The "Cherry" and others
[2002] SGHC 68

Case Number : Adm in Rem 834/1998, 750/1998, 784/1998

Decision Date : 05 April 2002

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Vivian Ang, Corina Song and Kenny Yap (Allen & Gledhill) for the plaintiffs; Lim Tean, Minn Naing Oo and Shem Khoo (Rajah & Tann) for the defendants

Parties : —

Admiralty and Shipping – Bills of lading – Bills of lading act – Whether physical possession of bill necessary before party can claim as holder – Whether holder of bill can hold bill in agent's physical possession – s 5 Bills of Lading Act (Cap 384, 1994 Ed)

Admiralty and Shipping – Carriage of goods by sea – Voyage charterparties – Breach – Whether vessel's owner breached obligation to deliver by accepting instructions of charterer's representative instead of cargo owner's – Whether cargo owners clothe vessel's character with appearance of ownership of the cargo – Whether acts of vessel's charterer binds plaintiffs – Whether Cargo owners' loss brought about by vessel's owner

Tort – Conversion – Title to sue – Cargo owners having no actual possession of bill of lading – Whether title to sue transferable to cargo owners through their agent

Tort – Conversion – Transhipment of goods without cargo owners' knowledge or consent – Loss of goods – Whether carriers liable for conversion

Words and Phrases – 'Holder' – s 5 Bills of Lading Act (Cap 384, 1994 Ed)

Judgment

GROUNDS OF DECISION

1. This is a consolidated trial of three actions arising from the shipment of fuel oil from Kuwait to Fujairah in the United Arab Emirates on three vessels.

2. Each action related to a different vessel, namely the "Cherry", the "Epic" and the "Addax". The plaintiffs in all the actions are Glencore International AG of Switzerland. The defendants are the owners of the vessels, Stanley Shipping Ltd, Crest Shipping Ltd and Wyndham Shipping Ltd, all of Malta. The vessels were operated by a Greek company, Dynacom Tankers Management Ltd ("Dynacom").

3. The three vessels were sailing under time charterparties to Metro Trading International Inc. ("Metro" or "MTI") which was previously known as Metro Bunkering and Trading Co and under voyage charterparties to Alpine Shipping Co of Monrovia, the plaintiffs' chartering arm.

4. The plaintiffs had purchased the oil shipped on the three vessels from Metro. Metro had in turn purchased the oil from the Kuwait Petroleum Corporation ("KPC") on FOB Kuwait terms. The plaintiffs entered into voyage charterparties with Metro to carry the oil from Kuwait to Fujairah where Metro operated storage facilities consisting of floating storage tanks, the principal one being the M.T. Metrotank. Their claims were for the loss of the cargoes that were partly unloaded, or not unloaded at all at Fujairah.

5. As the facts and issues in the three actions are for practical purposes similar, I will use the Cherry action to consider the common matters.

6. The "Cherry" loaded a cargo of 87,972 mt, 380 cst fuel oil at Mina Al Ahmadi and Mina Abdulla, Kuwait. The oil had been purchased by Metro and sold on to the plaintiffs on 24 November 1997 on substantially back-to-back terms. The plaintiffs chartered the "Cherry" on a voyage charterparty on the same day to carry the oil from Kuwait to Fujairah. The oil was loaded on the "Cherry" on 3 December 1997 and arrived at Fujairah on 8 December.

7. The bill of lading issued for this shipment on 3 December 1997 stated

> Shipped in apparent good order and condition by Kuwait Petroleum Corporation in the tank ship called the M.V. "Cherry" at the port of Mina Abdulla, Kuwait, a quantity of petroleum products said to be bunker grade fuel oil 380 cst, 571,353 Barrels, 86,582 long tons, 87,972 metric tons, in bulk and to be **delivered** (subject to all the terms, conditions, liberties and exceptions herein incorporated or contained whether written printed or stamped on the fact of back hereof) in the like good order and condition at the port of Fujairah U.A.E. or so near thereto as the said ship may safely get (always afloat) unto the order of Banque Trad Credit Lyonnais (France) S.A. Paris or to his or their Assigns or Order upon payment of freight as per Charter Party or as may be agreed or hereinafter set out.
> (Emphasis added)

8. The plaintiffs as voyage charterers issued discharge instructions to Metro for the "Cherry" on 4 December 1997 in the following terms

