LLOYD'S LAW REPORTS

Editor:
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CASES JUDICIALLY CONSIDERED

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STATUTES CONSIDERED

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HOUSE OF LORDS

Feb. 11, 12, 13, 17, 18, 19, 20 and 24, 1986

LEIGH AND SILLIVAN LTD.
v.
ALIAKMON SHIPPING CO. LTD.

(THE "ALIAKMON")

Before Lord KEITH OF KINKEL,
Lord BRANDON OF OAKBROOK,
Lord BRIGHTMAN,
Lord GRIFFITHS and
Lord ACKNER

Sale of goods (c. & f.) — Damage to goods — Title to sue — Whether term that ownership of goods to pass to buyer by endorsement and delivery of bill of lading varied — Whether buyers entitled to sue — Whether buyers mitigated their damage when disposing of steel.

In July, 1976, the buyers contracted to buy a quantity of steel in coils from the sellers. Shipment was to be from Korea c. & f. free out Immingham and as the buyers were traders in steel they hoped to resell it at a profit before or after its arrival in the United Kingdom.

Payment was to be made 180 days after bill of lading date by bill of exchange endorsed by the buyers' bankers.

The buyers were however, unable to sell the goods before the bill of lading was tendered and found it impossible or difficult and embarrassing to obtain their bankers' endorsement of the bill of exchange. Therefore a meeting was held between the sellers and the buyers and it was agreed that the goods would be held "to the order of" or "at the disposal of" the sellers; that their approval would be obtained before any of the goods were resold and that the sellers would do their best to help the buyers resell the goods.

As a result of a meeting on Nov. 25, the buyers wrote a letter to the sellers confirming inter alia that the ownership of the steel remained in the sellers.

The steel was loaded by the sellers on board the defendants' vessel *Aliakmon*. Part of the steel was not in such condition as to comply with the contract of sale as was noted in the mate's receipts. The defects were divided between those that existed before loading began and those that occurred during loading. However the bill of lading, when issued, contained no adverse comments on the apparent good order and condition of the goods. The steel was further damaged during the voyage by moisture and in part by crushing in the stow and it was said that damage also occurred during discharging and in a warehouse after discharge.

The sellers brought an action for the balance of the contract price and interest and the buyers counterclaimed in that action for the financial loss they had suffered. That action was settled and the buyers received credit for £43,000.

The buyers brought an action against the defendants claiming £120,487.52 being the difference between the sound value of the steel and the damaged value and various other expenses incurred.

The issues for decision were (1) whether the buyers had title to sue; (2) whether the defendants were liable for breach of contract; (3) whether the defendants were estopped from denying liability for the damage caused to the goods and (4) whether the buyers had mitigated their damages when disposing of the steel.

———*Held*, by Q.B. (Com. Ct.) (STAUGHTON, J.), that the buyers were entitled to sue.

On appeal by the defendants:

———*Held*, by C.A. (Sir JOHN DONALDSON, M.R., OLIVER and ROBERT GOFF, L.JJ.), that the appeal would be allowed; the buyers had no right to sue.

On appeal by the buyers the question for decision being whether the defendant owners owed a duty of care in tort to the buyers in respect of the carriage of goods on c. & f. terms and if so whether and to what extent such duty was

qualified by the terms of the bill of lading under which the goods were carried:

———*Held*, by H.L. (Lord KEITH OF KINKEL, Lord BRANDON OF OAKBROOK, Lord BRIGHTMAN, Lord GRIFFITHS and Lord ACKNER) that (1) in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property he must have had either the legal ownership of, or a possessory title to, the property concerned at the time when the loss or damage occurred, and it was not enough for him to have had only contractual rights in relation to such property which had been adversely affected by the loss of or damage to it (*see* p. 4, col. 2; p. 5, col. 2; p. 6, col. 1);

———*The Wear Breeze*, [1967] 2 Lloyd's Rep. 315, approved;

———*The Irene's Success*, [1981] 2 Lloyd's Rep. 635, overruled;

———*The Mineral Transporter*, [1985] 2 Lloyd's Rep. 303, considered.

