APL Co Pte Ltd v Voss Peer
[2002] SGCA 41

Case Number : CA 18/2002

Decision Date : 03 October 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J

Counsel Name(s) : Loo Dip Seng and Gan Seng Chee (Ang & Partners) for the appellants; Ian Koh and Bryan Tan (Drew & Napier LLC) for the respondent

Parties : APL Co Pte Ltd — Voss Peer

Admiralty and Shipping – Bills of lading – Straight bill of lading – Sea waybill – Whether both the same – Characteristics of a straight bill – Whether presentation of bill necessary to obtain delivery of goods under it – Advantage of holding straight bill of lading not the same as sea waybill

production of the bill of lading. The respondent applied for summary judgment to claim for the balance of the purchase price. The appellants in turn applied under O 14 r 12 to determine whether, in relation to a straight bill of lading, the shipowner may deliver the goods to the named consignee without production of the bill of lading. The judge below held that the appellants were not entitled to deliver the cargo to the named consignee without production of the bill of lading and held the appellants liable in conversion and damages. The appellants appealed against this decision.

Held,

dismissing the appeal:

(1) While a bill of lading, devoid of the characteristic of negotiability, is substantially similar to a sea waybill, that is not to say that they are the same. Whilst one cannot indorse a straight bill to transfer constructive possession of the cargo, it does not necessarily follow that the straight bill does not impose a contractual term obligating the carrier to require its production to obtain delivery (see 48).

(2) The issue must be resolved on the basis of contract law and the intention of the parties. Clear words must be present to imply that the parties intended the instrument to be treated, in all respects, as if it were a sea waybill and that its presentation is not necessary for delivery. The fact that the parties issued the instrument as a bill of lading must mean that they wished to retain all the other features of the bill of lading, other than the characteristic of transferability (see 48-50).

(3) From the perspective of the market place, there is much to commend the rule that presentation of a straight bill of lading is a pre-requisite to obtaining delivery under it. Such a rule is simple to apply and promotes certainty (see 51-53).

(4) In respect of a straight bill of lading, the shipowners should only deliver the cargo against its presentation (see 55).

Case(s) referred to

Barclays Bank Ltd v Commissioners of Customs & Excise

[1963] 1 Lloyd Rep 81 (refd)

Evans & Reid v "Cornouaille"

[1921] Lloyd's Rep 76 (refd)

Glyn Mills, Currie & Co v East & West India Dock

[1882] 7 App Cas 591 (refd)

Henderson & Co v The Comptoir d'Escompte de Paris

[1873-4] LR 5 PC 253 (refd)

Interstate Window Glass Co v New York N.H & H.R Co

. 133A.102, 104 [1926] (refd)

Olivine Electronics Pte Ltd v Seabridge Transport Pte Ltd

[1995] 3 SLR 143 (refd)

Skibsaktieselskapet Thor v Tyrer

[1929] 35 L. IL. R163 (folld)

Sze Hai Tong Bank v Rambler Cycle Co

[1959] AC 576 (refd)

The Brij

[2001] 1 Lloyd Rep 431 (refd)

The Chitral

[2000] 1 Lloyd's Rep 529 (refd)

The Happy Ranger

[2002] EWCA Civ 694 (refd)

The Houda

[1994] 2 Lloyds 541 (refd)

The Rafaela S

[2002] EWHC 593 (refd)

The River Ngada

[2001] LMLN 570 (refd)

The Sormovskiy 3068

[1994] 2 Lloyd's Rep 266 (folld)

The Stettin

[1889] 14 PD 142 (refd)

Thrige v United Shipping Co Ltd

[1924] Lloyd's Rep 6 (refd)

Legislation referred to

Carriage of Goods by Sea Act 1971 [UK] s 1(4)

Carriage of Goods by Sea Act 1992 [UK]

Carriage of Goods by Sea Act 1936 [USA]

[Delivered by Chao Hick Tin JA]

Judgment

Cur Adv Vult

GROUNDS OF DECISION

1 This appeal raises a straightforward, but not an easy question relating to the carriage of goods by sea. The question is whether, in relation to a straight bill of lading (BL), making the goods deliverable to a specific person as consignee, without words importing transferability, such as "to XYZ or order", the shipowner may deliver the same to XYZ without production of the BL. There is no decided case on the point and textbook writers are not unanimous as to what the correct answer is.