> Please find below our **discharge instructions**, after completion of loading please forward full loaded details and instruct vessel to proceed to off Fujairah where she will **discharge into M.T. Metrotank and or any other vessel and or shoretanks as instructed by Metro local representative**.
>
> **Receivers: Glencore International A.G.**
>
> Inspectors: We understand that you will ullage vessel on her arrival at Fujairah and that provided there is not a significant difference between arrival quantity and B/L quantity vessel will discharge without inspector being present and B/L quantity will be applied to inventory.
> Obviously should you note a significant difference between vessels arrival quantity and B/L then we request that you appoint Caleb Brett to attend for outturn quantity prior to vessel commencing discharge.
>
> ETA notices to be sent to following on a daily basis and then 12/6 hrs.
>
> 1) Glencore, London tlx 21223 attn. D. Hawkins
>
> 1. Please also keep the above informed of vessel tendering nor and throughout discharge.
>
> (Emphasis added)

9. On the same day Metro as the time charterers instructed Dynacom as follows

> Please note charterers hereby invoke letter of indemnity clause of the charterparty and request owners to **discharge cargo as below** without production of original bill of lading as per Metro Trading International Inc orders, at Fujairah
>
> Quantity : 87972.00 mt
>
> Description : FO 380 cst
>
> Bill of Lading Date : 3.12.97 Kuwait
>
> (Emphasis added)

10. The defendants accepted those instructions and complied with Metro's orders without the bill of lading being produced. They also claimed that they acted under the instructions of Metro's officers at Fujairah when they discharged part of the oil and retained the rest on board.

11. Payment was to be made by the plaintiffs through a letter of credit issued by Banque Trad-Credit Lyonnais in favour of KPC, with Metro's instructions that all correspondence relating to the letter of credit were to be addressed to the plaintiffs and to place the bills of lading at the disposal of the plaintiffs.

12. The bank made payment under the letter of credit upon presentation of the bills of lading. On 2 February the plaintiffs instructed the bank through their agents Glencore UK Ltd ("Glencore UK") to endorse the bills of lading to the order of Credit Lyonnais, London and forward them to Credit Lyonnais with further instructions for the latter to endorse the bills in blank and forward them to Glencore UK. These instructions were complied with, and Credit Lyonnais forwarded the bills of lading to Glencore UK on 5 February 1998.

13. The action over this shipment arose because only 32,000 mt of the oil was discharged from the "Cherry" after she arrived at Fujairah. The remaining 55,972 mt remained on board and were carried to Singapore without the plaintiffs' knowledge or consent. The defendants claimed that this was done on the instructions of Metro. Metro having collapsed in February 1998 was left out of these proceedings.

The claim

14. The plaintiffs claimed that the defendants were obliged under the bills of lading to discharge the entire Cherry cargo at Fujairah and alternatively, that they were liable in tort for conversion of the oil.

The defence

15. The defendants denied the plaintiffs' claims and made a counterclaim which was subsequently withdrawn. At the end of the case, the main points of the defence were identified as

> (a) the plaintiffs had no title to sue on the bills of lading because they were not holders of the bills of lading as defined in the Bills of Lading Act (Cap 384) ("the Act");
>
> (b) the plaintiffs had no title to sue in conversion as they did not have the

immediate right of possession of the oil when the alleged conversion took place in December 1997;

(c) the defendants were not in breach of contract because they had delivered the cargo to Metro, the plaintiffs' agents, at Fujairah;

(d) the defendants had acted on the instructions of the plaintiffs' agents, Metro at Fujairah;
(defences (c) and (d) will be dealt with together under "Delivery to Metro")

(e) the plaintiffs had clothed Metro with all the appearances of being the owner of the cargo, and were bound by Metro's acts, and

(f) the plaintiffs had failed to prove that the defendants' acts caused their loss.

Title to sue on the bills of lading

16. Section 5 of the Act refers to a holder of a bill of lading as a person "with possession" of the bill. This provision does not refer to physical possession specifically. The defendants argued that the plaintiffs cannot sue as the holders of the bill of lading because they were not in physical possession of the bill which was with Glencore UK. They contended that a holder of the bill of lading under the Act must have physical possession of the bill because the rights under the bill are only passed by the act of physically transferring the bill to the transferee.

17. This line of defence called for an examination of the relationship between the plaintiffs and Glencore UK which led to the bill of lading going into the physical possession of the latter.

