3. ARTICLES AND PAPERS

A. SOME COMMENTS ON THE LIABILITY OF A SHIP'S AGENT

By CAPTAIN IAN McKAY

Captain Ian McKay of McKay Shipping Limited in Auckland, New Zealand — himself a ship's agent and broker — offered the following comments on a paper delivered by Graeme Macnish at the Eleventh Annual General Meeting and Conference of The MLAANZ at Christchurch in New Zealand on Monday, 15 October 1984.

In making these observations, Captain McKay has drawn on his own extensive experience and, as a consequence, his comments are of much practical relevance.

First, let me say what an excellent paper Graeme Macnish has presented to us today; it is a thorough document that very fully covers the subject and I congratulate him on a job well done.

Commenting on the paper, which looks at the liabilities of a ship's agent as they apply in Australia, leaves me just a little "flat footed" as I am not fully conversant with Australian law; however, I have assumed that New Zealand law closely parallels Australia and so can be regarded as common. I understand in both countries it has evolved from British law but with a few local differences that really do not affect this subject.

Graeme Macnish initially identifies an agent and his duties and there is no argument that he has clearly defined them. What it really comes down to, in simple language, is that an owner or charterer seeks to have people of integrity acting for him in order to ensure that his business is conducted in the most expeditious manner with the most advantageous return — nothing unusual in that — it is something we all seek and expect.

While we talk of integrity, let me say that about six years ago some enterprising ships' agents met in Rotterdam and conceived the idea of a co-ordinated network of financially stable agency companies in the major ports around the world. This network is known as the Multiport Ship Agencies Network and that group very carefully selects its membership by checking their reputation, their financial stability and their commercial integrity to ensure the very highest standard of service and only one company is appointed in each country except in the United States and Canada where East and West Coast agents are appointed. I suppose that it is not really very different to belonging to one of the professional associations with the rigorous rules they impose on their members. I am very proud to tell you that my company was appointed the sole New Zealand member of Multiport.

The particular areas of exposure set out in the paper are all cause for some concern to agents on possible liability. The one of greatest concern must be the possible liability resulting from oil pollution and agents in New Zealand are clearly liable under the local marine pollution legislation as it currently applies, though moves are afoot to have the Act changed and I understand that a bill could be put to Parliament shortly that will eventually absolve the agent from responsibility and place it back on the shipowner. I believe my namesake, a former New Zealand Vice-President of the Association, has together with other well known legal identities played a major role in seeking to have the law changed and I would like to take this opportunity to thank them on behalf of all agents for their time and effort.

The marine pollution legislation as it presently stands is a matter of prime concern to an agent especially as he is in no way in control of the ship's domestic activities or navigation and the main source of pollution almost certainly results from an oil spill while bunkering or a rupture of a fuel tank if a vessel should ground. Quite clearly, in my view, this is a liability that should properly be the sole responsibility of the master — the poor fellow. After all, I am certain most owners have proper cover either through a P. and I. Club or, if they are tanker owners, they are insured through the Intertanko scheme. One would expect that proof of entry into such a scheme would satisfy the authorities instead of trying to hold some poor agent responsible, especially as he is probably undercapitalised and fairly thin in terms of assets.

I, therefore, strongly object to being held liable, for example, to the grounding of a vessel, entering a harbour with the master in command and assisted by a harbour pilot, with the result that substantial oil pollution occurs — that unfortunate accident in my view is certainly not attributable to any negligence on my part.

The name "Pacific Charger" will evoke some memories amongst the audience, as it was on a dark May night in 1982 that the "Pacific Charger" went ashore just outside Wellington and was very soon in a precarious position with ruptured hull and fuel tanks. A salvage contract was let to a Singapore salvage organisation and my company acted as their agent, but we went further and also acted in an advisory and operational role in conjunction with them and this took us well beyond the role of agent. One of our senior people was on board the ship with the salvage master. Had things gone bad I'm sure it would have made interesting legal history but as you know that venture had a happy ending and the ship was successfully salvaged.

You will gather from my earlier remarks that the spectre of oil pollution is very daunting and certainly was cause for some concern

with the "Pacific Charger" and while a considerable quantity did escape from the vessel, from memory about 150 tonnes, very little damage to the environment occurred — nature took care of the problem, breaking up and dispersing the heavy oil by wave action and a strong outgoing tide. I believe we were probably aided to some extent by a sympathetic Marine Department surveyor who clearly had a sound practical grasp of the situation. Mind you, had the reverse been the case and had we been faced with a major pollution problem with the enormous costs associated with major oil spills then I think we would have been headed for the "back of Bourke".

Items such as customs duties, port charges and taxation are clearly areas where an agent has a more direct responsibility as he will be guiding his principal on the requirements and costs of complying with the law in this area. Accordingly, I am happy to meet my liabilities in this area because as a prudent agent I should have the money in hand from the owner to cover these disbursements.

