

OFFLOADING THE EURYMEDON

(1) INTRODUCTION

It was recently held by the Privy Council in *New Zealand Shipping Company Ltd v. A. M. Satterthwaite & Co. Ltd*¹ that a stevedoring company, in an action brought against it by a cargo-owner for negligently damaging the cargo, was entitled to rely on an exemption clause in a bill of lading to which, ostensibly, the stevedore was not a party. This case, not only in the final stage of appeal, but also in the earlier hearings before Mr Justice Beattie in the Supreme Court of New Zealand² and in the New Zealand Court of Appeal³ is of great interest because it raises issues fundamental not only to the doctrine of privity of contract, but also to the doctrine of consideration and to the role played by the concepts of offer and acceptance in the traditional unilateral contract situation.⁴

It is intended, in this article, to examine the arguments advanced and the points raised in judgment at the various stages of the hearing—all three stages being of equal interest—and to comment in particular on those aspects of the case dealing directly with the problems of offer, acceptance and consideration. The judgment of Mr Justice Beattie at first instance has been examined in some depth;⁵ however, although this much of the ground has already been explored, it is intended here, for the sake of completeness, to survey it once again.

(2) EARLIER CASES

In order to appreciate the impact of the decision in the *Eurymedon*,⁶ it is necessary to recall earlier decisions on the same point.

¹ [1974] 1 All E.R. 1015 (Lords Wilberforce, Hodson, and Salmon; Viscount Dilhorne and Lord Simon of Glaisdale dissenting).

² [1972] N.Z.L.R. 385.

³ [1973] 1 N.Z.L.R. 174 (Turner P., Richmond and Perry JJ).

⁴ The case is interesting not only for the legal points which it raises. The actual decision may well have repercussions in the sphere of international politics, where cargo-owners in under-developed countries have been complaining that the existing rules governing the allocation of risk in respect of cargo which is the subject of international shipping unduly favour the ship-owning countries by placing on cargo-owners the main burden of insurance in international trade. See Atiyah, 'Bills of Lading and Privity of Contract' (1972) 46 *Australian Law Journal* 212, where the decision of Beattie J. at first instance is examined in the light of the Hague Rules and subsequent amendments thereto. It is pointed out that, as a result of the complaints, a compromise solution was reached in the Brussels Protocol of 1968. The Protocol contains a number of amendments to the Rules, one of which partially overrules the decision of the House of Lords in *Scruttons Ltd v. Midlands Silicones Ltd* [1962] A.C. 446. Servants and agents of the carrier are now protected by the Rules to the same extent as the carrier himself, but independent contractors are specifically excluded from this protection. The Privy Council's decision is unlikely to please the Third World objectors.

⁵ Atiyah, *loc. cit.*

⁶ [1974] 1 All E.R. 1015.

The situation had frequently arisen where cargo had been damaged in the course of offloading. Cargo-owners had, in these situations, been attempting to circumnavigate the limitations imposed by exemption clauses, contained in the bill of lading, on the liability of the carrier, by ignoring possible rights of action which they might have had against the carrier, and, instead, by suing the stevedore in tort for negligence. Stevedores had retaliated by claiming for themselves the protection of the exemption clauses in bills of lading. Until the decision in the *Eurymedon*, the stevedores' attempts had met with a resounding lack of success.

In *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd.*,⁷ the High Court of Australia categorically rejected the defendant stevedore's attempt to invoke the protection of the exemption clause. The Court reaffirmed the fundamental importance of the doctrine of privity and held that the stevedore could not rely on the clause because it was not a party to the contract in which it was contained. This decision was subsequently approved by the House of Lords in *Scruttons Ltd v. Midlands Silicones Ltd.*⁸ It is to be noted that in neither case was the exemption clause expressed as extending protection to anyone other than the carrier.

However, in its reaffirmation of the doctrine of privity, the House of Lords was not quite so absolute as the High Court had been. Lord Reid, in passing, expressed the opinion that a stevedoring company might be able to claim the benefit of an exemption clause contained in a bill of lading if it could be shown that the carrier contracted with the cargo-owner not only on his own behalf, but also as agent for the stevedore. In that situation, the stevedore would be a party to at least that part of the contract which embodied the exemption clause and the doctrine of privity would have no application. In order for such a device to succeed, Lord Reid considered that four criteria would have to be met: first, it must be apparent from the terms of the bill of lading that it was intended to extend to the stevedore the benefit of the exemption clause; secondly, it must be made clear in the bill of lading that the carrier is contracting for the benefit of the clause not only on his own behalf, but also as agent for the stevedore; thirdly, that the carrier has authority from the stevedore to contract for exemption on his behalf or alternatively that the stevedore has later ratified the carrier's act; and, finally, that some form of consideration moves from the stevedore in respect of the promise of immunity extended to him in the form of the exemption clause.⁹

In the case under discussion, an attempt had obviously been made, in

⁷ (1956) 95 C.L.R. 43.

