Bill of lading — evidence of quantity of goods shipped

ACE IMPORTS PTY LIMITED v *COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO*
Supreme Court of New South Wales 12 August 1987.

Proceedings were brought by the owner of goods carried aboard the *Esmeralda 1* from Rio Grande in Brazil to Sydney. Yeldham J had to consider two issues—

1. Whether the defendant carrier was estopped from denying that it had received for carriage the number of cartons stated to be contained within the container; and
2. Whether the defendant took reasonable care of the goods, and the pillage complained of by the plaintiff was, therefore, not due to the negligence of the plaintiff.

The goods were a consignment of cartons of cutlery, posters and leaflets. The consignment was described on the bill of lading as "FCL/FCL" which was accepted by the Judge as meaning "that a shipper wants to ship the whole container so he gets that container from the shipping firm and he loads it, packs it and he stows it and seals it. He brings it to the depot for shipment." Yeldham J accepted further evidence that indicated that this abbreviation meant that "it is a shipper-packed container, and . . . that it is an importer who will unpack the container."

The container was described on the face of the bill as "said to contain" the number of 437 cardboard boxes allegedly packed in it by the shipper. Under the heading "number and kind of packages, description of goods" on the face of the bill of lading appeared the entry "01 — container 20' with 437 cardboard boxes, containing: 'cutlery and leaflets and posters'". Stamped amongst these words appeared "said to contain — packed by shippers". Along the margin of the face of the bill were the printed words "particulars furnished by shipper of goods". Above the signature appeared the following—

> Shipped on board the above vessel . . . in apparent good order and condition unless otherwise stated and to be discharged at the aforesaid port of discharge . . . weight, measure, marks, numbers, quality, quantity, condition, contents and value, if mentioned in this Bill of Lading were furnished by the shippers and were not or could not be ascertained or checked by the Master unless the contrary has been expressly acknowledged and agreed to. The signing of this Bill of Lading is not to be considered as such an agreement . . . .

Clauses 9 and 10 of the bill of lading were as follows —

> 9. Description of Goods
> (1) This Bill of Lading shall be prima facie evidence of the receipt by the carrier in apparent good order and condition, except as otherwise noted, of the total amount of containers, packages or other units or weight of other cargoes specified in the face hereof. Proof to the contrary shall not be admissible when this Bill of Lading has been referred to a third party acting in good faith.
> (2) Except as provided in sub-clause 9(1) above no representation is made by the carrier as to the weight, contents, measurement, quantity, quality, and description, condition, marks, numbers or value of goods and the carrier shall be under no responsibility whatsoever in respect of such description of particulars.

The bill of lading was stated to be subject to the Hague Rules, article III rule 4 of which provides that a shipped on board bill of lading (as in this case) shall be prima facie evidence of the receipt by the carrier of the goods as described therein.

Section 7 of the Usury, Bills of Lading, and Written Memoranda Act 1902 (NSW), in expressing the common law, states as follows—

> "Every Bill of Lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other persons signing same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the Bill of Lading has had actual notice, at the time of receiving the same, that the goods had not been in fact laden on board."

The plaintiff's claim was for damages for lost goods due to pilferage. The defendant alleged that such pilferage occurred prior to the sealing of the container at the port of loading and occurred, therefore, prior to its period of responsibility. The plaintiff submitted, however, that section 7 and the similar principles of common law and the terms of clause 9(1) of the bill of lading precluded the defendant from denying that it had received on board one container in which were contained 437 cardboard boxes.

Yeldham J accepted that the bill of lading is normally prima facie evidence of the quantity of goods shipped and referred to *Henry Smith & Co* v *The Bedouin Steam Navigation Co Ltd*[1], *Attorney-General of Ceylon* v *Scindia Steam Navigation Co Ltd*[2] and *Scrutton on Charter Parties* (18th Edition)[3]. He referred to *New Chinese Antimony Co Ltd* v *Ocean Steamship Co Ltd*[4] in which case the bill of lading bore a typewritten clause stating that "a quantity said to be 937 tones" was shipped, and contained a printed clause as follows—

> "Weight, measurement, contents and value . . . unknown."

The Court of Appeal held that the bill of lading was not even prima facie

1 [1896] AC 70.
2 [1962] AC 60.
3 Page 105ff.
4 [1917] 2 KB 664.

evidence of the quantity shipped and that the shippers bore the onus of proving that that amount had in fact been shipped. This case was distinguished in *Attorney-General of Ceylon* v *Scindia Steam Navigation Co Ltd*[5] where reliance was placed on a clausing "weight, contents and value when shipped unknown". It was held in this case that this clausing was not a disclaimer in relation to a number of bags of breakbulk cargo shipped.

Yeldham J referred to his own decision in *Associated Packaging Pty Ltd* v *Sankyo Kaiun Kabushiki Kaisha*[6] and stated that nothing in that case was intended to convey that any presumption, inference or estoppel allegedly arising from the terms of the bill of lading could not be rebutted by appropriate evidence or the terms of the bill of lading itself.

In the present case, Yeldham J held that the bill of lading made it plain on its face that the carrier made no representation as to the accuracy of the statement that the container contained 437 cardboard boxes. The various clausings demonstrated plainly that the carrier did not pack or seal the container and was relying on the shipper's representations as to the container's contents which the carrier was not able to verify for itself. This view was not affected by clause 7 of the bill of lading which entitled the carrier to open the container and inspect the goods.

Yeldham J concluded in relation to clause 9(1) that it related in the circumstances of the present case only to the receipt of one container and that the words "packages or other units or weight of other cargo specified on the face hereof" related only to non-containerised goods. The reference to "packages" was in his view restricted to cases where no container was used.

As to the second issue, Yeldham J was satisfied on the evidence before him that the goods were stolen from the container prior to its being sealed and padlocked at the port of loading and no liability fell on the carrier in all events.

Yeldham J did not have to consider the question of package limitation or the effect of clause 9(1) on the various package limitation provisions applicable under the bill of lading and under the Hague Rules.

5 Supra n2.
6 [1983] 3 NSWLR 293.