronic data interchange

The ordinance contemplates future developments in the area of communications technology by making provision for the passage of regulations relating to electronic data interchange or paperless transactions. However, no guidelines are set out with respect to these paperless transactions.

While this approach is understandable, given the infancy of electronic data interchange affecting the transmission of documents relating to the carriage of goods by sea, the problem is that it may lead to a lacuna in the law. In other words, there must inevitably be some time-lag between the introduction and acceptance of the new technology and the passage of regulations governing that new technology. During this time-lag and necessarily in the absence of clear rules, the parties to the carriage by sea will have to act under great uncertainty as to their rights and liabilities.

Conclusion

The contract of carriage by sea may be seen as the archetypal contract for the benefit of a third party, being entered into between the shipper and the carrier for the benefit of an intermediate endorsee or the ultimate receiver. The

⁵⁰ s 4(4).

⁵¹ s 4(4) states that a person 'shall be entitled' to sue the carrier for the benefit of another.

⁵² Brooks (note 19 above), p 16.

common law and the Bills of Lading Ordinance were unable fully to resolve the problems of privity that this contract engendered. The Bills of Lading and Analogous Shipping Documents Ordinance is a skilfully drafted piece of legislation that eradicates these problems and establishes entitlements of suit in contract based on common sense and the commercial expectations of the parties involved in the sea carriage. The problems with the ordinance that have been identified are admittedly minor, and are largely remediable by existing principles of the common law.

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Reasonable Foreseeability, Pollution, and the Rule in Rylands v Fletcher

Introduction

The tort customarily known as *Rylands v Fletcher*¹ is familiar to most lawyers: 'the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.'² Whether an invention of Justice Blackburn or, as he would have it, a recognition of an existing tort category applying to the use of dangerous things, *Rylands v Fletcher* liability, despite a sometimes precarious existence, has come to be accepted into the lexicon of tort law. It is assumed to impose a kind of strict liability, and indeed it must, for if it did not, it would be duplicative and add nothing to the tort of negligence, which in the meantime has grown to almost unimagined limits.³

Unlike negligence, the tort of *Rylands v Fletcher* has not flourished. With only one or two exceptions the judicial approach has been one of restriction and retrenchment. This might be thought correct inasmuch as a tort imposing strict liability should be closely interpreted and circumspectly applied. On the other hand, given the obvious weaknesses of the fault concept, with its dubious and outdated moral basis, as the determinant for tort liability, and the acknowledged failings of modern tort law as a means of compensation for damage in an increasingly technologically complex world, strict liability in the tort system

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¹ (1866) LR 1 Ex 265.

² Ibid, pp 279–80.

³ Indeed, if the negligence tort had been as developed in 1866 as it came to be by the middle of the 20th century, the principle of non-delegability would surely have decided the case against the defendant under ordinary negligence law.