2 The court below held that the appellant carrier was not entitled to deliver the cargo to the named consignee without production of the BL. Accordingly, Judith Prakash J held the appellant-carrier liable in conversion and damages. The appellants, APL Co Pte Lte (APL), have appealed against the decision.

The facts

3 The facts of the case are largely undisputed. The respondent shipper, Mr Peer Voss, who carried on an automobile business in Germany, offered to sell a convertible Mercedes Benz motocar (model CLK 320) to a Korean company in Seoul, Seohwan Trading Co Ltd (Seohwan), at a price of DM108,600. A down-payment of DM48,500 was made by Seohwan. Following that payment, Mr Voss made an arrangement with APL to ship the motorcar on board the vessel "Hyundai General" from Hamburg to Busan, South Korea. The motorcar was loaded onto the vessel on 28 August 2000.

4 The BL issued for the shipment bore the name of the buyer, Seohwan Trading Co Ltd, in the box entitled "consignee" but without the words "to order". The bill also provided that:-

> "A set of three originals of this bill of lading is hereby issued by the carrier. Upon surrender to the carrier of any one negotiable bill of lading, properly endorsed, all others shall stand void."

5 The three sets of the original BL issued in respect of the shipment were at all times held by Mr Voss, because the buyer had yet to pay Mr Voss for the remainder of the purchase price. The only disputed point of fact was whether Mr Voss had already been paid by the buyer. APL asserted that the payment had been made.

6 Soon after the vessel arrived at its destination, APL's office at Busan released the motorcar to Seohwan without the production of any of the three sets of the BL. In making the delivery, APL relied upon two documents furnished by Seohwan. The first was a copy of Mr Voss' invoice for the balance sum. The second was a copy of an outgoing cable from the Korean Exchange Bank to a bank in Frankfurt showing a remittance of DM207,500, purportedly as payment for the motorcar and another transaction between the parties.

7 In November 2000 Mr Voss wrote to Seohwan demanding payment of the balance sum. No reply was received. As the balance of the purchase price of the motorcar was still not paid by mid December 2000, Mr Voss demanded payment of the same from APL. APL rejected the claim on the ground that they were not wrong to have delivered the motorcar to Seohwan without the production of the BL.

8 The present action instituted by Mr Voss against APL was to claim for the loss of the balance of the purchase price. Mr Voss applied for summary judgment and APL, in turn, applied under O.14 r 12 for the determination of the question of law set out in the opening paragraph of this judgment.

Classification of bills of lading

9 A bill making goods deliverable "to XYZ or order" is an order bill. A bill making goods deliverable "to XYZ" and nothing more, means that the goods can only be delivered to XYZ and no one else. XYZ will not have the option of transferring it to another person. This second kind of bill is known as a "straight" bill or a "non-order" bill. There is, in fact, a third type of bill known as the "bearer" bill, which will allow delivery to be made to whomsoever holds the bill. A "bearer" bill can arise in the following circumstances:-

(i) if the bill explicitly so declares itself to be one;

(ii) if the name of the consignee is stated as "bearer";

(iii) if it is an order bill but does not mention to whose order it is; or

(iv) if it is an order bill endorsed in blank by the person named in the order bill.

(see *Tetley on Marine Cargo Claims, 3rd Edn* at 182-3).

10 An order bill is often loosely described as "negotiable". But this word does not have the same meaning as it bears in relation to a bill of exchange. The description "negotiable" simply means the bill is transferable; it does not give to the transferee a better title than what the transferor possesses. It is not in dispute that the present BL is a straight bill or a non-order bill.

11 It is trite law that under a BL, which is usually an order bill and is negotiable, the carrier is under the obligation to deliver the cargo at the port of destination to the holder of the bill, upon presentation of and under the terms found in the bill itself. If the cargo is delivered to someone who does not present the original bill of lading, even if the person is the named consignee, the carrier will be held answerable for the tort of conversion. In *Skibsaktieselskapet Thor v Tyrer* (1929) 35 L. IL. R163 at 170, Wright J said,

> "It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril."

