CLAUSE PARAMOUNT IN BILLS OF LADING

TASMAN STEAMSHIP CO. LTD. v. WINSTONE LTD., [1955] N.Z.L.R. 588.

This was an appeal from the decision of Stanton J. in the Supreme Court determining, as a preliminary question of law (placed before the Court as a "case stated"), the construction of a bill of lading on which the present respondents were seeking to sue the appellant. The Court of Appeal comprised Gresson, Cooke and North JJ. The relevant facts, as appeared from the case stated, were that the appellants, owners of the S.S. "Union Carrier", had contracted through agents in Japan to ship a cargo of asbestos sheets from Japan to New Zealand, and the agents had duly issued a bill of lading over the goods. The goods arrived in New Zealand in a damaged condition (short delivery was also alleged) and the respondent, as consignee of the bill of lading, in due course brought an action on it against the appellants, who repudiated liability on the true construction of the contract.

The bill of lading in fact contained extensive exemptions from liability in favour of the appellant, but along the margin of one of its pages were the following words, in larger print:

> Subject to the provisions of the Carriage of Goods by Sea Act of the United States of America, approved April 16 1936.

The opening words of that enactment read as follows:

> Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act.

Section 13 thereof similarly limits the ambit of the Act. Attention is drawn to the fact that the voyage in question was not one "to or from ports of the United States": and furthermore similar New Zealand legislation (the Sea Carriage of Goods Act 1940) only applies to contracts for the outward carriage of goods from New Zealand, while Japan has no comparable enactment at all. There is no evidence that a further trans-shipment from New Zealand to the United States was ever contemplated.

The arguments put forward by counsel for the parties are best summarized by North J. (at 603):

> The appellant in effect says, "This clause [clause paramount] was inserted into the printed form merely in order to comply with the requirements of the United States Act and has no application whatever when the form is used to record a contract for the carriage of goods from Japan to New Zealand." Alternatively, the appellant says, and this was the form the main argument took, "Bring the Act into the bill of lading if you wish, but if you do you must read the bill of lading as if all the words of the Act were set out at length in the document and, when so read, the sections in the Act, which now become additional clauses in the contract, are all controlled by the opening words of s. 13 which reads: 'This Act shall apply to all contracts for the carriage of goods by sea to or from ports of the United States in foreign trade.' Consequently the incorporation of the provisions of the Act does us no harm." The respondent, on the other hand, says, "The agent of the shipowner made a contract for the carriage of goods from Japan to New Zealand and, particularly when regard is had to the circumstances that there was no similar Act in force in Japan, we were entitled to conclude, and every reasonable person perusing the bill of lading would conclude, that the shipowner was acknowledging that his printed conditions and exceptions were to be read subject to the provisions of the United States Act."

It is difficult to elicit from the judgments a precise ratio decidendi; and the learned Judges seem, without in terms adopting any definite principle of construction, to

have wavered in varying degrees between what may conveniently be termed the "reference" and "incorporation" approaches of construction, when determining the effect of the American Act on the shipowner's exemptions in the bill of lading. The result of adopting the "incorporation" approach would logically involve all sections of the American Act (including the sections defining and thereby limiting its operation) becoming express terms of the bill of lading, to be construed as if set out at length therein; whereas if the "reference" approach is adopted the American Act is merely referred to by the Court in undertaking the construction and renders ineffective terms which are inconsistent (in the sense of being repugnant) to it. Under this latter construction the sections of the Act which define the ambit of its operations are seen to be irrelevant, for no term inconsistent thereto appears in the bill of lading. It is proposed to show that the difficulties which the judges perceived in this case were directly attributable to the extent to which they assumed the Act had actually been incorporated into the bill of lading.

The real difficulty the case presented is well set out in the following comments by Gresson J. (at 594):

> I do not overlook that it is by no means unusual to find that, where parties make use of a printed form, superfluous or inapplicable words are left undeleted (Cunard Steamship Co. Ltd. v. Marten, [1902] 2 K.B. 624, 627); but it is not possible in this case to say whether the words were just overlooked, or were regarded as inapplicable, or were deliberately retained in the belief that they had some operation. There is an absence of evidence from which to draw any conclusion.