⁸ [1962] A.C. 446.

⁹ *Ibid.* 474.

drafting the exemption clause, to meet the four criteria discussed by Lord Reid.¹⁰ It is worthwhile setting out the clause in full:

[i]t is hereby expressly agreed that *no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier)* shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee, or Owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause *the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading . . .* (italics mine).

(3) THE FACTS

The facts in the *Eurymedon* may be shortly stated. Apart from the sophistication of the exemption clause in the bill of lading, they vary in only one material respect from those in the earlier 'stevedore' decisions. The plaintiff was the consignee of goods shipped in England and bound for New Zealand. After the bill of lading had been transferred to the plaintiff (at which point, of course, property in the goods passed to him) the defendant, a stevedoring company, negligently damaged the goods while offloading them at Wellington. The unusual factual point in the case was that the shipping company which carried the goods and on whose behalf the bill of lading was issued was a wholly owned subsidiary of the defendant. In fact, the defendant acted as general agent in New Zealand for the shipping company. The nexus between the defendant and the carrier left no doubt that the former was aware of the particular terms of the exemption clause in the bill of lading.¹¹

It should be noted at this point that the plaintiff, as consignee of the goods, was not party to the original contract of carriage. The contract was relevant because of the principle enunciated in *Brandt v. Liverpool*,

¹⁰ It is, in this connection, interesting to note that although the clause closely follows the guide-lines laid down by Lord Reid, clauses in that form were already in use before the decision in *Scruttons Ltd v. Midlands Silicones Ltd* [1962] A.C. 446. It was not, therefore, drawn in the light of Lord Reid's observations: *New Zealand Shipping Co. Ltd v. A. M. Satterthwaite & Co. Ltd* [1974] 1 All E.R. 1015, 1033 per Lord Simon of Glaisdale.

¹¹ This account of the facts is largely a reproduction of that appearing in Atiyah, *op. cit.* 213.

*Brazil and River Plate Steam Navigation Co. Ltd.*¹² that a consignee who has accepted a bill of lading and requested delivery of the goods thereunder is entitled to the benefit of, and is bound by, the stipulations in the bill of lading.¹³

It was not disputed by the defendant that the plaintiff's goods were damaged as a result of negligence on its part. The only question was whether the defendant was protected from liability by the exemption clause in the bill of lading.¹⁴ The correctness of Lord Reid's four criteria for the success of the agency argument was not challenged at any stage. Accordingly, the question in effect became whether or not the exemption clause embodied those four criteria so as to make the defendant a party, as principal, to that part of the contract of carriage in which the exemption clause was contained.

(4) AT FIRST INSTANCE

Beattie J. found that clause 1 satisfied the first two of Lord Reid's requirements: it was clear from the terms of the clause that it was

¹² [1924] 1 K.B. 575.

¹³ See *New Zealand Shipping Co. Ltd v. A. M. Satterthwaite & Co. Ltd* [1974] 1 All E.R. 1015, 1021 *per* Lord Wilberforce. It had originally been argued by the stevedore that the consignee was bound by the terms in the bill of lading by virtue of the operation of s. 13 of the Mercantile Law Act 1908 (N.Z.) which provides that upon transfer of the bill of lading and the consequent passing of property in the goods from the consignor to the consignee, the latter assumes all the rights of action and all liabilities as if the contract contained in the bill of lading had been made with himself: *A. M. Satterthwaite & Co. Ltd v. New Zealand Shipping Co. Ltd* [1972] N.Z.L.R. 385, 390. However, as Richmond J. pointed out in the Court of Appeal, it is doubtful whether that provision can apply to make the consignee a party to contracts *collateral* to the bill of lading: *A. M. Satterthwaite & Co. Ltd v. New Zealand Shipping Co. Ltd* [1973] 1 N.Z.L.R. 174, 181. The majority in the Privy Council echoed this doubt, but held that where the statute did not apply the common law rule operated to bind the consignee to the terms of the bill of lading.

¹⁴ This is, by design, a somewhat truncated version of the issue. For the record, the precise question for determination arose as follows: the parties agreed that the Hague Rules (as embodied in the various Carriage of Goods by Sea Acts) were applicable to the contract contained in the bill of lading. Clause 11 of the bill reflected Article IV, rule 5 of the Rules, stipulating a \$200 limitation, in the absence of certain conditions, on the liability of the carrier in respect of any goods. The conditions were not met in the present case. Article III, rule 6 provides that the carrier is to be discharged from all liability in respect of damage to goods unless suit is brought within one year after delivery of the goods. The action in the present case was not brought within the one year period. The plaintiff sued the stevedore rather than the carrier to avoid the effect of these provisions. The defendant claimed that the provisions covered not only the carrier, but extended to protect the stevedore. Its claim was threefold: (1) clause 1 of the bill of lading exempts the defendant, as stevedore, from liability; (2) if the defendant is liable at all, the extent of its liability is limited to \$200; (3) the plaintiff's action was not commenced within the one year period and is therefore out of time. However, the second and third of the defendant's claims were dependent upon the success of the first, for they were based on provisions in the Hague Rules and it was only by virtue of the bill of lading that those provisions were incorporated. Consequently, if the defendant could not establish that it was a party to clause 1 of the bill, it could not rely for protection on the Hague Rules: *A. M. Satterthwaite & Co. Ltd v. N.Z. Shipping Co. Ltd* [1972] N.Z.L.R. 385, 389 *per* Beattie J. To anticipate slightly, Beattie J. eventually found that the defendant was a party to clause 1 and that, as a result, Article III, rule 6 applied. The plaintiff's action failed because it was out of time.