12 In *Sze Hai Tong Bank v Rambler Cycle Co* [1959] AC 576 at 586, the Privy Council held such a delivery to be in breach of contract. Lord Denning said (at p.586):-

> It is perfectly clear that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. … The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are, therefore, liable in conversion unless likewise protected."

But we hasten to add that in *Sze Hai Tong Bank* the court was clearly dealing with a negotiable bill, as it was stated to be "unto order or his or their assigns".

13 In *Glyn Mills, Currie & Co v East & West India Dock* (1882) 7 App Cas 591 at 610, Lord Blackburn said that a carrier delivering the goods without the bill of lading being produced would be in breach of the contract. Although there did not appear to be any evidence that the bill in issue contained a clause requiring it to be produced, his Lordship seemed to have implied such a term.

Appellants' arguments

14 The argument raised by the appellants is that as a straight BL is non-negotiable, and being unendorseable to a third party, it is to be equated to a sea waybill whose essential characteristic is also that of non-negotiability.

15 As far as a sea waybill is concerned, it is settled law that the obligation of the carrier is to deliver the cargo to the named consignee provided that the latter can prove his identity; there is no requirement that the consignee must present the waybill before he can obtain delivery of the goods: see *Scrutton on Charterparties and Bills of Lading (20th Edn 1996)* at 39.

16 The advantage of resorting to a sea waybill is that it avoids the problems arising from the late arrival of the documentation; its contents can be telexed to the destination. Sea waybills are often used in trades involving short sea voyages, where the carrying ship may arrive at its destination before the shipping documents do.

Appellants' authorities

17 In support of the proposition which the appellants have advanced, they cited a number of recent authorities. But we must add that in none of them was the *ratio decidendi* on point. Furthermore, reliance is also placed on the views expressed in two works, *Benjamin's Sale of Goods (5th Edn)* and *Carver on Bill of Lading (1st Edn).* But it must be noted that the relevant chapters in these two works were authored by the same writer, Prof Guenter Treitel.

18 It may be expedient if we should at this juncture set out the views expressed in those two works. In *Benjamin's Sale of Goods (5th Edn)* at 18-014 it is stated that –

> Two things follow from the fact that a document of this kind is not transferable by indorsement and delivery. First, the consignee (if in possession of the document) cannot, by purporting to transfer it in this way, impose on the carrier a legal obligation to deliver the goods to another person. Secondly, the shipper cannot oblige the carrier to deliver the goods to a different consignee from the one named merely by indorsing and delivering the bill to that other person; for under a straight bill the carrier is entitled and bound to deliver the goods to the originally named consignee without production of the bill, so that, when he delivers the goods, he may have no means of knowing of the purported transfer of the bill. This difficulty cannot arise in the case of an order bill, under which the goods are deliverable only on production of the bill." (Emphasis added).

19 In *Carver on Bills of Lading*, a similar view is propounded at 6-007 –

> A "straight" bill is not a document of title in the common law sense, so that its transfer does not operate as a transfer of the constructive possession of the goods. It is not a symbol of the goods because the carrier is entitled and bound to deliver the goods to the named consignee without production of the bill. It follows that a carriage document will not be a document of title in the common law sense if it is expressed on its face to be "non negotiable". Sea waybills have the legal nature of "straight" or "non-negotiable" bills: they are similarly not documents of title in the common law sense, since under such waybills delivery is to be made to the named consignee, irrespective of production of the waybill, and not to the holder of the waybill as such. (Emphasis added).

20 Furthermore, while *Carver on Bills of Lading* in paragraphs 1-007 and 1-008, also states that there is no difference between sea waybill and a 'straight' or 'non-negotiable' BL, the authors seem to imply that that is so only in the context of the UK Carriage of Goods by Sea Acts (COGSA) of 1971 and 1992 and this appears from the following passage:-

> "One possible view is that the definitions in this Act assume that it is *only* an order (or a bearer) bill which is a "bill of lading," so that a document making goods deliverable to an identified person (and not to his order) is not a bill of lading at all. This may, indeed, be the position for the purposes of the 1992 Act, and the Carriage of Goods by Sea Act 1971, while not using the expression "sea waybill" also contrasts bills of

