

Bill of lading — exclusion clause

NISSHO IWAI LIMITED v MALAYSIAN INTERNATIONAL SHIPPING CORPORATION "BUNGA TERATAI"
New South Wales Supreme Court 4 February 1987.

Yeldham J found that the defendant carrier was not liable for the loss of 700 cartons of Malaysian prawns in a container that was stolen while in the custody of the stevedores after discharge from the carrier's vessel.

The container was the subject of a combined transport bill of lading, pursuant to which the carrier agreed to carry the cargo from Sarawak via Singapore to Sydney. The plaintiff who was the endorsee under the bill of lading sued the carrier under the bill of lading. The carrier cross claimed against the stevedores who had not been sued directly by the plaintiff. The basis of the plaintiff's claim was that the defendant was in breach of the obligations to deliver the cargo in good order and condition, in breach of article III, rules 1 and 2 of the Hague Rules, and in tort. The carrier, while denying the breaches, said that the container was delivered into the custody of the stevedores and had discharged its liability pursuant to clause 8(2)(d) of the bill of lading.

Yeldham J considered that the stevedores were independent contractors for whose negligence (assuming it existed) the carrier was not responsible. His Honour concluded that there was no evidence to find that the carrier itself was negligent. The stevedores were an experienced and reputable company.

His Honour considered that the liability regime under the Hague Rules had ceased once the container was discharged from the vessel as clause 3(2) of the bill of lading limited that regime to the carriage of goods by sea within the meaning of the Hague Rules. Article I of those Rules provides that the Rules cover the period from the time when the goods are loaded onto until the time when the goods are discharged from the vessel.

The carrier's liability was defined in clause 8(2)(d) of the bill of lading which stated that the carrier would not be liable or responsible in relation to the loss of the goods due to any—

cause or event which the Carrier could not avoid or the consequence of which the Carrier could not prevent by the exercise of reasonable diligence.

The court held that the carrier was entitled to rely on the exclusion clauses in the bill.

His Honour considered there was no basis to conclude that the carrier could in any way have avoided the consequences of whatever was done or omitted by the stevedores or its employees.

The plaintiff also argued by way of resurrecting the doctrine of fundamental breach that the failure to deliver the container was in breach of an essential term of the contract and so the carrier was unable to rely on any limitation or exclusion provisions contained in the bill of lading. This was rejected on the basis of the Privy Council's decision in *Port Jackson Stevedoring Pty Limited v. Salmond & Spraggon (Aust) Pty Limited*.¹

Other submissions made on behalf of the plaintiff which were rejected, included a submission that the carrier had failed to prove that the container was safely discharged onto the wharf. His Honour found that there was no substance in that submission. He considered that in accordance with well established procedures the carrier was required only to discharge the container into the custody of the stevedores.

¹ (1979-1980) 144 CLR 300.