intended to extend protection to the stevedore and that the carrier was contracting for the benefit of the clause not only on his own behalf, but as agent for the stevedore. He further found that, on the particular facts before him, the third requirement was satisfied. He held that, because of the tight nexus between the carrier and its parent, the defendant, and because the defendant was specifically aware of the terms of the bill of lading, and in particular of clause 1, it could be regarded as having authorized the carrier's act of contracting on its behalf.¹⁵ It was also found, as a matter of interpretation of the bill of lading, that the carrier contracted as agent for the stevedore only in respect of the exemption clause; if the defendant was a party to the contract at all, it was party to only so much of the contract as was represented by clause 1 and the subsidiary exempting provisions.¹⁶

The substantial question was, therefore, whether or not some form of consideration could be spelt out as having moved from the stevedore in respect of the cargo-owner's promise of indemnity which was embodied in clause 1 and the subsidiary provisions.

To this end, the defendant indicated the stevedoring contract pursuant to which it had obligated itself to the carrier to offload the cargo-owner's goods upon arrival of the ship in Wellington. It was argued that the performance of this duty by the stevedore constituted good consideration for the cargo-owner's promise of immunity. This assertion is, of course, translatable into the familiar question of whether the performance by one party of an existing duty contractually owed to a third party constitutes sufficient consideration to support a new contract between the first party and another.

In considering the argument, Beattie J. canvassed the trilogy of nineteenth century decisions which support an affirmative answer to the proposition: *Shadwell v. Shadwell*,¹⁷ *Scotson v. Pegg*¹⁸ and *Chichester v. Cobb*.¹⁹ Despite repeated academic and judicial criticism of these decisions,²⁰ Beattie J. regarded them as authoritative and held, on the basis

¹⁵ [1972] N.Z.L.R. 385, 392.

¹⁶ *Ibid.* 396.

¹⁷ (1860) 9 C.B.N.S. 159.

¹⁸ (1861) 6 H & N 295.

¹⁹ (1866) 14 L.T. 433.

²⁰ See *Jones v. Padavotton* [1969] 1 W.L.R. 328, 333 where Salmon L.J. expressed dissatisfaction with the majority decision in *Shadwell v. Shadwell* (1860) 9 C.B.N.S. 159; 142 E.R. 62 and stated his preference for the dissenting judgment of Byles J. On the basis of this statement, Treitel, *The Law of Contract* (3rd ed. 1970) 85 expresses the view that the correctness of *Shadwell v. Shadwell* (1860) 9 C.B.N.S. 159 must be open to doubt. See also Cheshire & Fifoot, *The Law of Contract* (2nd Aust. ed. 1969) 181-2, where all three of the decisions cited above are considered unsatisfactory and the dearth of modern authority on the point is lamented (these passages have been omitted from the treatment of consideration in Cheshire & Fifoot, *The Law of Contract* (3rd Aust. ed. 1974)). It is, however, concluded that the cases do support the proposition for which they are cited: *ibid.* 94. See also

of *Scotson v. Pegg*,²¹ that the offloading, by the stevedore, of the cargo pursuant to the stevedoring contract was sufficient consideration for the cargo-owner's promise of immunity.²²

As to the precise nature of the agreement between the plaintiff and the defendant, Beattie J. held that the carrier could not be regarded as having entered into a contract with the cargo-owner on the defendant's behalf because at the point when the carrier finalized his dealings with the cargo-owner the defendant had not furnished any consideration. No liability or detriment was imposed on the defendant by the bill of lading. Nor had it at any stage promised the cargo-owner that it would perform its duties under the stevedoring contract.²³ On the contrary, the stevedore was relying on an executed consideration and, by definition, that is not supplied until performance of the requisite act (in the present case, the offloading of the cargo).

However, although Beattie J. was not prepared to regard the carrier as *contracting* on behalf of the defendant, nor to consider the exemption clause as embodying a contract between the plaintiff and the defendant, he was prepared to read the clause as an *offer* of immunity by the plaintiff to the defendant, and to treat the carrier as the defendant's agent for the purpose of receiving the offer.²⁴

More specifically, Beattie J. interpreted the exemption clause as embodying an offer to the world at large (or at least to each member of the various classes of person enumerated in clause 1). When the defendant performed the requisite act of unloading the cargo pursuant to the stevedoring contract, it at once accepted the cargo-owner's offer and provided consideration for the promise of immunity.

