Time-Charter Stowage Clauses in a Bill of Lading Contract*

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In *The Coral* the Court of Appeal considered the mechanics and the effect of incorporating clauses 2 and 8 of the New York Produce Exchange [NYPE] form into a bill of lading contract. Their deliberations were inconclusive, as the matter came before them on an appeal against an application for summary judgment. But their decision stands for a continuation of the line of authority in which the English courts have tended to favour the use of clauses in bills of lading incorporating the terms of charterparty[1]. The Court ruled firmly, however, that a charterparty clause which removes from the shipowner responsibility for loading and stowage and places it on the charterer will be given effect as a definition of the scope of the contractual service provided to the shipowner, in accordance with the rule in *Pyrene* v. *Scindia*.[2] Such a scope of responsibility clause will not be rejected in the context of the bill of lading for incompatibility with the carrier's obligations under common law or under the Hague Visby Rules properly to load and stow the cargo.

The facts and proceedings

The *Coral* was chartered on the NYPE form, clause 8 of which provides, in relevant part:

> ". . . charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the Captain. . ."

Clause 2 of the NYPE form makes related provisions to the effect that the charterers are to provide the requisite dunnage and shifting boards but are to have use of any such materials already on the ship.

A self-trimming bulk carrier, *The Coral* loaded at Durban a consignment of steel in sheets for Trabzon in Turkey under bills of lading issued by the charterer on behalf of the owner. The bills of lading contained a clause paramount incorporating the Hague-Visby Rules and a clause stating:

* *Balli Trading Ltd.* v. *Afabra Shipping Co. Ltd. (The "Coral")* [1993] 1 Lloyd's Rep. 1.

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1. See *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.* [1959] A.C. 133; *The Merak* [1965] P.223; *The Annefield* [1971] P.168; *The Rena K* [1978] 1 Lloyd's Rep. 545.
2. *Infra.* n.11

"All terms and conditions, liberties and exceptions of the charterparty, dated as overleaf, are herewith incorporated."

The steel was loaded in two parcels, each in a different hold. A surveyor appointed by the shipowner's P&I Club attended the loading at Durban and found that all reasonable precautions had been taken in handling and stowing the cargo. Both holds also contained other cargo bound for the intermediate port of Diliskelisi.

The Diliskelisi cargo was duly discharged, but the steel sheet was not restowed. As a result it may have been left partially unsupported in the half-empty holds. On the voyage from Diliskelisi to Trabzon the ship ran into heavy weather (winds force 6 to 8) resulting in a collapse of stow, damaging approximately one-third of the steel cargo.

The consignees brought an action against the shipowner and applied under Order 14 of the Rules of the Supreme Court for summary judgment against them on the ground that they had no arguable defence. Sheen, J., gave the shippers liberty to sign judgment for damages to be assessed. He held that the shipowner's defence turned on a question of law, namely the interpretation of the charterparty clause when incorporated by reference into the bill of lading, which question could and should be determined on an application for summary judgment. He held that the clause meant only that the stowage would be performed by the charterer and did not amount to an allocation of responsibility for stowage as between the shipowner and the bill of lading holder. At the time, his judgment caused a frisson of apprehension amongst the legal advisers of shipowners, as appearing to presage a wave of applications for summary judgment in cargo claims.

Summary judgment and questions of construction

The Court of Appeal reversed the decision of Sheen J., for one principal reason: that the merits of the case ought not to have been determined on an application for summary judgment. The Court agreed that if the interpretation of the charterparty clause had been in favour of the consignees, then the shipowner had not raised an arguable defence. But if the shipowner's interpretation had been correct, then further factual issues would have remained to be determined at trial: in particular, whether the ship was unfit to carry this type of cargo by reason of the shape of her holds, as alleged by the consignees. For this reason they held that the proper construction of the bill of lading contract ought not to have been determined on summary judgment.[3] The case is therefore authority for the proposition that a question of construction ought not to be determined on an application for summary judgment unless such determination will be finally dispositive of the case one way or the other. Thus the Court of Appeal had to decide merely whether the shipowner had an arguable defence, and for that reason were guarded in their approach to the questions raised.

3. *Supra.* pp.8-9, especially p.9 col. 1.

The shipowner contended that clauses 2 and 8 of the NYPE form when incorporated into the bill of lading contract amounted to an agreement that the carrier would not be responsible for stowage. The consignees contended that the clause did no more than state that performance of the carrier's obligation properly and carefully to stow would be delegated to the charterer.