So far as the appellant's first submission was concerned the Court unanimously rejected it on the basis that the Cunard case (supra) was not available to disregard the clause paramount, where the clause could possibly without inconsistency have been deliberately inserted. Gresson J.'s reference to the "absence of evidence from which to draw any conclusion" as to the intention of the parties introduces criticism of a statement which he made later (at 594)

protesting at the lack of evidence of the circumstances in which it was made, and in which he expressed an inclination to decline the application and vacate the Supreme Court Order on the authority of Watson v. Miles, [1953] N.Z.L.R. 958 (C.A.). Cooke J. (at 598), expressed a similar view. With respect, it is submitted that, even though their Honours did not exercise such purported discretion, their views were based on a misunderstanding of the vacating of the Supreme Court order in Watson v. Miles (supra) and that in fact there was a material difference between that case and the present one. In Watson v. Miles the case stated to the court involved determination of a question of title to property, which was to be preliminary to an action for possession of land, and the inadequacy of the facts placed before the Court was of such a kind as might reasonably be expected to be supplied at the subsequent trial. The Court of Appeal accordingly vacated the Order. But in the present case the "missing" facts as to the intention of the parties could not reasonably be expected to be supplied at a later trial, for such would only relate to the finding as to negligence of the shipowners, and, despite the paucity of facts, the Court was obliged to assume that no other facts were available.

The history of the development of the clause paramount in bills of lading appears to throw some further light on the intention of the parties. At common law the common carrier was regarded as being absolutely liable for goods entrusted to his care, but this harsh rule was mitigated by recognition of his ability to contract out of his liability. However these contractual exemptions, inserted by carriers in their contracts of carriage, so increased in number and complexity that bills of lading (being negotiable instruments of title to the goods as well as contracts of carriage) were seriously prejudiced. As a result there was agitation for a minimum standard of liability to be imposed on carriers below which they could not exempt themselves. This culminated in the acceptance of an International Convention, conveniently referred to as the "Hague Rules", which was adopted at the International Conference on Maritime Law held in Brussels in 1922. Shipowners reacted to the consequent legislation, not by reframing their exemptions in conformity with the Hague Rules,

but, to save as many of their exemptions as legally permitted, retained all their prior exemptions subjected by means of a clause paramount to the governing legislation. North J. also discussed the history of the clause paramount (at 602) but did not proceed to draw the inference, which it is submitted is justifiable (at least where the clause paramount is not ambiguous), that the parties intended to exclude the Hague Rules so far as possible.

Some of the points adverted to by their Honours in the course of their judgments which reflect inadvertence to the "reference" principle of construction and adherence to the "incorporation" approach, demonstrate the real difficulties which they encountered in following the latter mode of construction to the extent that they did.

First, that the learned Judges regarded the American Act as in some degree incorporated into the bill of lading is shown by the reasons they advanced for excluding the sections of the American Act which defined (and thereby limited) the ambit of operation, in endeavouring to refute the appellant's main argument. Gresson J. in effect reasoned that the parties must be deemed to have drawn a distinction between the "operative" and "defining" provisions of the Act when they used that word in the clause paramount. Cooke J. argued that the word "provisions" in the clause paramount was ambiguous, and applied the maxim verba chartarum fortius accipiuntur contra proferentem (which Gresson J. also used to add weight to his decision). But it is submitted that both these lines of reasoning are not beyond criticism. For if New Zealand law is the proper law of the contract, then (see infra) it will govern its construction; and it might be argued that section 5 (b) of the Acts Interpretation Act 1924 would militate against any supposed distinction between "operative" sections and sections defining the ambit of the Act. (Whether the American Act should be construed as an "Act" at all is an open question which cannot be discussed in a brief article.) The argument against the supposed ambiguity of the word "provisions" is furthermore unreal, for the parties were not likely to have intended such a subtle construction on the words they used; and the history of the clause paramount (see supra) and a dictum of Lord Wright

in Vita Food Products Inc. v. Unus Shipping Co. Ltd., [1939] A.C. 277 show that the inference was rather to the contrary. Lord Wright said (at 286):