(2) the persons who had the right to sue the shipowners for loss of or damage to the goods on the contract contained in the bill of lading were the sellers and the buyers ought to have made it a further term of the variation that the sellers should either exercise this right for their account or assign such right to them to exercise for themselves; if either of these two precautions had been taken the law would have provided the buyers with a fair and adequate remedy for their loss; by the variation to which they (the buyers) agreed, the buyers were depriving themselves of the right of suit under s. 1 of the Bills of Lading Act, 1855, which they would otherwise have had (*see* p. 10, col. 2);

(3) the buyers were c. & f. buyers and as at the time the goods were damaged the risk in the goods but not the legal property in them had passed to the buyers, the buyers were not entitled to sue the defendant owners and the appeal would be dismissed (*see* p. 11, col. 2).

The following cases were referred to in the judgment of Lord Brandon:

Albazero, The (H.L.) [1976] 2 Lloyd's Rep. 467; [1977] A.C. 774;

Anns v. Merton London Borough Council, (H.L.) [1978] A.C. 728;

Brandt v. Liverpool Brazil and River Plate Steam Navigation Co. Ltd., (C.A.) (1923) 17 Ll.L.Rep. 142; [1924] 1 K.B. 575;

Candlewood Navigation Corporation Ltd. v. Mitsui O.S.K. Lines Ltd. (The *Mineral Transporter*) (P.C.) [1985] 2 Lloyd's Rep. 303; [1986] A.C. 1;

Cattle v. Stockton Waterworks Co., (1875) L.R. 10 Q.B. 453;

Chargeurs Réunis Compagnie Française de Navigation à Vapeur v. English & American Shipping Co., (C.A.) (1921) 9 Ll.L.Rep. 464;

Dorset Yacht Co. v. Home Office, (H.L.) [1970] 1 Lloyd's Rep. 453; [1970] A.C. 1004;

Elliott Steam Tug Co. Ltd. v. Shipping Controller, (C.A.) [1922] 1 K.B. 127;

Healey v. Healey, [1915] 1 K.B. 938;

Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., (H.L.) [1963] 1 Lloyd's Rep. 485; [1964] A.C. 465;

Junior Books Ltd. v. Veitchi Co. Ltd., (H.L.) [1983] 1 A.C. 520;

Margarine Union G.m.b.H. v. Cambay Prince Steamship Co. Ltd., (The *Wear Breeze*), [1967] 2 Lloyd's Rep. 315; [1969] 1 Q.B. 219;

Nea Tyhi, The [1982] 1 Lloyd's Rep. 606;

Peabody Donation Fund (Governors of) v. Sir Lindsay Parkinson & Co. Ltd., (H.L.) [1985] A.C. 210;

Schiffahrt & Kohlen G.m.b.H. v. Chelsea Maritime Ltd. (The *Irene's Success*), [1981] 2 Lloyd's Rep. 635; [1982] Q.B. 481;

Simpson & Co. v. Thomson, (H.L.) (1877) 3 App. Cas. 279;

Société Anonyme de Remorquage à Hélice v. Bennetts, [1911] 1 K.B. 243;

Wait, In re (C.A.) [1927] 1 Ch. 606;

World Harmony, The [1965] 1 Lloyd's Rep. 244; [1967] P. 341.

This was an appeal by the plaintiff buyers, Leigh and Sillivan Ltd. from the decision of the Court of Appeal ([1985] 1 Lloyd's Rep. 199) allowing the appeal of the defendant shipowners, Aliakmon Shipping Co. Ltd. from the decision of Mr. Justice Staughton ([1983] 1 Lloyd's Rep. 203) given in favour of the buyers and holding in effect that the buyers were entitled to claim damage from the owners for damage caused to a consignment of steel which was carried on board the owners' vessel even though there was no contract between the buyers and the owners.

Mr. Anthony Clarke, Q.C. and Mr. Nigel Teare (instructed by Messrs. Anthony King & Co. Billericay) for the buyers; Mr. Nicholas Phillips, Q.C. and Mr. Jonathan Sumption (instructed by Messrs. Holman Fenwick & Willan) for the owners.

The further facts are stated in the judgment of Lord Brandon of Oakbrook.

Judgment was reserved.

Thursday, Apr. 24, 1986

JUDGMENT

Lord KEITH OF KINKEL: My Lords, my noble and learned friend, Lord Brandon of Oakbrook, is to deliver a speech setting out the reasons for which in his view this appeal should be dismissed. I agree entirely with his reasoning and conclusions, and would dismiss the appeal accordingly.