In short, the defendant's acceptance, by performance, of the plaintiff's offer was held to result in a unilateral contract of the type considered in *Carlill v. Carbolic Smoke Ball Co.*²⁵ Accordingly, the defendant was contractually entitled to the benefit of the exempting provisions in the bill of lading and these operated to defeat the plaintiff's claim.

From this decision of Beattie J. the plaintiff appealed.

Anson's Law of Contract (23rd ed. 1969) 99. Davis, 'Promises to Perform an Existing Duty' (1937) 6 *Cambridge Law Journal* 202, 205 and Atiyah, *An Introduction to the Law of Contract* (2nd ed. 1971) 75 for similarly qualified acceptance of the authority of the cases. It might be noted at this point that the Privy Council has administered an at least partial *quietus* to the debate by unqualifiedly proclaiming *Scotson v. Pegg* (1861) 6 H & N 295; 158 E.R. 120 to be good law: *New Zealand Shipping Co. Ltd v. A. M. Satterthwaite & Co. Ltd* [1974] 1 All E.R. 1015, 1021.

²¹ (1861) 6 H & N 295.

²² [1972] N.Z.L.R. 385, 398.

²³ *Ibid.* 397.

²⁴ *Ibid.*

²⁵ [1893] 1 Q.B. 256 (C.A.).

(5) IN THE COURT OF APPEAL

It was acknowledged by the Court of Appeal that the first three of Lord Reid's criteria had, in the circumstances of the case, been met.²⁶ The sole ground of contention was the aspect of consideration.

Counsel for the stevedore proffered to the Court the two basic arguments which he had advanced before Beattie J. In the first place, he asserted that a contract between the cargo-owner and the stevedore came into existence contemporaneously with the contract of carriage, consideration for the promise of immunity being an implied undertaking on the part of the stevedore to offload the cargo, pursuant to the stevedoring contract, when the ship berthed at Wellington. This proposition was rejected, as it had been at first instance, on the ground that there was no evidence whatsoever in the bill of lading of any promise moving from the stevedore.²⁷

However, the principal contention for the stevedore was that which had found favour with Beattie J., namely that clause 1 of the bill of lading amounted to an offer by the cargo-owner, received by the carrier on behalf of the stevedore, which was accepted when the stevedore performed its duties pursuant to the stevedoring contract. The Court of Appeal unanimously rejected this contention. There appear to have been two principal reasons for its doing so. The first was founded on a point of interpretation. It was held that in so far as clause 1 announced that the carrier was acting as agent for the stevedore (amongst others), it was clear that it was so acting only for the purpose of making them parties to the contract evidenced by the bill of lading. Clause 1 did not reveal any intention that the carrier was to be appointed agent for the purpose of receiving offers or for binding the stevedore to agreements collateral to the bill of lading. In view of the traditionally restrictive interpretation placed on clauses which purported to exclude liability for negligence, the Court was 'reluctant to give efficacy to an exemption clause by reading into it [a] stipulation which the draftsman himself had not seen fit to formulate'.²⁸

The second reason given by the Court for rejecting the stevedore's contention is concerned with an important aspect of the theory underlying unilateral contracts. It raises issues of great interest. It was held that an offer made to the world at large cannot form the basis of a unilateral contract unless the offer expressly or impliedly makes known to the persons to whom it is addressed some particular method of acceptance sufficient to make the bargain binding. The condition precedent to the

²⁶ *A. M. Satterthwaite & Co. Ltd v. New Zealand Shipping Co. Ltd* [1973] 1 N.Z.L.R. 174, 178 *per* Turner P., 179 *per* Richmond J., 182-3 *per* Perry J.

²⁷ *Ibid.* 179 *per* Richmond J., 183 *per* Perry J.

²⁸ *Ibid.* 181 *per* Richmond J., see also the observations of Perry J., *ibid.* 185-6.

imposition of obligations on the offeror must emerge, with sufficient certainty, from the terms of the offer itself. In the present case, the so-called offer was extended to all servants and agents of the carrier (including every independent contractor from time to time employed by the carrier). The potential promisees included not only the respondent stevedoring company which, in the event, unloaded the cargo, but also every other servant, agent or independent contractor of the carrier who might be concerned, in any capacity and at any stage, in the carriage of the cargo until its unloading was completed. Since the addressees of the offer were so great in number and so varied in class, there was an infinite variety of ways in which the offer could be accepted. The case was quite different from *Carlill v. Carbolic Smoke Ball Co.*,²⁹ where use of the smoke balls was clearly the only act by which the defendant advertiser's offer could have been accepted. In the circumstances, the cargo-owner had failed to indicate the form of acceptance which he required and consequently his promise could not be regarded as amounting to an offer capable of ripening into a contractual obligation.³⁰

This aspect of the Court of Appeal's decision has a greater relevance to the general law of contract than at first sight appears. It is perhaps worth digressing at this point to examine the implications.