> lading with "non-negotiable" receipts containing or evidencing contracts for the carriage of goods by sea. But it does not follow that sea waybills or similar non-transferable documents cannot be bills of lading for any legal purposes whatsoever. The definitions and distinctions just quoted apply only for the purposes of the Acts in which they occur and not for the purposes of other legislation or of rules of common law or where a question arises as to the meaning of the phrase "bill of lading" in a contract. For example, the fact that a document which has the characteristics of a sea waybill (and is therefore not a bill of lading) for the purposes of the Carriage of Goods by Sea Act 1992 does not preclude the possibility of such a document's being regarded as a "bill of lading" for the purposes of section 1(4) of the Factors Act 1889 and hence of the Sales of Goods Act 1979." (Emphasis added).

21 In *The Bill of Lading by Michael Bools,* the author shares the views of *Benjamin* and *Carver* when he states (at 169):-

> "With respect to a non-negotiable bill, the position is the same in England and America; the carrier need not require that it be produced or surrendered and need not even see the bill. All that is necessary is that the receiver produces identification to show that he is the person named in the bill as the consignee."

No authority is cited by the author in support of this proposition except for the US case *Interstate Window Glass Co v New York N.H & H.R Co.* 133A.102, 104 (1926).

22 Turning now to the cases relied upon by the appellants, the first is *The Chitral* [2000] 1 Lloyd's Rep 529 where the question before the court was, who had the title to sue in relation to the cargo carried on board *"The Chitral"* from Bremen to Dubai and which cargo was damaged during carriage. The judge, David Steel J, could not accept the argument that the bill in question, where the printed box for naming of the consignee (headed "if order state notify party") was left blank was an "order" bill. The case had nothing to do with the question under consideration in this judgment. It did not deal with the delivery obligation of the carrier.

23 Next is *The River Ngada* [2001] LMLN 570 where again the issue was whether the claimant had the title to sue in respect of the damage caused to the cargo. There, the Deputy Judge opined that in a straight BL, the production of the BL by the named consignee was not a necessary pre-condition for delivery. In coming to this view, the Deputy Judge relied upon the passage in *Benjamin's Sale of Goods* at 18-014, which we have quoted above.

24 The more recent case, *The Rafaela S* [2002] EWHC 593 was also not concerned with the question whether in a straight BL the shipowner/charterer could deliver the cargo to the specified consignee without the production of the BL. The issue there was whether the shipowner/charterer could rely on the limitation prescribed under the *United States Carriage of Goods by Sea Act 1936* or the more generous regime of *Hague* or *Hague-Visby Rules* which had been enacted in the UK *Carriage of Goods by Sea Act 1971.* To determine this question, it was necessary to decide whether the straight BL issued by the shipowner/charterer was a BL within the meaning of s.1(4) of the 1971 Act, which provided that –

> "nothing in this section shall be taken as applying anything in the Rules to any contract for the carriage of goods by sea unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title."

25 The 1971 Act did not define a "bill of lading". There, Mr Justice Langley held that a straight BL which was not negotiable was not a "document of title". He was of the view that the definition of a BL included "the characteristics of transferability of title to the goods" and relied for this proposition on *Scrutton on Charterparties, 20th Edn, Article 2* pages 1-2, *Benjamin's Sale of Goods, 5th Edn, 18-007* and *Carver on Bills of Lading 1st Edn* 6-007 and 6-014. He accordingly held that a straight BL did not fall within the 1971 Act. However, Langley J went further to express the view (obiter) that, *while the point was of some nicety,* it was not necessary in respect of a straight BL that delivery must be against the BL.

26 In *The Brij* [2001] 1 Lloyd Rep 431, the Hong Kong High Court, relying solely on *Benjamin on Sale of Goods*, held that in the case of a straight BL, the carrier could deliver directly to the specified consignee without the production of the BL. The substantive issue in the case would appear to relate to the question of privity of contract.

Respondent's contention

27 On the other hand, the respondent contends that a straight BL, while it shares the characteristic of non-transferability with a sea waybill, is nevertheless not a sea waybill. The respondent relies upon a number of leading cases on the subject to substantiate his argument that production of the BL is vital to obtaining delivery, irrespective of whether it is a straight or an order bill. However, like the cases relied on by the appellants, those cited by the respondent also do not contain a ratio to that effect. This was because they did not address, nor was it necessary to address, the specific issue, that in respect of a straight BL, the carrier could deliver to the named consignee without its production.