18. Glencore UK is a wholly owned subsidiary of the plaintiffs. The two companies are parties to a consulting and management agreement dated 1 January 1991 when the plaintiffs were known as Marc Rich & Co AG and Glencore UK was known as Marc Rich & Co Ltd. Under the agreement Marc Rich & Co Ltd was to act, *inter alia*, as a correspondent of Marc Rich & Co AG for the transmission of information, correspondence and documents and serve as the latter's London liaison with bankers, financiers and charterparties. When Glencore UK gave written instructions to Banque Trad Credit Lyonnais on 2 February 1998 to forward the bill of lading to themselves the instructions were expressly stated to be issued pursuant to that agreement. When the bill of lading was sent to Glencore UK, they received it as the agent of the plaintiffs with no interest in it of their own.

19. Defence counsel referred to *"The Shravan"* [1999] 4 SLR 194 where it was held that a party suing on a bill of lading as holder must be in possession of the bill at the time of the commencement of the action. The decision was of little assistance to the defendants' contention because the questions whether possession for that purpose means physical possession and whether possession through an agent puts the principal in possession were not considered.

20. There is a discussion on this point in *Carver on Bills of Lading* (1st Edn) at para 5-017 in the context of the Carriage of Goods by Sea Act, 1992 which is equivalent to the Bills of Lading Act:

> Possession held by agent. Where a bill of lading is transferred, e.g. by a seller who has shipped goods in pursuance of a contract for the sale of those goods, the actual possession of the bill may be acquired, not by the buyer himself, but by a person who acts as his agent for the purpose of taking delivery of the

goods from the carrier. Under the 1855 [Bills of Lading] Act, contractual rights were not normally transferred to the agent since property would not normally have passed to him. This reasoning is obsolete now that the "property gap" of the 1855 Act has been closed by the 1992 [Carriage of Goods by Sea] Act. But the question can now arise whether it is the agent or his principal (the buyer) who is the "holder" of the bill for the purposes of the 1992 Act. **Where the person who receives the bill acts in a purely ministerial capacity, there can be little doubt that possession of the bill will be regarded as having been transferred to the buyer**: this would be so in the common case in which possession is acquired on behalf of a corporate buyer by a member of its staff. It is less clear who is the "holder" of a bill which is transferred to an agent who has been engaged as an independent contractor by the buyer for the purpose of taking delivery of the goods from the ship. This was, for example the position in *The Aramis* [1989] 1 Lloyd's Rep. 213, where the bills were "indorsed by the shippers and by … forwarding agents appointed by [the buyers] to obtain delivery of the goods and, in the case of one consignment, to arrange for their onward carriage. The purpose of the second of these indorsements (i.e. of that by the agents) is far from clear since the bills were not transferred to any further parties by the agents but were simply presented by the agents to the ship's agents to claim delivery. It does not appear that the bills were ever in the possession of the buyers themselves. Even where a bill of lading is transferred to a buyer, that buyer may take delivery of the goods as agent for the seller. This was the position in *The Aliakmon* [1986] A.C. 785, where a c. & f. seller sent to the buyer a bill of lading which named the buyer as consignee and which had (unnecessarily, it seems) also been indorsed to the buyer, and the buyer, being unable to pay in accordance with the originally agreed terms, agreed to take delivery of the goods as agent of the seller. The actual decision was that the buyer had no cause of action against the carrier either in contract or in tort in respect of damage done to the goods by the carrier's breach of the contract of carriage, even though the resulting loss fell on the buyer, the risk having passed to him on shipment. In a later case [*White v. Jones* [1995] 2 A.C. 207 at 265], Lord Goff has said that such a situation would now be covered by the 1992 Act, and this seems to mean that the buyer could now sue the carrier in contract as lawful holder of the bill, even if he held it as agent of the seller. It would seem to follow that, on facts such as those in *The Aramis,* the "forwarding agents" could likewise now acquire contractual rights against the carriers, and that under section 2(4) of the Act they could exercise these rights for the benefit of their principals, the buyers. But it is submitted that this does not exclude the possibility of such rights being acquired also by the principal. **The Act does not define "possession," which is a sufficiently flexible concept to allow for the possibility of actual possession being held by one person and constructive possession being held, at least for some purposes, by another.**
(Emphasis added)

21. There is no justification to confine possession to physical possession in this case. The rights of the holder cannot be diminished because it had arranged for the bill to be kept by its agent which has no separate interest in it.