Adopting the analysis in Scrutton, Article 34, two groups of issues may be discerned: issues concerning the meaning of the charterparty clauses in the context of the bill of lading; and issues concerning the consistency of the incorporated clauses with the other terms of the bill of lading.[4] It had been conceded by the consignees that the wide words of incorporation were sufficient to apply to clauses 2 and 8 of the charterparty.

The meaning issues

The general approach of the Court to the "meaning issues" was set out by Beldam L.J.:

The clauses were . . . directly germane to the shipment, cariage and delivery of goods . . . and such causes may be treated as incorporated even though the precise words may need some modification."[5]

In support of this he cited *The Miramar*, which is commonly thought to be authority for the view that the House of Lords had set its face against verbal manipulation.[6] Although Lord Diplock (delivering the judgment of the House in that case) began by undertaking to clarify to what extent, "if any", such verbal manipulation was permissible, the only definitive pronouncement his judgment yielded is that set out in the footnote which merely establishes that there is no *presumption* in favour of manipulation. There are suggestions that he might have been inclined to allow verbal manipulation if there were a "business reason" to do so[7]. The Court of Appeal in *The Coral* have lent support to that view of *The Miramar*, for nothing is made of the fact that the incorporated clauses made no specific reference to the bill of lading holders.

The first and boldest argument for the shipowner was that the meaning of clause 8 of the NYPE form was laid down by authority. In *Canadian Transport Co. Ltd.* v. *Courtline Ltd* the House of Lords had held that clause 8 placed both the duty to perform and the responsibility for stowage on the charterers.[8] It followed that the owners were not responsible for bad stowage. Thus when the words were removed

4. Mocatta, Mustill and Boyd (eds.) *Scrutton on Charterparties*, 19th. ed. (London, 1984) pp.63-65.
5. *Supra.* at p.5
6. *Miramar Maritime Corporation* v. *Holborn Oil Trading Ltd.* [1984] A.C. 676 at p.683; [1984] 2 Lloyd's Rep. 129 and p.134 col.2, Lord Diplock. Lord Diplock said: '. . . this House should take this opportunity of stating unequivocally that, where in a bill of lading there is included a clause which purports to incorporate the terms of a specified charter-party, there is not any rule of construction that clauses in that charter-party which are directly germane to the shipment, carriage or delivery of the goods and impose obligations on the "charterer" under that designation, are presumed to be incorporated in the bill of lading with the substitution of . . . the designation "consignee of the caro" or "bill of lading holder".'
7. [1984] 2 Lloyd's Rep. p.132 col.2; and p.133 col.2.
8. [1940] A.C. 934; (1940) 67 Lloyd's Rep. 262.

into the bill of lading contract they relieved the shipowner of responsibility for bad stowage.

The Court of Appeal rejected this argument on the simple ground that the words did not necessarily bear the same meaning in the context of the bill of lading contract as they did in the charterparty. This must be right, as it is the very words which are incorporated into the bill of lading contract, not the meaning which the law has attributed to them using their original context as a guide to the parties' intentions.[9] The same result may be reached by a different route, for *Canadian Transport* is authority only for the proposition that clause 8 makes the charterers responsible for stowage "as between themselves and the shipowners". Indeed Lord Wright goes on to say, in support of this construction:

"If [the charterers] do not perform properly the duty of stowing the cargo, the shipowners will be subject to a liability to the bill of lading holders. Justice requires that the charterers should indemnify the shipowners against that liability. . .".[10]

The shipowner's other argument in support of their construction met with more favour. This was that there would be no point in incorporating clause 8 into the bill of lading contract unless it was intended to relieve them of liability for bad stowage. It would be unnecessary to include the clause merely to permit the shipowner to delegate the performance of his duty to stow to the charterer, as he would have a perfect right to do that in any event. The Court neither approved nor disapproved of this approach but the implication is that they thought it "arguable".