Lord BRANDON OF OAKBROOK: My Lords, this appeal arises in an action in the Commercial Court in which the appellants, who were the c. & f. buyers of goods carried in the respondents' ship, *Aliakmon* claim damages against the latter for damage done to such goods at a time when the risk, but not yet the legal property in them, had passed to the appellants. The main question to be determined is whether, in the circumstances just stated, the respondents owed a duty of care in tort to the appellants in respect of the carriage of such goods; and, if so, whether and to what extent such duty was qualified by the terms of the bill of lading under which the goods were carried.

The appellants' claim was put forward originally in both contract and tort. Mr. Justice Staughton at first instance gave judgment for the plaintiffs on their claim in contract, so making it unnecessary for him to reach a decision on their further claim in tort. However, on appeal by the respondents to the Court of Appeal (Sir John Donaldson, M.R. and Lords Justices Oliver and Robert Goff), that Court set aside the judgment of Mr. Justice Staughton and dismissed the appellants' claims in both contract and tort. Sir John Donaldson, M.R. and Lord Justice Oliver (as he then was) rejected the claim in tort on the ground that the respondents did not at the material time owe any duty of care to the appellants. Lord Justice Robert Goff (as he then was) rejected the claim in tort on the ground that, although the respondents owed a duty of care to the appellants, they had not, on the facts, committed any breach of that duty. The judgment of Mr. Justice Staughton is reported in [1983] 1 Lloyd's Rep. 203 and that of the Court of Appeal in [1985] 1 Lloyd's Rep. 199; and [1985] 2 W.L.R. 289.

My Lords, the facts relating to what I have called the main question to be determined are unusual and need to be set out with some particularity. By a contract of sale made in July, 1976, the appellants ("the buyers") agreed to buy from Kinsho-Mataichi Corporation ("the sellers") a quantity of steel coils ("the goods") to be shipped from Korea to Immingham on c. & f. terms, free out Immingham. The price of the goods was to be paid by a 180 day bill of exchange to be endorsed by the buyers' bank in return for a bill of lading relating to the goods. The buyers, who were traders in steel rather than users of it, intended to finance the transaction by making a contract for the resale of the goods to sub-buyers before the bill of lading was tendered by the sellers.

The goods were loaded on board *Aliakmon* ("the ship") at Inchon in South Korea and a bill of lading dated Sept. 14, 1976, was issued in respect of them. The bill of lading showed the carrying ship as *Aliakmon*; the shippers as Illsen Steel Co. Ltd.; the port of shipment as Inchon; the port of discharge as Immingham; and the consignees as the buyers. It is to be inferred that Illsen Steel Co. Ltd., in shipping the goods, were acting as agents for the sellers. The bill of lading further expressly incorporated the Hague Rules.

The buyers later found themselves unable to make the contract for the resale of the goods which they had intended to make with the result that their bank declined to back the bill of exchange by which payment for the goods was to be made. In this situation representatives of the buyers and the sellers met on Oct. 7, 1976, in an effort to find a solution to the problem. Following that meeting the sellers sent the bill of lading to the buyers under cover of a letter dated Oct. 11, 1976, and receipt of these was acknowledged by the buyers by a letter dated Oct. 18, 1976. The Court of Appeal has held, and the buyers now accept, that the effect of the letters so exchanged was to vary the original contract of sale in the following respects. First, the sellers, despite delivery of the bill of lading to the buyers, were to reserve the right of disposal of the goods represented by it. Secondly, while the buyers were to present the bill of lading to the ship at Immingham and take delivery of the goods there, they were to do so, not as principals on their own account, but solely as agents for the sellers. Thirdly, after the goods had been discharged, they were to be stored in a covered warehouse to the sole order of the sellers.

On arrival of the ship at Immingham the buyers duly carried out the terms of the contract of sale as varied in the manner described above. On discharge of the goods they proved to be in a damaged condition. Mr. Justice Staughton found, and his finding has not been challenged, that a substantial part of this damage, but not all, has been caused by improper stowage of the goods in two respects: first, the stowage of steel and timber in the same compartment, resulting in condensation from the timber causing rusting of the steel; and, secondly, overstowage of the goods in such a way as to cause crushing of them. He further assessed the amount of damage at £83,006.07, a figure which is likewise not in dispute.

The buyers subsequently paid the price of the goods to the sellers, after certain claims for alleged defects in them had been settled. The result of this was that the legal ownership of the goods, which had until then remained in the sellers by reason of their reservation of the right of disposal of them, finally passed to the buyers.