Stevedoring is an area of liability that has not been covered in Mr Macnish's paper probably, I suspect, because in Australia such contracts are often decided between the shipowner and stevedore on a direct basis and settlement likewise is on a direct basis with little involvement of the agent. Such, of course, is not the case in New Zealand where agents invariably act for principals in finalising stevedoring contracts.

Stevedoring is a money up front system in New Zealand where a statutory body, the Waterfront Industry Commission or W.I.C., allocates the labour at all ports but only after a suitable advance of funds has been made. This system makes the stevedore liable under the legislation to the W.I.C. and it is, therefore, up to the stevedore to ensure he has been properly funded by the agent before starting to work a ship. The system works well for the W.I.C., so much so that I believe I am right in saying that the W.I.C. has not lost a penny through defaulting stevedores. However, some stevedores are not so lucky and occasionally things go amiss, so much so that a well known Auckland stevedore is currently looking to recover a substantial amount from an agent who has been unable to meet his obligation due, I understand, to his owner defaulting.

Those areas in the paper by Mr Macnish such as wreck removal, oil pollution and damage to port installations are fortunately not everyday occurrences but when they do occur usually involve a number of identities, substantial monetary damages and are so complex that it is in the agent's best interest to very quickly pass all the files over to his owner's friendly legal practitioner or P. & I. Club. The value of agents entering their own organisations into P. & I. Clubs such as C.I.S.B.A. cannot be stressed enough as these clubs really do a very good job in protecting an agent or broker's interest when situations like this occur.

The more mundane activities of an agent are the day to day problems associated with bills of lading, the collection of freight, the giving of advice to the master, industrial action and so on.

Clearly I must agree with Graeme Macnish that the relationship of a ship's agent to a principal is a contractual one and all dealings require the utmost integrity and faith on both sides. While that faith in an agent or owner is not necessarily shown in the early stages of the relationship — due mainly, I believe, to the very human problem of being sure that both sides are performing properly — that integrity and faith comes through as the relationship develops.

It cannot be stressed enough that agents should very closely follow the advice of Mr Macnish that care must be taken to ensure that, when signing bills of lading, he is signing "as agent only" and that the principal is clearly identified in the bill of lading or in the charter-party if acting for a charterer. This is well illustrated in the paper when the author refers to the case where the House of Lords clearly came down on the side of one McKelvie who signed "as agent only" thereby not incurring any personal liability and so very clearly acting only as an agent.

Reference is made to confusion over a signature on a bill of lading and, while I have had no personal experience of this type, I must concur that in the case of the "Tideway" the agents were far from responsible in not informing the plaintiffs that they were seeking extensions in time for their claim from the wrong party. That to me, a layman, is what I would call a dereliction of duty as, in my view, while the agent has a duty to defend his principal he must also exercise integrity with all parties and disclose the real defendant and/or facts whatever they may be.

The identification of the principal is not an area where we have had recent problems with suppliers or other contractors but occasionally some confusion occurs as to who is liable for the work performed or supplies provided when a vessel is on charter — this is usually fairly quickly cleared up these days, especially with today's modern communication systems which result in prompt answers being forthcoming.

When it comes to giving advice to the master of a vessel I fully support the view in Graeme Macnish's paper that one needs to be careful; however, the giving of advice is surely an essential part of an agent's duties especially when this applies to local customs, as no master can be expected to be conversant with local requirements in all the world's ports and so must seek guidance from his agent. However, if a situation should develop where there is conflict between the master and the cargo interests then it is advisable to ensure the facts are correctly advised by telex to the owners requesting their instructions so that both the master and agent are fully in the picture and clearly aware of what is required to be done.

The major area of advice that our company is very frequently called upon to give to ship's masters is in the area of the statutory requirements relating to harbours, safe working loads and cargo working arrangements and customs, health and agriculture requirements. Our New Zealand wharfies are a little sensitive, so in the best interests of the owner or charterer we warn masters' not to give orders directly to the wharfies but rather to give them through the stevedoring supervisor or his foreman — after all no master or agent wants his ship "blacked" because some zealous third mate was overheard to make a comment as to the speed of work. Fortunately for New Zealand we do not have the equivalent of the Painters and Dockers Union as you do in Australia and our problems in that area are almost non-existent. However, in fairness I should say that in real terms relations between the various parties and the Waterfront Union are quite cordial and very few stoppages occur; these are usually resolved promptly which makes my position as Chairman of the National Association of Waterfront Employers just so much easier.

I agree totally with Graeme Macnish when he states an agent must be free of any influences when called upon to arrange such things as stevedoring. My company, as with most of the major agents in New Zealand, have some if not a major financial holding in stevedoring companies and one, therefore, is very much aware of the need to act in the strictest propriety, so much so that if a conflict is looming we put the stevedore in direct touch with our principal in order to keep ourselves one step removed and "lily white".

The current competitive marketing situation that exists worldwide in the shipping industry does, as Mr Macnish points out, impose a duty on the agent to carefully point out to the shipper the terms and conditions under which goods are carried. Curiously, he makes no mention of the shipper's responsibility to ensure that he correctly presents the cargo for shipment and shows the correct measurement or weight on his bill of lading. You would be surprised at the number of people who cannot measure a package. Most are quite intelligent people and, strangely, a good number under declare — I haven't met one yet who has overpaid his freight.