The Court of Appeal's argument is couched in terms of offer and acceptance. It is clear, however, that in most contexts issues depending upon an analysis of offer and acceptance can be resolved just as clearly by reference to the doctrine of consideration. Sir Owen Dixon made the point quite bluntly with his assertion that offer and acceptance on the one hand and consideration on the other can be regarded as two aspects of the one thing.³¹

Once this is recognized, it is possible to translate the Court's reasoning in the present case into the perhaps more familiar terms employed by the English Court of Appeal in *Combe v. Combe*.³² It was held in that case that a unilateral promise will only be enforced if the act is done on the faith of the promise and at the request express or implied of the promisor. Where the element of request is absent, the act cannot constitute sufficient consideration for the promise.³³

Similarly, in the present case, the argument can be restated in the form

²⁹ [1893] 1 Q.B. 256.

³⁰ *A. M. Satterthwaite & Co. Ltd v. New Zealand Shipping Co. Ltd* [1973] 1 N.Z.L.R. 174, 180 *per* Richmond J., 184-5 *per* Perry J.

³¹ Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468, 474. See also *Australian Woollen Mills Pty Ltd v. The Commonwealth* (1954) 92 C.L.R. 424, 458 where the High Court, in analysing a typical unilateral contract situation talks in terms both of offer and acceptance and of consideration and request.

³² [1951] 2 K.B. 215 (C.A.).

³³ *Ibid.* 221 *per* Denning L.J.

that because the cargo-owner did not expressly or impliedly request the stevedore to offload the ship pursuant to the stevedoring contract, the performance of that act cannot amount to sufficient consideration for the cargo-owner's promise of immunity and that, therefore, no contract was ever formed between the cargo-owner and the stevedore.³⁴

The argument that request is an essential element of consideration has been the subject of considerable controversy amongst text-writers and commentators.³⁵ Some have claimed that request is essential,³⁶ others that it is not,³⁷ and others yet that even if it is essential, it can be implied whenever a court sees fit to do so.³⁸

The relevance which the *Eurymedon* has for this debate lies in the uniqueness of the alleged unilateral contract on which the decision turned. In previous cases involving unilateral contracts, the request element had not given rise to difficulty.³⁹ It is agreed amongst the participants in the debate that if request is an essential element in consideration, it need not be in the form of an express statement from the promisor, but can be implied from the surrounding circumstances. In most cases, the type of act required in response to the promise will emerge quite clearly from the terms of the promise itself. Again, the case of *Carlill v. Carbolic Smoke Ball Co.*⁴⁰ may be taken as an example. There, the only act which could conceivably have amounted to consideration for the defendant company's promise was the use, by a member of the public, of the smoke-ball. Those arguing for the importance of request generally assert that a request by a promisor to perform an act may be implied from the fact that it has been specified.⁴¹ This proposition seems, virtually to eliminate the area of real

³⁴ It seems, at first sight, possible to argue that by accepting the bill of lading, the cargo-owner impliedly requested the stevedore to perform his obligations pursuant to the stevedoring contract. This argument would, however, overlook a point which was fundamental to the Court of Appeal's reasoning, namely that the offer was not addressed to the stevedore alone, but to every servant and agent of the carrier. If the cargo-owner is to be regarded as having impliedly requested the stevedore to offload the ship, he must also be regarded as having impliedly requested every addressee of the offer to perform some appropriate act which would amount to acceptance. The point is that no *particular* act was specified or requested.

³⁵ The discussion has largely been conducted with reference to the doctrine of quasi-estoppel. It is conceded that if request is not an essential element of consideration, the doctrine of quasi-estoppel loses its *raison d'être*, for the representee who has changed his position by acting on an assurance can obtain relief by suing the representor on the unilateral contract constituted by his acceptance of (acting on) the assurance (offer). See: Cheshire & Fifoot, *The Law of Contract* (3rd Aust. ed. 1974, 94 ff; Goodhart, 'Unilateral Contracts' (1951) 67 *Law Quarterly Review* 456; Atiyah, *Consideration in Contracts: A Fundamental Restatement* (1971) 45 ff.

³⁶ Smith, 'Unilateral Contracts and Consideration' (1953) 69 *Law Quarterly Review* 99.

³⁷ Cheshire & Fifoot, *The Law of Contract* (3rd Aust. ed. 1974) 94 ff; Goodhart, *loc. cit.*; Note, (1953) 69 *Law Quarterly Review* 106.

³⁸ Atiyah, *An Introduction to the Law of Contract* (2nd ed. 1971) 86-7; *Consideration in Contracts: A Fundamental Restatement* (1971) 58-9.

³⁹ With the exception, of course, of *Combe v. Combe* [1951] 2 K.B. 215.

⁴⁰ [1893] 1 Q.B. 256.

⁴¹ Smith, *op. cit.* 101.

contention between the schools for, if it is possible to make the implication at that low level, it is surely equally valid to say that request is not necessary at all.