> The Canadian Act (Hague Rules) only applies to shipments of goods from any port in Canada . . . . and accordingly prima facie would not apply to a shipment from Newfoundland. [Emphasis added]

Secondly as to the supposed presumption (mentioned particularly by North J. at 605) that the words having been considered as intentionally inserted in the contract must be given an operative meaning, it could be argued that this is always subject to a contrary indication appearing from the context as shown by Ocean Steamship Co. Ltd. v. Queensland State Wheat Board, [1941] 1 K.B. 402, where an express reference to English law as the proper law of the contract was negatived by other terms in the contract. Here if the bill of lading is treated as embodying (through incorporation) the American Act, surely the sections limiting the ambit of its operation would similarly negative any such presumption of operation?

On the other hand, the advantages of applying the "reference" principle are clear. It is submitted that the Court would have been justified in basing its decision solely on this principle of construction, and Gresson J. came close to adopting it (at 592, ll.25-31). It will be seen that on a proper application of the "reference" principle of construction the American Act is not incorporated into the bill of lading at all. The two documents remain separate, and only in the event of inconsistency or repugnancy between them are the conflicting parts of the bill of lading rendered ineffective to the extent of their inconsistency or repugnancy. It is possible that, at times, it is the shipowner who benefits from such an application of the rules. Any omission by the parties to provide in the bill of lading for a positive duty imposed by the Act would also fit easily into this construction, for such omission or freedom from the obligation would be treated as inconsistent with the express duty therein provided.

Dicta, by learned judges, who have failed to differentiate between, and thereby confused, the two approaches are typified in the following passage from Lord Esher's judgment in Dobell & Co. v. The Steamship Rossmore Co. Ltd., [1895] 2 Q.B. 408, 412:

> That document has brought in by reference the provisions of an American Act of Congress, and what we have to do is to construe the bill of lading reading into it as if they were written into it the words of the Act of Congress. [Emphasis added]

It is submitted that this is an example of loose use of language referred to by Gresson J. (at 592, l.26), for in Dobell's case, additional words, namely:

> It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exceptions from liability contained in the Act of Congress . . . . [Emphasis added]

show plainly that nothing short of the whole Act of Congress was intended by the parties to be incorporated therein.

The last point raised by this case is the question of the proper law of the contract. In the Vita Food Products case (supra) Lord Wright said (at 291):

> The proper law of the contract does indeed fix the interpretation and construction of its express terms and supply the relevant background of statutory or implied terms . . . .

It is interesting to speculate whether the Court was correct in its acceptance of New Zealand law as the "proper law" of the contract merely because the parties agreed so, and did not raise the issue. It is possible to argue, to the contrary, that the establishment of the proper law must be determined, as a question of law, from the intention of the parties as evidenced by their express assertion in the contract or implied from the other terms of the

contract or the relevant surrounding circumstances at the time of the making of the contract. Such would appear to have been the opinion of Lord Atkin in The King v. International Trustee for the Protection of Bondholders A/G., [1937] A.C. 500, 529, and it is submitted that this represents the common weight of authority on the point. To this it might be argued that the parties' agreement for the case stated amounted to an oral variation of the contract - but it is not likely that the parties, by their submission, thus intended to vary their legal relationships created by the contract, and furthermore the respondent is an assignee of, and not a party to the original contract. However, as the facts of the case stood, the Court would probably have still found (if it had adverted to determining the proper law of the contract) that it was the law of New Zealand.

In conclusion, the main topic of this article may be summarized as follows: The Court of Appeal in this case appears to have reached its decision by relying to some extent on the assumption that the American Act had been incorporated into the bill of lading. It is submitted that the Court was thereby led into difficulties which would not have been raised had it given to the words "subject to" their natural effect by treating the American Act merely as being referred to in the event of the bill of lading containing a term inconsistent with or repugnant to it. However if the latter mode of construction had been consciously adopted by the Court its conclusion would not have been different, since its actual decision, though based partly on reasoning difficult to justify, represented the only logical conclusion.