28 In the celebrated case, *The Stettin* (1889) 14PD 142, Butt J held that a shipowner was not entitled to deliver the goods to the consignee named in the BL without the production of the bill and that the shipowner who so delivered must bear the consequences. But the fact remains that the case itself was concerned with a negotiable bill which specified that the goods were "to be delivered to the consignee named in the BL or to his assigns". While it is true that the distinction between a straight and negotiable bill was raised in argument, Butt J did not specifically refer to it in his judgment. Arguably, it could be inferred that Butt J did not think that the distinction was relevant as far as the delivery obligation of the carrier was concerned.

29 In an earlier case, *Henderson & Co v The Comptoir d'Escompte de Paris* (1873-4) LR 5 PC 253, the Privy Council (PC) assumed that where a BL did not include the words "or order or assigns", it was not a negotiable document. The PC held that, while the absence of those words in a BL was unusual, that would not suffice to put a man of business, or a bank, on inquiry into the nature of the special arrangement. It did not constitute constructive knowledge. It seems to us that apart from the fact that it decided that a straight BL was not transferable, nothing more should be read into it.

30 In *Thrige v United Shipping Co Ltd* [1924] Lloyd's Rep 6 where it was unnecessary to decide the question whether, where a BL was made out to a consignee and the property passes on shipment, the shipowner who delivered to the named consignee without production of the BL was or was not liable for breach of contract, Scrutton LJ stated that if *Stettin* had decided that there was such a duty, he thought *Stettin* might require further consideration. He also declined to express a view whether such a BL was or was not a negotiable instrument.

31 *Barclays Bank Ltd v Commissioners of Customs & Excise* [1963] 1 Lloyd Rep 81 involved a negotiable BL as goods were shipped under the BL to "order of the shipper". To that extent, the point may be made that the following general statement of Diplock LJ should be viewed with some circumspection –

> "So long as the contract is not discharged the bill of lading, in my view, remains a document of title by indorsement and delivery of which the rights of property in the goods can be transferred. It is clear law that where a bill of lading or order is issued in respect of the contract of carriage by sea, the shipowner is not bound to surrender possession of the goods to any person whether named as consignee or not, except on production of the bill of lading …"

It is difficult to say whether in that pronouncement, Diplock LJ also had in mind a straight BL, where words such as "to order" were absent.

32 In *The Houda* [1994] 2 Lloyds 541, there was a shipment in August 1990 of a cargo of crude oil by a time-charterer from Kuwait shortly before the invasion of that country by Iraq. The BLs were left by the master in Kuwait and were never seen. After the invasion, the management of the charterers moved to London where the charterers gave orders relating to the voyage of the vessel. Eventually, a settlement was reached and the cargo was discharged. The charterer sued for the loss of services of the *Houda* for a period of some 36 days. One of the questions which the court was asked to address was whether the owner was obliged to deliver without the production of the BLs and it held that the owner was not so obliged. But again we recognised that the BLs which the charterers instructed the shipowners to issue were negotiable.

33 In *Evans & Reid v "Cornouaille"* [1921] Lloyd's Rep 76, which also concerned an "order" BL, and where the shipowner parted with the cargo without the production of the BL, Hill J said (at p.77):-

> "The fact that the coal was intended to be delivered to the Societe Union did not entitle the Master to

> deliver to anybody without production of the Bill of Lading. It would not have entitled him to deliver even if the Societe Union had been the consignee named in the Bill of Lading. It is said that the plaintiffs ought to have informed the defendants that the buyers of the coal had not taken up the documents. There is no such duty upon the plaintiffs. The transaction between the buyers and the plaintiffs had nothing to do with the shipowners. The latter were only concerned with the fulfillment of their Bill of Lading contract, and the plaintiffs were entitled to rely upon this, that the ship would not give delivery of the goods until the Bill of Lading, with the plaintiffs' endorsement upon it, was presented to the Master.

34 We now turn to the views of textbook writers. As indicated before, not all writers hold the same view on the question as *Benjamin* or *Carver*. Moreover, the relevant chapters in both *Benjamin* and *Carver* were written by the same author.