The decision of the Court of Appeal in the *Eurymedon* tends, however, to give the lie to this last proposition. The unique aspect of the unilateral contract in that case is that the type of act required in response to the offer does not emerge either explicitly or from the terms of the offer itself. The facility for making implications about the presence of request is notably absent. The finding, in these circumstances, that the failure of the offeror to indicate, in some form, the type of act sought in response to his offer prevents the offer from giving rise to contractual obligations, supports the view that some element of request, if only a bare intimation, is indeed an essential aspect of consideration. Similarly—and perhaps more significantly—a decision upholding the validity of a unilateral contract in such circumstances would seem necessarily to contain the inference that consideration does not depend upon any form of request, express or implied.

The Court of Appeal, having denied the existence of any contract between the cargo-owner and the stevedore, allowed the appeal. The stevedore appealed from this decision to the Privy Council. It was to be hoped that the opinions handed down by the Privy Council might cast further light on the points raised above.

(6) BEFORE THE PRIVY COUNCIL

This, unfortunately, did not happen. The principal ground on which the Court of Appeal decision was based was passed over entirely by the majority of the Privy Council,⁴² who appear to have been diverted, by a new argument which was raised on behalf of the stevedore, from examining in detail the judgments of the court below. Lord Simon of Glaisdale, in a dissenting opinion, referred to the Court of Appeal's principal contention, but only to accept it without additional comment or qualification.⁴³ Viscount Dilhorne, in a separate dissenting opinion, did not refer to the contention at all, preferring to base this aspect of his judgment on different grounds.⁴⁴ The failure of any member of the Board to come to grips with this issue is unfortunate not only because the loose threads in the above discussion must now be left hanging, but also because the sophistication of the points advanced in the Court of Appeal deserved more than the scant attention paid to it—at least by the majority—in the Privy Council.

⁴² *New Zealand Shipping Co. Ltd v. A. M. Satterthwaite & Co. Ltd* [1974] 1 All E.R. 1015. The majority consisted of Lords Wilberforce, Hodson and Salmon and the majority opinion was delivered by Lord Wilberforce.

⁴³ *Ibid.* 1031.

⁴⁴ *Ibid.* 1022-3.

Counsel for the stevedore put four contentions before the Privy Council.⁴⁵ In the first place, it was argued, as it had been in both courts below, that the bill of lading constituted, or was evidence of, an immediately binding contract between the cargo-owner and the stevedore, made through the carrier as agent for the stevedore. This argument was not referred to by the majority, but was rejected in both dissenting opinions for the same reason that it had been rejected earlier: there was no evidence, in the bill of lading, of any consideration moving from the stevedore in respect of the promise of immunity.⁴⁶

A further argument for the stevedore consisted of the proposition accepted by Beattie J. at first instance and rejected by the Court of Appeal, that the exemption clause amounted to an offer of immunity by the cargo-owner to the world at large, which was received by the carrier on behalf of the stevedore and accepted by the stevedore upon performance of its duties pursuant to the stevedoring contract. Again, this argument was not directly referred to by the majority. Viscount Dilhorne rejected the proposition on the first of the grounds enunciated by the Court of Appeal, namely that clause 1 of the bill of lading was not expressed in terms of an offer, but of an agreement between the carrier and the cargo-owner and that its wording could not be twisted to accommodate the former interpretation.⁴⁷ Lord Simon of Glaisdale expressly adopted the views of the Court of Appeal. He held that clause 1 did not have the essential characteristics of an offer which could form the basis of a unilateral contract in that it did not refer to a particular mode of acceptance and, further, that its attempted construction as an offer was inconsistent with the wording of the clause itself.⁴⁸

The third of the arguments advanced on behalf of the stevedore was a variant of the unilateral contract proposition. It was devised to overcome the difficulties which proved to be the stumbling-blocks in the Court of Appeal, that clause 1 was expressed in terms not of an offer, but of an agreement and that there was no consideration moving from the stevedore,

⁴⁵ In the following discussion, consideration is given only to the first three of the stevedore's contentions, since the fourth does not readily fall within the scope of the article. Briefly, the fourth contention was that, whether or not there was any contract between the cargo-owner and the stevedore, the bill of lading evidenced the consent of the cargo-owner to the performance of services in relation to the goods on terms that the stevedore would have the benefit of exemptions contained in the bill of lading and that this consent nullified the duty of care which the stevedore would otherwise have owed at common law. This argument is similar to the defence of *volenti non fit injuria* which was accepted by Lord Denning in his dissenting judgment in *Scruttons Ltd v. Midlands Silicones Ltd* [1962] A.C. 446. Lord Simon of Glaisdale was the only member of the Board to deal directly with this point. He dismissed it, primarily on the ground that, were it correct, Lord Reid's four criteria would become redundant and a revolutionary short-cut to a *jus quaesitum tertio* would be created: *ibid.* 1032-3.