My Lords, under the usual kind of c.i.f. or c. & f. contract of sale, the risk in the goods passes from the seller to the buyer on shipment, as is exemplified by the obligation of the buyer to take up and pay for the shipping documents even though the goods may already have suffered damage or loss during their carriage by sea. The property in the goods, however, does not pass until the buyer takes up and pays for the shipping documents. Those include a bill of lading relating to the goods which has been endorsed by the seller in favour of the buyer. By acquiring the bill of lading so endorsed the buyer becomes a person to whom the property in the goods has passed upon or by reason of such endorsement, and so, by virtue of s. 1 of the Bills of Lading Act, 1855, has vested in him all the rights of suit, and is subject to the same liabilities in respect of the goods, as if the contract contained in the bill of lading had been made with him.

In terms of the present case this means that, if the buyers had completed the c. & f. contract in the manner intended, they would have been entitled to sue the shipowners for the damage to the goods in contract under the bill of lading, and no question of any separate duty of care in tort would have arisen. In the events which occurred, however, what had originally been a usual kind of c. & f. contract of sale had been varied so as to become, in effect, a contract of sale ex-warehouse at Immingham. The contract as so varied was, however, unusual in an important respect. Under an ordinary contract of sale ex-warehouse both the risk and the property in the goods would pass from the seller to the buyer at the same time, that time being determined by the intention of the parties. Under this varied contract, however, the risk had already passed to the buyers on shipment because of the original c. & f. terms, and there was nothing in the new terms which caused it to revert to the sellers. The buyers, however, did not acquire any rights of suit under the bill of lading by virtue of s. 1 of the Bills of Lading Act, 1855. This was because, owing to the sellers' reservation of the right of disposal of the goods, the property in the goods did not pass to the buyers upon or by reason of the endorsement of the bill of lading, but only upon payment of the purchase price by the buyers to the sellers after the goods had been discharged and warehoused at Immingham. Hence the attempt of the buyers to establish a separate claim against the shipowners founded in the tort of negligence.

My Lords, there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it. The line of authority to which I have referred includes the following cases: *Cattle v. Stockton Waterworks Co.*, (1875) L.R. 10 Q.B. 453 (contractor doing work on another's land unable to recover from a waterworks company loss suffered by him by reason of that company's want of care in causing or permitting water to leak from a water pipe laid and owned by it on the land concerned); *Simpson & Co. v. Thomson*, (1877) 3 App. Cas. 279 (insurers of two ships A and B, both owned by C, unable to recover from C loss caused to them by want of care in the navigation of ship A in consequence of which she collided with and damaged ship B); *Société Anonyme de Remorquage à Hélice v. Bennetts*, [1911] 1 K.B. 243 (tug-owners engaged to tow ship A unable to recover from owners of ship B loss of towage remuneration caused to them by want of care in the navigation of ship B in consequence of which she collided with and sank ship A); *Chargeurs Réunis Compagnie Française de Navigation à Vapeur v. English & American Shipping Co.*, (1921) 9 Ll.L.Rep. 464 (time charterer of ship A unable to recover from owners of ship B loss caused to them by want of care in the navigation of ship B in consequence of which she collided with and damaged ship A); *The World Harmony*, [1965] 1 Lloyd's Rep. 244; [1967] P. 341 (same as preceding case). The principle of law referred to is further supported by the observations of Lord Justice Scrutton in *Elliott Steam Tug Co. Ltd. v. Shipping Controller*, [1922] 1 K.B. 127, 139-140.

None of these cases concerns a claim by c.i.f. or c. & f. buyers of goods to recover from the owners of the ship in which the goods are carried loss suffered by reason of want of care in the carriage of the goods resulting in their being lost or damaged at a time when the risk in the goods, but not yet the legal property in them, has passed to such buyers. The question whether such a claim would lie, however, came up for decision in *Margarine Union G.m.b.H. v. Cambay Prince Steamship Co. Ltd.* (*The Wear Breeze*), [1967] 2 Lloyd's Rep. 315; [1969] 1 Q.B. 219. In that case c.i.f. buyers had accepted four delivery orders in respect of as yet undivided portions of a cargo of copra in bulk shipped under two bills of lading. It was