35 In contrast, in *Schmitthoff's The Law and Practice of International Trade (10th Edn, 2000),* the authors opine that (at pp 276 and 292):-

> A shipper who wishes to obtain a bill of lading which is not negotiable does not insert the word "order" in the appropriate box of the bill but inserts the name of the consignee in the following box. The effect of this procedure is that, although the shipper can transfer title in the goods to the consignee by delivering the bill of lading to him, the consignee cannot further pass on title in them to a third party by transfer of the BL.
>
> .
>
> .
>
> Logically, the function of the bill of lading on a document of title is distinct from its negotiable quality. Even a bill of lading which is not made negotiable operates as a document of title, because the consignee named therein can only claim delivery of the goods from the shipowner if able to produce the bill of lading.
>
> However, a great practical value of the bill of lading as a means of making goods in transit rapidly transferable is due to the customary combination of the two features of the bill, namely, its quasi-negotiability and its function as a document of title. (Emphasis added).

36 In *Paul Todd's Bill of Lading and Bankers' Documentary Credits (3rd Edition)* the author states (at p.13-14):-

> "If a bill of lading is issued, the carrier must deliver only upon tender of an original bill of lading at the port of discharge. A bill of lading may be made out to a named consignee, in which case he alone may validly present it to obtain goods from the vessel. Alternatively, it may be made negotiable … Because delivery of the goods can be made only against presentation of an original bill of lading, it follows that transfer of the document can also transfer the right to take possession of the goods on discharge. Hence, the bill of lading is said to be a 'document of title', representing the goods while they are goods on sea."

37 It is also of significance to note that *Tetley on Marine Cargo Claims (3rd Edn)*, classified the documentation relating to carriage of goods by sea, on the basis of negotiability or transferability, into the following three categories (at p.995):-

(i) Fully transferable and a document of title as well:

> a bill of lading to bearers,
>
> a bill of lading to a name left blank or to order or to assigns,
>
> a bill of lading to a named person or to order or to

assigns.

(ii) Not transferable but still a document of title:

a bill of lading to a named person,

a U.S. straight bill of lading (a hybrid governed by the *Pomerene Act*, it is marked nonnegotiable, has certain of the qualities of a document of title, and yet it need not be presented to take delivery).

(iii) Not transferable and not a document of title:

a waybill or non-negotiable receipt.

38 It would be seen that a straight BL is classified by *Tetley* as distinct from that of a sea waybill and is regarded nevertheless as a document of title, requiring its production to obtain delivery.

39 *Cooke on Voyage Charters* cited *Sze Hai Tong* for the proposition that –

> "… the bill of lading, by implication if not expressly, makes the goods deliverable upon, and only upon, the surrender of the bill of lading." (Emphasis added).

40 *Gaskell on Bills of Lading: Law and Contracts*, which was cited by the appellants, notes that a straight BL "is probably little more than a waybill by another name" (at para 1.49). It goes on to observe that "there are doubts if a carrier would get a good discharge for delivery without production of a (straight) bill of lading in English law." Then at para 14.24 the author states "it is unclear whether a carrier is obliged to deliver to the consignee named in a … straight bill, even without production of that bill" and against this statement there is a footnote which states "… the US legal position is that a straight bill does not have to be presented, but that general practice elsewhere is to require a straight bill to be surrendered, rather like an order bill." This is in line with the comment of *Tetley* at p.232 where it is stated that sea waybill are called "straight bills of lading in the US."

41 Finally, at para 14.25, having reviewed the different opinions on the matter, the author came to the conclusion that "the view of *Benjamin* is to be preferred, on the basis that there is no real distinction between a waybill and a straight bill, and that neither are needed to obtain delivery of the goods (unless the contract so requires)." But rather interestingly, the author goes on to explain that (also at para 14.25):-

> In practice, most of the standard form bills (which are mainly designed to be negotiable) do contain express terms which singly or together provide that a bill is to be surrendered before goods will be delivered. There is no apparent distinction, as a matter of construction, between cases where the bill is made out to order and when it is consigned "straight" to a named consignee. Thus, the express terms on the surrender of bills such as Conlinebill or the P&O Nedlloyd Bill state that "an original bill of lading, duly endorsed, *must* be surrendered …" This clause is to be found on the face of most bills. It might be said that the reference to "duly endorsed" indicates that the term only applies to negotiable and not straight bills. The better view is probably that the carrier is only requiring that any bill presented should apparently entitle the holder to claim delivery (as with a bearer bill), so there is no reason to restrict the application of the clause to negotiable bills when it is well known that the forms could easily be used as non-negotiable documents, e.g., straight consigned bills. (Emphasis added).