22. Counsel for the defendants went further and argued that "(e)ven if the Court is of the view that an agent may hold a bill of lading on behalf of his principal under the Act for the purpose of suit, it is our submission that Glencore U.K. were not agents of the Plaintiffs for such purpose." This suggestion

that the agent must not only be an agent, but be an agent for the purpose of the suit was wholly without authority, and the argument was not developed beyond the sentence set out. There is no justification for this additional requirement that I can see.

23. Another line of argument taken was that Glencore UK cannot be the plaintiffs' agents because the agreement between the companies specified that it shall not be construed to establish a partnership, association or joint venture between the parties, or constitute Marc Rich & Co Ltd an employee of Marc Rich & Co AG, and the former was to retain its capacity as an independent contractor. This does not follow because there is nothing to prevent an independent contractor from being an agent. The agreement clearly established Glencore UK as the plaintiffs' agent for the purposes stated.

24. I found that Glencore UK was holding the bill of lading simply as the agent of the plaintiffs for the transmission of documents with bankers, financiers and charterparties, and the plaintiffs were the holder of the bill for the purposes of the Act. This finding also addressed the defendants' complaint that agency was not pleaded by the plaintiffs. Since a holder of a bill of lading can be holding it while it is in the physical possession of its agent, that is a matter of evidence that need not be pleaded. The plaintiffs had made clear in their evidence that the bill was in the physical possession of Glencore UK pursuant to the agreement.

25. Counsel for the defendants also referred to the joint report of the Law Commission and Scottish Law Commission entitled "Rights of Suit in respect of Carriage of Goods by Sea" which contributed to the enactment of the Carriage of Goods by Sea Act 1992. Counsel noted that the Commission proposed that agents should be entitled to sue as holders of bills of lading even if they did not suffer any loss. He went on to submit that where the holder of a bill of lading is the agent, the principal has no title to sue since these rights vest in the agent. The first proposition that an agent is entitled to sue presented no difficulty, but the second proposition that the principal should not be entitled does not follow. The principal has the right to sue already. The law was changed to empower the agent who hitherto cannot sue to sue. The change did not confer the right to sue on the agent in substitution for the principal's right. The agent's new right runs with the principal's, not in its place.

Title to sue in conversion

26. It is generally accepted that for a person to sue in conversion he must have actual possession or the immediate right of possession of the goods alleged to be converted at the time of conversion (see *Clerk & Lindsell on Torts* 18th Edn paras 14-46 & 14-48). The defendants' argument was that the defendants did not have either of that when the "Cherry" was in Fujairah in December 1997.

27. The rule is not inflexible, and the title to sue may be transferred from a preceding party. In *Bristol & West of England Bank v Midland Railway Co* [1891] 2 QB 653 cheese was sold and shipped from Canada to England under bills of lading which provided that the goods were to be delivered to the order of the consignor or his assigns. The consignor drew bills of exchange on the consignee and sold the bills of exchange with the bills of lading endorsed in blank annexed, to the Toronto Bank in Canada. The Toronto Bank then sent the bills of exchange and bills of lading to the City Bank, their agents in London. On arrival in England cheese was delivered to the defendants to the order of the shipowners who were induced by the consignee to deliver the cheese to him without producing a delivery order from the shipowners. When the bills of exchange became due the consignee requested the plaintiff bank to advance him the money to take up the bills. The plaintiff bank advanced the money and received the bills of exchange and bills of lading from City Bank, and then they obtained the delivery order from the shipowner in exchange for the bills of lading. When they presented the delivery order to the defendants, they could not collect the cheese which had already been taken by

the consignee. The plaintiff bank sued the defendants for conversion. The defence raised was that the plaintiffs' action could not be maintained because the cheese was released to the consignee before the plaintiffs acquired any title to them. The defence was rejected by the Court of Appeal. Fry LJ held that Toronto Bank's right of property on the goods as pledgees was transferred to City Bank and then to the plaintiff bank, which then had the right to sue, although it became the pledgee after the goods were released to the consignee.

28. The case dealt with the plaintiff bank's title to the goods, and not to its immediate right of possession, but that is not a material difference. The issue was the title to sue, and the reasoning would be the same whether it is title to sue by having title in the goods or having the immediate right of possession. In December 1997 Banque Trad-Credit Lyonnais held the bills of lading and had the immediate right of possession. When they endorsed it to Credit Lyonnais which then endorsed and delivered them to the plaintiffs' agent Glencore UK, that right was passed to the plaintiffs, and like the plaintiffs in the case discussed, the title to sue in conversion was transferred.