For their part, the consignees urged that because there was no privity of contract between them and the charterer, they would have no contractual right of recourse for bad stowage if the owner's construction were correct, and that this in itself told against the owner's construction. The loss of any recourse by the consignee for bad stowage was a result which the Court was keen to avoid. Beldam L.J., suggested that an answer might be found in the law of agency; the consignee should be held to have made a contract with the charterer through the agency of the shipowner. It was said that this argument was first suggested by Devlin J., in *Pyrene* v. *Scindia*.[11] At all events, this stowage contract would come as a surprise to the principals and their agent. One object which this argument would have to meet would be that the shipper will frequently neither know the identity of the charterer nor have sight of the charterpaty terms until well after the contract of carriage with the shipowner has been made and the bill of lading signed. Furthermore, the Carriage of Goods By Sea Act 1992 may well not transfer the benefit (or the burden, if any) of this stowage contract to the consignee, who will usually be the party to suffer loss.[12]

9. *Hamilton & Co.* v. *Mackie & Sons* (1889) 5 TLR 677, Lord Esher, M.R. at p.677.
10. *Supra*, n.8 at p.943.
11. But the question in that case was whether an F.O.B. seller had made a contract of carriage with the shipowner through the agency of the buyer: [1954] 1 Lloyd's Rep. p.330 col.2
12. The 1992 Act transfers to the lawful holder of a bill of lading "all rights of suit under the contract of carriage", the contract of carriage being defined as "the contract contained in or evidenced by that bill of lading": SS 2(1) and 5(1). The Act does not contemplate a bill of lading evidencing two separate contracts, one a contract of carriage and the other a contract of stowage.

Closely related is the suggestion that by performing stowage the charterer impliedly undertakes a contractual obligation to the shipper to use care and skill. The requisite intentions to contract seem equally lacking in this case, as does any means of transferring the benefit of the contract to the consignee.

The Court did not have to decide between these competing arguments but it willl be seen that in its willingness to find an avenue of recourse (for the shipper) against the charterer, it leant in favour of the shipowner's construction to some degree.

The consistency issue

If the charterparty clauses survived the meaning hurdle, the consignees sought to strike them down for inconsistency or incompatibility with the other terms of the bill of lading contract. The Court rejected an argument (which may have appealed to Sheen J., in the court below) that the shipowner had undertaken an obligation by virtue of the Hague-Visby Rules properly and carefully to stow, which obligation could not be excluded by contract. In reply to this the Court referred to the decision in *Pyrene* that the object of the Hague Rules was not to define the scope of the contract of carriage, but the terms on which such services as were undertaking were to be performed.[13] Significantly, the Court appears to have rejected the notion that the Hague-Visby Rules create even a *prima facie* obligation to load and stow properly and carefully. They were prepared to accept that such a *prima facie* obligation exists at common law. But the consignees' argument that the charterparty clauses should be rejected as inconsistent with that implied obligation proved too much – "on that basis, however clear the term restricting the scope of the services undertaken by the owner, it would have to be rejected."[14]

Comment

Whilst it began life in the High Court as a triumph for consignees, the Court of Appeal have made *The Coral* very much an owner's case; and have gone the extra mile in this direction.

The apparently settled rule in *The Miramar*, that verbal manipulation of incorporated clauses will not be permitted, and that specific reference to bill of lading holders under that designation would be required to impose an obligation on them, has been thrown open to doubt, to the extent of that case being cited in support of the contrary conclusion.

The Court was willing to entertain the possibility that the shipper may have to pursue an uncertain recourse action against the charterer based on a contract which none of the parties are likely to have contemplated at the start of the venture, the benefit of which may well not be transferred to the consignee.

Finally, a significant assumption was made as to the precise effect of the rule in *Pyrene*. In that case, Devlin J., had to decide whether the Hague Rules package limitation applied before the goods had crossed the ship's rail. The cargo owners

13. *Supra* n.11.
14. *The Coral, Supra.* at p.7 col.2.

had relied on Article III rule 2, which states that "the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried", as defining the scope of the application of the Rules; and they contended that their goods had been damaged outside that scope. Devlin J., rejected this contention on the ground that Article III rule 2 defined, not the scope of the contract of carriage but the terms on which it was to be performed. It means that the carrier shall do whatever loading or stowage he does properly and carefully. The context of *Pyrene* was thus far removed from *The Coral.* Also, there is some evidence in Devlin J.'s judgment that he had in mind the division of performance of the operations of loading and stowage between the owner and shipper, in accordance with the nature of the cargo and practice of the relevant port.[15] Dividing performance between the carier and the shipper is one thing; placing responsibility for performance on a third party over whom the shipper has no control and without responsibility on the part of the carrier is quite another. If this point is raised again it is to be hoped that this distinction will be explored.

15. *Pyrene, supra.* n.11 at p.328 col.2-p.329 col.1: "The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port of loading and the nature of the cargo. It is difficult to believe that the Rules were intended to impose a universal rigidity in this respect or to deny freedom of contract to the carrier. . . . I see no reason why the Rules should leave the parties free to determine by their own contract the part which each has to play."