42 What is clear from *Gaskell* is that the views offered by the author are rather equivocal.

43 We must observe that while the BL issued in the present case does not have a clause with the identical words "an original bill of lading, duly endorsed, must be surrendered", it contained somewhat similar words "upon surrender to the Carrier of any one negotiable bill of lading,

properly endorsed, all others shall stand void." The reasoning of *Gaskell* on the expression "duly endorsed" can similarly be applied to the expression "properly endorsed" which is found in the present BL.

44 We now turn to *Charles Debattista's The Sale of Goods Carried by Sea (2nd Ed)* at para 2-32 where he refrains from stating the law definitively and instead opines that "given the guidance given by the Law Commissions in their Report accompanying COGSA 1992, it is extremely likely that the courts will regard non-order bills as sea waybills." Debattista's observations are revealing in its heavy reliance on COGSA but overlooked the fact that while the English and Scottish Commissions in their report on *Rights of Suit in respect of Carriage of Goods by Sea*, had observed that the straight BLs and the sea waybills are much the same type of document, they added the qualification, *"save that the sea waybill is not required to obtain delivery."* In short, while the two Commissions accepted that a straight BL and a sea waybill are very similar documents, they are not identical and that the production of a straight BL is necessary to obtain delivery.

45 It is of interest to note that in *The Happy Ranger* [2002] EWCA Civ 694, while the Court of Appeal held that the bill in question was not a "straight" BL, nevertheless two Lord Justices, Tuckey and Rix, expressly made the observation that the views of textbook writers that the production of a straight BL was not necessary for delivery, referring no doubt to *Benjamin* and *Carver*, were not necessarily correct. Even the third member of the quorum, Aldous LJ, would appear to agree with that reservation because he adopted the judgment of Tuckey LJ.

46 The only Singapore case which had the occasion to consider the issue was *Olivine Electronics Pte Ltd v Seabridge Transport Pte* [1995] 3 SLR 143. There the seller of 320 coloured television sets shipped them on board a vessel. The BL stated the buyer as the consignee and notifying party. The shipowner delivered the goods to the buyer without presentation of the BL. As the seller did not receive payment for the same, he instituted an action for conversion to recover the loss from the defendant shipowner for releasing the goods without the production of the BL. The defendant argued that as this was a straight bill, and not a document of title, and as it was similar to a sea waybill, its production was not needed to obtain delivery. Goh Joon Seng J, applying the *contra proferentum* rule, held that it was a term of the contract that delivery must be against the presentation of the BL. Thus it was unnecessary for the court to answer the more general question. However, the judge did remark that the law on the duty on the part of the carrier to deliver only against production of the original BL in a straight consigned BL was still "somewhat open".

Our Opinion

47 It seems to us that some of the confusion in this area of the law could perhaps have been caused by a misunderstanding of the Carriage of Goods by Sea Act 1992 (COGSA 1992), which requires a bill to be transferable before it is a bill of lading for the purposes of the Act. Indeed, that was also the position under COGSA 1971. The Act is only concerned with rights of suit in respect of carriage of goods by sea. It does not, in any way, deal with the question whether presentation of a straight bill is necessary to obtain delivery.

48 At the end of the day, it seems to us that the issue must be resolved on the basis of contract law and the intention of the parties. The entire argument of the appellants is that a straight BL is the same as a sea waybill. While it is true that a BL, devoid of the characteristic of negotiability, is substantially similar in effect to that of a sea waybill, that is not to say that they are the same. If the parties had intended to create a sea waybill they would have done so. Ordinarily, the main characteristics of a BL are twofold. First, it is negotiable (i.e., transferable). Second, it is a document of title, requiring its presentation to obtain delivery of the cargo. In the case of a straight bill, while the characteristic of transferability is absent, there is no reason why one should thereby infer that the parties had intended to do away with the other main characteristic, i.e., delivery upon presentation. As the Judge below noted, while one cannot indorse a straight bill to transfer constructive possession of the cargo, it does not necessarily follow that the straight bill does not impose a contractual term obligating the carrier to require its production to obtain delivery.