⁴⁶ *Ibid.* 1023 *per* Viscount Dilhorne, 1029-30 *per* Lord Simon of Glaisdale.

⁴⁷ *Ibid.* 1022-3.

⁴⁸ *Ibid.* 1031.

in respect of the promise of immunity, at the time when the bill of lading was signed.⁴⁹ It was contended that the bill of lading constituted an immediate bargain between the cargo-owner and the stevedore by which the cargo-owner agreed to grant immunity to the stevedore. The bargain matured into a binding unilateral contract when the stevedore made it unconditional by offloading the goods pursuant to the stevedoring contract. The bargain was entered into by the carrier who, at the time of contracting, was acting in this respect as agent for an unidentified principal. The stevedore became identified as the principal when it offloaded the goods.

The majority accepted this surprising contention, with the statement that:⁵⁰

[t]here is possibly more than one way of analysing this business transaction into the necessary components; that which their Lordships would accept is to say that the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shippers and the stevedore, made through the carrier as agent. This became a full contract when the stevedore performed services by discharging the goods. The performance of the services for the benefit of the shipper was the consideration for the agreement by the shipper that the stevedore should have the benefit of the exemptions and limitations contained in the bill of lading. The conception of a unilateral contract of this kind was recognised in *Great Northern Railway Co. v. Witham*⁵¹ and is well established.

It is difficult to accept this analysis. It runs counter to established theory on unilateral contracts, which holds that no such contract comes into existence until the offer is accepted and consideration furnished by performance of the requisite act. Until that occurs, neither party is under any obligation to the other, apart, perhaps from a duty on the part of the offeror to refrain from putting it out of his power to perform his promise in the future.⁵² It is implausible to hold that a 'bargain' is created at the moment when the offer is made, for to do so involves a recognition of a verbal (or written) acceptance of the offer, followed at a later stage by provision of consideration through performance of the act.⁵³ Such a sequence is foreign to accepted notions of the unilateral contract.

Moreover, the decision in *Great Northern Railway Co. v. Witham*⁵⁴ does not, despite the assertion of the majority, support the analysis. The case deals with a typical tender situation. The plaintiffs advertised for tenders for the supply of stores which they might require from time to

⁴⁹ *Ibid.* 1023-4 per Viscount Dilhorne.

⁵⁰ *Ibid.* 1020.

⁵¹ (1873) L.R. 9 C.P. 16.

⁵² See the observations of Diplock L.J. in *United Dominions Trust (Commercial) Ltd v. Eagle Aircraft Services Ltd* [1968] 1 W.L.R. 74, 83.

⁵³ *New Zealand Shipping Co. Ltd v. A. M. Satterthwaite & Co. Ltd* [1974] 1 All E.R. 1015, 1031 per Lord Simon of Glaisdale.

⁵⁴ (1873) L.R. 9 C.P. 16.

time during the course of the following year. The defendant submitted a tender which was accepted by the plaintiffs, who subsequently placed a number of orders which were duly filled. A dispute arose when, eventually, the plaintiffs placed an order which the defendant refused to fill. The plaintiffs sued the defendant for breach of contract. It was held that the defendant was in breach, not of a continuing contract with the plaintiffs, but of the contract which was formed when the plaintiffs placed the particular order. The acceptance of the tender did not in itself make a contract; it was no more than an intimation by the plaintiffs that they regarded the defendant's tender as a standing offer which, on their part, they would be willing to accept as and when they required articles to be supplied. Each fresh order constituted an acceptance of the standing offer and gave rise to a separate contract.⁵⁵

The analysis of the majority in the present case is apparently based on the incorrect view of *Witham's* case⁵⁶ that a 'bargain' was struck immediately the plaintiffs 'accepted' the defendant's tender. On the contrary, the case is quite consistent with the general thesis that no relationship (whether contractual or by way of 'bargain', whatever the distinction between those two states might be) arises between the parties to a unilateral contract until the moment when the offer is accepted by performance. On this basis, therefore, clause 1 in the bill of lading could at best be regarded not as evidencing a bargain between the parties, but simply as embodying an offer of immunity from the cargo-owner. If this is so, then the distinction between the second and third arguments for the stevedore disappears and the third becomes subject to the same criticisms as the second. The majority did not advert to these criticisms. This omission is particularly surprising in view of the admission by the majority that their way of analysing the transaction differed little, if at all, from the reasoning accepted by Beattie J.⁵⁷ In both dissenting opinions, it was held that the two arguments failed for the same reason: clause 1 could simply not be read as constituting an offer.⁵⁸

It is clear from the tone of the majority opinion that they were anxious not to reduce the efficacy of a clause which had become an accepted part of an important commercial transaction and which was in widespread use as a device for regulating the rights and liabilities of the various parties to shipping transactions. It is not reading too much into the opinion to say that they were prepared to juggle existing legal concepts in order to uphold the validity of the clause. Indeed, the opinion is expressly based

⁵⁵ *Anson's Law of Contract* (23rd ed., 1969) 59; Cheshire & Fifoot, *The Law of Contract* (3rd Aust. ed. 1974) 38.