common ground that, by doing so, they did not acquire either the legal property in, nor a possessory title to, the portions of copra concerned: they only acquired the legal property later when four portions each of 500 tons were separated from the bulk on or shortly after discharge in Hamburg. The copra having been damaged by want of care by the shipowners' servants or agents in not properly fumigating the holds of the carrying ship before loading, the question arose whether the buyers were entitled to recover from the shipowners in tort for negligence the loss which they had suffered by reason of the copra having been so damaged. Mr. Justice Roskill held that they were not, founding his decision largely on the principle of law established by the line of authority to which I have referred. He derived further support for his decision by reference to *Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co. Ltd.*, (1923) 17 Ll.L.Rep. 142; [1924] 1 K.B. 575. In that case it was held by the Court of Appeal that, although the plaintiffs could not bring themselves within s. 1 of the Bills of Lading Act, 1855, because they were neither consignees named in nor endorsees of bills of ladings relating to goods carried in the defendant shipowners' ship, nevertheless a contract between the plaintiffs and the defendants on the terms of the bills of lading could be implied from the fact that the plaintiffs had themselves presented the bills of lading to, and obtained delivery of the goods to which they related from, the ship at the port of discharge; and, secondly, that the plaintiffs were entitled to sue the defendants under such implied contract for loss suffered by them by reason of the want of care of the defendants in the carriage of the goods. Mr. Justice Roskill asked himself the rhetorical question why, if the plaintiffs had a right to sue the defendants in tort for negligence, should there have been any reason or need for implying a contract between them.

My Lords, Counsel for the buyers, Mr. Anthony Clarke, Q.C., did not question any of the cases in the long line of authority to which I have referred except *The Wear Breeze*. He felt obliged to accept the continuing correctness of the rest of the cases ("the other non-recovery cases") because of the recent decision of the Privy Council in *Candlewood Navigation Corporation Ltd. v. Mitsui O.S.K. Lines Ltd.* (*The Mineral Transporter*), [1985] 2 Lloyd's Rep. 303; [1986] A.C. 1, in which those cases were again approved and applied, and to which it will be necessary for me to refer more fully later. He contended, however, that *The Wear Breeze*, [1967] 2 Lloyd's Rep. 315; [1969] 1 Q.B. 219, was either wrongly decided at the time, or at any rate should be regarded as wrongly decided today, and should accordingly be overruled.

In support of this contention Mr. Clarke relied on five main grounds. The first ground was that the characteristics of a c.i.f. or c. & f. contract for sale differed materially from the characteristics of the contracts concerned in the other non-recovery cases. The second ground was that under a c.i.f. or c. & f. contract the buyer acquired immediately on shipment of the goods the equitable ownership of them. The third ground was that the law of negligence had developed significantly since 1967 when *The Wear Breeze* was decided, in particular as a result of the decisions of your Lordships' House in *Anns v. Merton London Borough Council*, [1978] A.C. 728 and *Junior Books Ltd. v. Veitchi Co. Ltd.*, [1983] 1 A.C. 520. In this connection reliance was placed on two decisions at first instance in which *The Wear Breeze*, [1967] 2 Lloyd's Rep. 315; [1969] 1 Q.B. 219, had either not been followed or treated as no longer being good law. The fourth ground was that any rational system of law would provide a remedy for persons who suffered the kind of loss which the buyers suffered in the present case. The fifth ground was the judgment of Lord Justice Robert Goff in the present case, so far as it related to the buyers' right to sue the shipowners in tort for negligence. I shall examine each of these grounds in turn.

Ground (1): difference in characteristics of a c.i.f. or c. & f. contract

My Lords, under this head Mr. Clarke said that in the other non-recovery cases the plaintiffs who failed were not persons who had contracted to buy the property to which the defendants' want of care had caused loss or damage; they were rather persons whose contractual rights entitled them either to have the use or services of the property concerned and thereby made profits (e.g. the time charter cases), or to render services to the property concerned and thereby earn remuneration (e.g. the towage cases). By contrast buyers under a c.i.f. or c. & f. contract of sale were persons to whom it was intended that the legal ownership of the goods should later pass, and who were therefore prospectively, though not presently, the legal owners of them.

I recognize that this difference in the characteristics of a c.i.f. or c. & f. contract of sale exists, but I cannot see why it should of itself make any difference to the principle of law to be applied. In all these cases what the plaintiffs are complaining of is that, by reason of their contracts with others, loss of or damage to property, to which, when it occurred, they had neither a proprietary nor a possessory title, has caused them to suffer loss; and the circumstance that, in the case of c.i.f. or c. & f. buyers, they are, if the contract of sale is duly completed, destined later to acquire legal ownership of the