49 It seems to us that clear words must be present to imply that the parties intended the instrument to be treated, in all respects, as if it were a sea waybill and that its presentation by the named consignee is not necessary. Indeed, if the parties had wanted to have a sea waybill they could have quite easily adopted that format. They would not have issued a BL with three originals. By issuing the instrument as a BL, it must mean that they wished to retain all the other features of a BL, other than the characteristic of transferability.

50 Davies & Dickey on Shipping Law (2nd Edn)

states at 163: "if a negotiable document of title is not needed, the parties may choose to use a sea

waybill as the contract of carriage, instead of a bill of lading." Clearly, the option is with the parties. And if they nevertheless choose to adopt the format of a BL, the court should not be astute to convert their arrangement into something they do not want to have in the first place. That is the first point we make.

51 Secondly, even looking at the matter from the perspective of the market place, there is much to commend the rule that even in respect of a straight bill presentation of it is a pre-requisite to obtaining delivery. If nothing else, the advantage of this rule is that it is simple to apply. It is certain. It would prevent confusion and avoid the shipowners and/or their agents having to decide whether a bill is a straight bill or an order bill [e.g., *Happy Ranger* (supra)], and run the risk attendant thereto if the determination they make on that point should turn out to be erroneous. The rule would obviate such wholly unnecessary litigation. In this connection, we think the following words of Clarke J in *The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266 (which concerned an order bill) have much to commend themselves (at p.274):-

> "It makes commercial sense to have a simple rule that in the absence of an express term of the contract the master must only deliver the cargo to the holder of the bill of lading who presents it to him. In that way both the shipowners and the persons in truth entitled to possession of the cargo are protected by the term of the contract."

52 Thirdly, to accept the arguments put forward by APL is to envisage two broad categories of documents which could be used by shippers. The first option is the negotiable BL; in such a situation, delivery of the goods can only be made upon presentation of the BL. The second option for shippers is to use a non-negotiable straight BL or sea waybill; here, the straight BL or waybill need not be produced for delivery of the goods. In essence, APL's scheme envisages that as long as the shipping document is non-negotiable on its face, presentation of the original BL or sea waybill is unnecessary for delivery. We think that this approach is overly restrictive for an unpaid seller who wishes to use a non-negotiable BL while retaining his security for payment.

53 Indeed, to hold that a straight BL is not the same as a sea waybill has the advantage of providing such a seller, or in the case of documentary credit, the bank, with some security against default by the buyer, and the buyer of some assurance that the seller has shipped the cargo before he is required to make payment. In short, it gives both the buyer and the seller, where they, for their own reasons, want only a straight BL be issued, a fair measure of protection. That was what Mr Voss wanted: payment before delivery by carrier. In contrast, the sea waybill is only a contract of carriage whereby the carrier undertakes to deliver the cargo to the person identified by the shipper as entitled to take delivery of the cargo. The sea waybill is retained by the shipper and all the consignee need show to take delivery is proof of his identity. It is a receipt, not a document of title. It, unlike a BL, cannot be used as a security to obtain financing.

54 Fourthly, adopting the rule that presentation of a straight BL is a pre-requisite to obtaining delivery also avoids the undesirable consequences of the shipper's rights of suit under the original contract of carriage surviving any transfer of the document to the consignee.

Judgment

55 In the light of the foregoing, we hold that in respect of a straight BL, the shipowners should only deliver the cargo against its presentation. In the circumstances, there is no defence to the respondent's claim. Some faint attempts were made to raise triable issues so that the action could go for trial but they are, as found by the judge below, wholly without merits. The appellants' defence rests essentially on the legal point on which they have failed. Accordingly, we affirm the decision of the High Court and dismissed the appeal with costs. The security for costs, together with any accrued interest, shall be paid out to the respondent's solicitors to account of the respondent's costs.

Sgd:

CHAO HICK TIN	TAN LEE MENG
JUDGE OF APPEAL	JUDGE