⁵⁶ *Great Northern Railway Co. v. Witham* (1873) L.R. 9 C.P. 16.

⁵⁷ *New Zealand Shipping Co. Ltd v. A. M. Satterthwaite & Co. Ltd* [1974] 1 All E.R. 1015, 1020.

⁵⁸ *Ibid.* 1024 per Viscount Dilhorne, 1032 per Lord Simon of Glaisdale.

on the premise that the document was of a patently commercial nature and that to regard any aspect of it as *nudum pactum* would be paradoxical.⁵⁹

On the other hand, neither dissentient was prepared to subordinate the actual wording of the clause to what was clearly its underlying intention. Viscount Dilhorne observed that:

[i]t is a commercial document but the fact that it is of that description does not mean that to give it efficacy, one is at liberty to disregard its language and read into it that which it does not say and could have said or to construe the English words which it contains as having a meaning which is not expressed and which is not implied.⁶⁰

In the result, the validity of the clause was upheld, with the consequence that the stevedore was entitled to rely on all the exempting provisions expressed in or imported into the bill of lading. The plaintiff's action failed because it was not commenced within the period stipulated by Article 3, rule 6 of the Hague Rules.

(7) CONCLUSION

It now appears to be settled that the agency device can be used, in the shipping context, to overcome the obstacles placed, by the doctrine of privity of contract, in the way of the stevedore's sheltering behind exemption clauses contained in documents to which, for all intents and purposes, they are not party. Apart from further amendments to the Hague Rules, the only factor which might cast doubt on the finality of the decision in the *Eurymedon* is the creation of the agency relationship between the stevedore and the carrier. It will be recalled that an essential feature of the case was the familial tie between the stevedoring company and the carrier. In cases where this nexus does not exist, it is conceivable that the agency device could fail, for it may be difficult to establish authority in the carrier to act on behalf of the stevedore.

On the other hand, Lord Reid intimated that a later ratification (as opposed to a prior authorization) by the stevedore of the carrier's act might be sufficient to create the agency relationship.⁶¹ Since ratification may be express or implied, it is arguable that, in circumstances where there is no direct connection between the stevedore and the carrier, an agency relationship will come into existence once it is shown that the stevedore was aware of the particular terms of the exemption clause contained in the bill of lading. Ratification would be implied from his condoning of

⁵⁹ *Ibid.* 1019-20.

⁶⁰ *Ibid.* 1022.

⁶¹ [1962] A.C. 446, 474.

the practice.⁶² In any event, it might be predicted, in view of the emphasis so strongly placed by the Privy Council on commercial convenience, that any difficulties in this regard will be made light of in future cases.

In so far as the decision reveals a new and more liberal approach to the difficulties created by the doctrine of privity, its ramifications will be widespread. It will doubtless play an important role in shaping the rights of parties not only to shipping contracts, but to contracts for the carriage of goods generally. Its impact may also be felt in respect of claims for personal injuries in an *Adler v. Dickson*⁶³ situation. Given a suitably worded exemption clause in the sailing ticket, servants and agents of shipping lines may in future be protected from liability in respect of injuries sustained by passengers as a result of their negligence.⁶⁴ However, so far as legal principle is concerned, the effect of the *Eurymedon* is not so startling. The crucial question in the case was, surely, that posed by the decision of the Court of Appeal: is an offer which gives no hint as to how it is to be accepted capable of ripening into a unilateral contract? That question was not answered by the majority decision in the Privy Council.

A. J. DUGGAN*

⁶² *A. M. Satterthwaite & Co. Ltd v. New Zealand Shipping Co. Ltd* [1972] N.Z.L.R. 385, 391.

⁶³ [1955] 1 Q.B. 158.

⁶⁴ In this context, the result is perhaps unfortunate, for as Lord Denning has pointed out, the considerations underlying claims for personal injuries are different from those which govern liability for damage done to goods in the course of carriage. In the latter context, it has been the common practice of carriers to limit their liability and to leave the goods owner to insure if he wants greater cover. Carriers base their charges and insurers calculate their premiums on the footing that the limitation is valid and effective between all concerned. In the former situation, however, the exemption is imposed on the passenger by a ticket which constitutes a contract, but which he has no opportunity of accepting or rejecting. It is not usual for a passenger to insure his own safety and he is therefore compelled to travel entirely at his own risk: *Gillespie Bros & Co. Ltd v. Roy Bowles Transport Ltd* [1973] 1 All E.R. 193, 197; *Adler v. Dickson* [1955] 1 Q.B. 158, 180. It may perhaps be necessary to create, in the personal injury situation, an exception to the trend foreshadowed by the decision in *New Zealand Shipping Co. Ltd v. A. M. Satterthwaite & Co. Ltd* [1974] 1 All E.R. 1015.

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