CASE NOTES*

Bill of lading — limitation and indemnity clauses

P S CHELLARAM & CO LTD v *CHINA OCEAN SHIPPING COMPANY*

New South Wales Supreme Court decision of Carruthers J, Admiralty Judge, 7 December 1988

The plaintiff cargo-owner sued China Ocean Shipping Company (COSCO) and its Sydney agent, Five Star Shipping Agency (Five Star) for an alleged failure to deliver a container containing 900 cartons of cassette tapes shipped from Hong Kong to Sydney. The container had been released to the consignee without presentation of the bill of lading. Proceedings were not commenced until after the expiry of 12 months from the date upon which the goods should have been delivered.

I. DECISION

The decision is of importance as the judge held that the defendants were prevented from relying upon Article III Rule 6 of the Hague Rules by reason of the doctrine of promissory estoppel or, alternatively, estoppel by silence. He also held that although the defendants were entitled to rely on the limitation of liability contained in Article IV Rule 5 of the Hague Rules, it was of no assistance in the circumstances because each carton constituted a "package" within the meaning of the Rules. Mr Justice Carruthers also held that the plaintiff was entitled to recover 7.5% buying commission as part of the full market value of the goods upon arrival at Sydney. He also refused to permit the defendants to rely on the provisions contained in clause 5(2) of the bill of lading which contained an undertaking by the plaintiff not to sue any servant, agent or sub-contractor of COSCO.

There was no dispute that Five Star had delivered the container to the consignee without production of the original bill of lading. This was done with the authority of COSCO but without the plaintiff's consent. A letter of indemnity was obtained from the consignee.

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* Provided by Ebsworth & Ebsworth, Solicitors, Sydney (unless otherwise stated).

II. TIME LIMITATION

A considerable amount of the judgment is taken up with recounting the history of the claim prior to the commencement of proceedings outside the time limitation. Suffice it to say that there was considerable correspondence between the solicitors acting for the various parties concerning the institution of proceedings in various potential jurisdictions and the settlement of the claim generally. Mr Justice Carruthers formed the view that there was —

> A basic assumption (albeit tacit) adopted by the solicitors for both parties that pending the resolution of settlement negotiations, time would not run for the purposes of the limitation proceedings. It must necessarily follow from this primary assumption that if settlement negotiations broke down, the defendants would put Chellaram on notice that settlement negotiations were at an end and Chellaram had a reasonable time in which to commence proceedings, immune from reliance by the defendants upon the limitation provisions.

His Honour reached this view whilst admitting that "at no stage during the course of the correspondence or the telephone discussions, was there any reference to limitation provisions".

III. DEVIATION

It was urged upon Carruthers J that the limitation of liability contained in Article IV Rule 5 of the Hague Rules could not avail the defendants because of their wrongful act in delivering the goods to an unauthorised person which, it was argued, amounted to a deviation. His Honour rejected that argument and relied on the Privy Council decision in *Port Jackson Stevedoring Pty Limited* v *Sammond & Spraggan (Aust) Pty Limited,*[1] in which the stevedore was held entitled to rely on a limitation provision in the Hague Rules notwithstanding the negligent delivery of goods by employees of the stevedore to persons who had no right to receive them.

IV. PACKAGE LIMITATION

His Honour then turned to consider whether or not the "package" in Article IV Rule 5 was the container itself or each of the cartons within the container. He referred to a number of decisions in the United States concerning this question. His Honour agreed with those American authorities "to the effect that a container is functionally part of the vessel, at least so long as 'its contents and the number of packages or units are disclosed'." His Honour referred to the fact that the plaintiff had disclosed the number of packages stowed in the container and that COSCO had supplied the container to the shipper.

Another argument raised by the plaintiff, which His Honour did not find it necessary to deal with, was that the plaintiff had been denied

1 (1980) 144 CLR 300.

the opportunity to declare the nature and value of the goods before shipment and insert them in the bill of lading. His Honour did, however, reject a submission made by the plaintiff that the terms and conditions on the back of the bill of lading were so faint and small as to render them illegible and accordingly the defendants should not be entitled to rely upon them. His Honour inferred that a legible copy could have been readily made available to the plaintiff and referred also to the Full Court decision in the case of *Wilson* v *Compagnie des Messageries Maritimes,*[2] which had rejected a similar proposition.

V. CIRCULAR INDEMNITY

Perhaps the most surprising part of His Honour's judgment is where he deals with the position as between the defendants. Clause 5(2) of the COSCO bill of lading contained a provision frequently found in bills of lading by which the merchant undertook not to make any claim against any servant, agent or sub-contractor of the carrier and if such a claim was made to indemnify the carrier for so doing. His Honour found that there had been negligence by both defendants and they were joint tort feasors. Each was responsible for the same "injuria" and the same "damnum". His Honour referred to the fact that Five Star may have had the right to be indemnified by COSCO pursuant to its contractual agency agreement but noted that no cross claims had been filed between those parties, and the defendants were not "at arm's length," because they were being represented by the same solicitor and counsel in the proceedings. Accordingly, His Honour inferred that the possibility of a claim for indemnity being made by Five Star against COSCO "must be remote". For this reason His Honour said that the court "should not in the exercise of its discretion entertain the application for relief sought, as it is merely a hypothetical question". The relief sought was a declaration of indemnity in favour of COSCO against all consequences of the plaintiff's claim against Five Star.

Five Star also sought to argue a defence of circuity, on the basis that if the plaintiff succeeded against Five Star it would recover the whole of that judgment from COSCO which would be entitled to recover the whole of that amount from the plaintiff under the indemnity contained in clause 5(2) of the bill of lading. His Honour declined to accede to this argument again on the basis that there was no evidence before him that Five Star would inevitably recover the whole of any judgment against it from COSCO.

It would therefore seem that the absence of evidence as to the right of Five Star to be indemnified by its principal was fatal to arguments raised by both COSCO and Five Star to exclude or limit their liabilities to the plaintiff.

2 [1954] SR 258.

There is an observation at the conclusion of the judgment which is clearly incorrect. It had apparently been argued before Carruthers J by the plaintiff's counsel that decisions on the circular indemnity question of Yeldham J in *BHP* v *Hapag Lloyd*[3] and *Sidney Cooke Ltd* v *Hapag Lloyd*[4] and the decision of Rogers J in *Mercedes Benz Aust Pty Limited* v *Scan Carriers SA*[5] were wrongly decided because the provision equivalent to clause 5(2) in the COSCO bill of lading was null and void by reason of Article III Rule 8 of the Hague Rules. In dealing with this argument Carruthers J stated "This interesting point, which was not raised in the three cases to which I have referred, will have to await resolution in a future case". It is quite clear from the second of those cases referred to, namely *Sidney Cooke Ltd* v *Hapag Lloyd*, that an argument based upon Article III Rule 8 was raised and rejected by Yeldham J.

3 [1980] 2 NSWLR 572.
4 [1980] 2 NSWLR 587.
5 Unreported, 25 November 1987.