

CA, application for leave to appeal before Nourse LJ; Evans LJ. 18th September 1997.

LORD JUSTICE NOURSE: I will ask Lord Justice Evans to give the first judgment.

LORD JUSTICE EVANS:

1. The plaintiffs, it is now accepted, are the holders of a bill of lading dated 9th September 1995 issued by the defendants, who were the charterers of the "Prosperity". It covered a cargo of steel which was shipped at a Russian port for carriage to China. The original destination was Shekou, but it was changed to Mawan. The goods were discharged there into the custody of local agents. Then, as the Judge said, "*Unwisely, (and according to the defendant's own letter of 6th August, contrary to express instructions) the vessel's agents released the goods, presumably to Billiongold or their customers, without production of the original bills of lading against a guarantee which has proved to be worthless.*"
2. The plaintiffs claim damages and they applied for summary judgment under order 14. The judge, Timothy Walker J, rejected two proposed defences which were raised by the defendants and he gave judgment for the sum of US \$2,133,316, plus interest. The defendants now seek leave to appeal against that judgment.
3. The first suggested defence, which was that the plaintiffs are not the holders of the bill of lading so as to be entitled to sue, is not pursued.
4. The second defence relies upon two of the express clauses of the bill of lading, which I should read:

"6(2) "PORT TO PORT SHIPMENT

The responsibility of the Carrier is limited to that part of the carriage from and during loading of 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. 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 or 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 this 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 stuffed in or on a Container and to store the Goods or that part thereof ashore afloat or 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."

5. Leave to appeal was refused by the single judge, Saville LJ, who said that he was not persuaded that the judge was wrong either as to the arguments presented to him or those which are in the draft notice of appeal. The expanded argument in the notice of appeal has been very clearly, if I may say so, presented to us by Mr Flaux, both in his skeleton argument and in his short oral submissions to us today. In essence, the defendants say that they performed their obligations under the bill of lading by discharging the goods into the custody of the agents and that they are not liable for the subsequent misdelivery. They are free from liability, they say, because the clauses say so. In particular, the first sentence of clause 6(2) and the last sentence of clause 14. Those sentences say in summary that the carrier is not to be liable for mishaps occurring after discharge from the vessel. The defendants take that argument further by saying that clause 6(2) authorised them to contract with the local agent, acting themselves as agent for the plaintiffs, the cargo interests. It follows from that, they say, that the plaintiffs have their remedy, and they would say their sole remedy, against those local agents. They say, further, that clause 14 goes beyond the scope of being an exemption clause and has the effect, properly construed, of modifying their delivery obligation. Their obligation was discharged by delivering the goods into the custody of the local agents, as they did.
6. The learned judge rejected the clause 6(2) argument, relying upon a statement of the law by Clark J in "*The Ines*" [1995] 2 Lloyd's Rep 144. He quoted a passage beginning at page 152, which I will read because in my view it expresses admirably what the law is on this topic:
"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. That principle protects the shipper from fraud. It also protects the ship-owner. The parties would not in my judgment be likely to have contracted out of it. Thus clear words would be required for them to be held to have done so. The clause should be construed so as to enable effect to be given to one of the main objects and intents of the contract, namely that the goods will only be delivered to the holder of an original bill of lading."
7. It is an implied if not express term of a bill of lading contract that the goods will be delivered at the discharging port only to or to order of the holder of the bill of lading, which must be duly presented by him. It is no longer appropriate to speak of a fundamental term or of a fundamental breach, though it is perhaps almost impossible to avoid doing so in circumstances such as these. One sees, for example, that in the passage already quoted from the judgment of Clarke J he referred to giving effect to "*one of the main objects and intents of the contract*", language strangely reminiscent of the issues which arose when the fundamental breach cases were before the

courts. It is now clearly established that these matters always involve questions of construction. The nature of the defendant's obligation depends upon all the terms of the contract and an individual printed clause may qualify the main obligations, just as they may operate as exemption clauses in the event of a breach.

8. I would say that in the present case it is quite impossible to suggest that this court would hold that the clauses relied on here have the effect of qualifying the ship-owner's obligation not to deliver the goods except against production of the bill of lading.
9. It is true that the undertaking printed on the face of the bill of lading refers expressly to the clauses printed overleaf and does not say in terms that the goods will not be delivered except against production of the bill of lading. I should read the relevant parts:
"SHIPPED ON BOARD by the Carrier the Goods as specified above in apparent good order and condition unless otherwise stated, to be transported to such place as agreed, authorised or permitted herein and subject to all the terms and conditions appearing on [on to?] the front and reverse of this Bill of Lading to which the Merchant agrees by accepting this Bill of Lading any local privileges and customs notwithstanding.
...
IN WITNESS whereof one (1) original Bill of Lading has been signed if not otherwise stated above, the same being accomplished, the other(s), if any, to be void. If required by the Carrier one (1) original Bill of Lading must be surrendered duly endorsed in exchange for the Goods or delivery order."
10. In the bottom left-hand corner of the document there is an express statement "*continued overleaf*", directing the attention to the printed clauses which appear in their customary form.
11. However, if the appellants' submissions were correct, this document, although masquerading as a bill of lading, would not give to its holder or to third parties that deal with them the security which it leads them to expect. On the true construction of this document it is, in my judgment, what it purports to be, that is to say a bill of lading contract which cannot be accomplished except by delivery against presentation of the bill of lading itself.
12. For those reasons I would hold that this application must be refused.

LORD JUSTICE NOURSE:

I agree and do not wish to add anything of my own.

ORDER: Application refused.

MR JULIAN FLAUX QC (instructed by Messrs Ince & Co, London EC3R 5EN) appeared on behalf of the Applicant/Defendant.
THE RESPONDENT/PLAINTIFF did not attend and was not represented.