While on the subject of shipper responsibility, it is a sad commentary of the times we live in but it is no longer prudent to accept, over the telephone, a large parcel of cargo as a firm booking unless it is followed up by a confirming telex or, better still, a signed booking note. Regrettably I have to say there have been a number of cases in New Zealand where owners have committed ships to load a cargo only to be told when the voyage is under way that the deal has folded. I am aware of an incident in which a telex exchange confirmed a quantity of cargo for loading and then a day or two later a properly executed booking note was signed and the ship in question set out for New Zealand only to find six or seven days later that the business had failed and the cargo was unavailable — this resulted in tremendous expense to this shipowner (probably in the region of $100,000) and he is now attempting to recover through the courts.

We now move to the area where I believe most agents get into trouble — the release of cargo and payment of freight. This is, thus, one of the most important aspects of an agent's duties and Graeme Macnish very clearly spells this out. It is, of course, fundamental to ensure that the freight is paid prior to releasing the bill of lading; however, it is common in some trades to allow shippers to uplift the bill of lading on the basis of credit being given.

One overseas principal with whom my organisation is associated allows a producer board to uplift its bills and permits seven to ten days credit on payment of freight but then they are a sole shipper and most unlikely to default, being government backed — basically, however, it is bad practice and one that should not be encouraged. In this case, with voyage times being about 18 days, there is ample time to take a lien on the cargo if the worst should happen. I wonder what the legal position would be if the ship was involved in an accident with no bill of lading having been signed. In the coastal and island trades credit terms are normal and shipowners accept the occasional defaulter as part of the risk. Our records show that there is one defaulter in every four thousand bills processed in the Pacific Island trades, usually for fairly small amounts of money. While this is not viewed as a major problem that does not mean that we do not take every step to recover.

Graeme Macnish makes the point that it is not an uncommon practice to release cargo without producing a bill of lading. Well, that may be so in Australia but to the best of my knowledge it is not done in New Zealand — except in very special circumstances and only when the agent is in possession of a letter of indemnity authorised by the owners after consultation with the owners' P. & I. Club and supported by a proper bank guarantee. I do, however, endorse his comments that if it is done then it must be done properly — that is a fundamental requirement.

Pressure is always on agents to issue clean bills of lading and one must very carefully watch this problem and do everything to resist when there are known impediments to issuing such a bill; it is advisable to seek the owners' comments and instructions in each individual case and then carry out those instructions implicitly otherwise you leave yourself open to liability. Most pressure comes from those shippers who always seem to have a deadline in clearing the bill through a bank and so meeting the terms of a documentary letter of credit. These people will always argue that it is impossible to get an extension of the letter of credit while you seek instructions — but that, of course, is a ploy and the governing factor is the date of shipment.

Having said all that, I now do a complete turn and tell you that in the meat trade from New Zealand it is a common daily occurrence to issue clean bills of lading in circumstances where known discrepancies occur in the tally figures given by a freezing works and the ship's tally — over or under as the case may be. In this situation a letter of indemnity is taken from the shipper pending an outturn report at the discharge port when the matter is settled but this is a very peculiar New Zealand custom. Regrettably the practice has been in force for a very long time now and is so established that from the point of view of owners it would be extremely difficult to bring in a new set of rules.

Mr Macnish makes the comment that in these recessionary times a higher than usual number of owners and charterers encounter serious financial trouble. I can certainly testify to that and it is quite embarrassing to see the frequency with which failures are occurring and long established shipowners suddenly find themselves on the way out, some of whom have been famous names in the shipping community for many years. It is even worse when you are personally caught up in a failure which catches both the agents, the stevedores and harbour authorities as recently happened in New Zealand with the failure of Sin Wah Line in 1982. When that organisation failed it left a number of creditors wishing they had never heard the name Sin Wah. In this case it was not a straight agent-owner relationship but because one or two harbour boards were owed money they acted and took possession of containers on lease to Sin Wah. If that wasn't bad enough, the situation was further compounded by a stevedore who acted in the dual role of agent and stevedore. I believe this must rate as one of the most interesting maritime legal situations that has developed in New Zealand for many years. At present the matter is still not finalised and it would, therefore, be rather injudicious of me to say anything more on the matter. So my personal advice to agents is that if you suspect your principal is going bad then try and hold as much money as possible and at the same time get the best legal advice.

This is a very good opportunity to finish with a plug for the specialist P. & I. Clubs that cover agents. They do a very good job and provide adequate cover. Surprisingly they do not have many clients enrolled in either Australia or New Zealand. Perhaps this is because it is only in the last decade or so that more aggressive agents and independent owners have forced their way into our trades whereas previously agents were more often than not subsidiary companies of the lines and, thus, protected. However, I strongly advocate that agents living in an increasingly complex commercial world should seek the protection that the P. & I. Clubs offer. While not providing total cover, the protection is such that it does provide some peace of mind and allows an agent to sleep at night.