Delivery to Metro

29. The defendants contended that they had fulfilled their obligation to deliver the oil by complying with the instructions of Metro. They drew a distinction between the term "discharge" used in the instructions and the term "deliver" used in the bill of lading and contended that delivery occurs not upon discharge of the cargo, but when the cargo is placed in the control of the cargo receiver.

30. They referred to a discourse on the duty to deliver under a bill of lading at p 142 of *Voyage Charters* by Julian Cooke and others:

> (D)elivery of the cargo is the final obligation of the shipowner under the charterparty. It brings about the termination of the bailment and therefore, generally speaking, it makes the point of time at which the carrier's responsibility for safe custody of the goods comes to an end. However, the general rule may be varied by special terms of the contract of affreightment, frequently found in bills of lading, which provide that the carrier's responsibility shall cease as soon as the goods are discharged from the ship, and before they are delivered to the consignee.
>
> What constitutes delivery
>
> It has been said that delivery occurs when "the goods are so completely under the control of the consignee that he may do what he likes with them" (*British Shipowners v. Grimon* (1876) 3 Rett. 968, 972), or when they are "placed under the absolute dominion and control of the consignees" (*Chartered Bank v. British India S.N. Co.* [1909] A.C. 369, 375). In practice, upon the discharge of the goods from the ship they are frequently in the custody of agents or contractors rather than the shipowner or consignee themselves, and in those circumstances delivery will occur when the goods are placed in the hands of an agent of the consignee. Thus, in *British Shipowners v. Grimond* and in *Knight v. Fleming* (1898) 25 Rett. 1070, it was held that delivery occurred and the shipowner'' responsibility for the goods therefore ceased when they had been passed over the ship's raid into the hands of harbour porters employed by the consignee. The same contractor may initially take possession of the goods as agent of the shipowner and later, when the shipowner's obligations as regards discharge had

> been fulfilled, remain in possession thereafter as agent of the consignee. …
>
> The effect of the requirement that delivery involves the placing of the goods under the complete control of the consignee is that, even when the shipowner's obligations regarding discharge are complete, and the goods are in the hands of an independent warehouse, delivery will not be regarded as complete so long as the shipowner is maintaining any lien or right of disposition over the goods, and the bill of lading remains in force as a document of title until all the shipowner's rights of disposition have ceased to exist.

31. Reliance was also placed on Lord Hobhouse's judgement in *The "Berge Sisar"* [2001] 1 LLR 663 where he said in para 36

> Taking delivery in pars. (a) and (c) [of s 3(1) Carriage of Goods by Sea Act 1992] means, as I have said, the voluntary transfer of possession from one person to another. This is more than just co-operating in the discharge of the cargo from the vessel. Discharge and delivery are distinct aspects of the international carriage of goods…. Although the normal time for delivering cargo to the receiver may be at the time of its discharge from the vessel, that is not necessarily so. There may be a through contract of carriage. The goods may need to be unpacked from a container. The vessel may need to discharge its cargo without delay into a terminal. … The delivery to which s.3 is referring is that which involves a full transfer of the possession of the relevant goods by the carrier to the holder of the bill of lading. The surrender of the relevant endorsed bill of lading to the carrier or his agent before or at the time of delivery will ordinarily be an incident of such delivery.

32. It is clear that delivery of a cargo does not necessarily include its discharge from the vessel, although that may often be the case. If the carrier is instructed to retain the cargo on board at the discharge port so that it can be on-carried to another destination, the carrier would have delivered the cargo by keeping the cargo on board so that it can proceed on the next voyage. The instructions received by the carrier must be considered to determine whether delivery is made.

33. The plaintiffs' instructions to Metro were specific, to "discharge into M.T. Metrotank and or any other vessel and or shoretanks on instructions by Metro local representative."

34. These discharge instructions to Metro did not reach the "Cherry". Metro issued separate voyage instructions of their own to the vessel. On 24 November 1997, before the receipt of the plaintiffs' discharge instructions, Metro instructed the "Cherry" that "If Fujairah will be declared as final dischport [discharge port] **cargo will be discharged** according to instructions of **'Metro storage' coordinator**" (emphasis added) and on 6 December, after Fujairah was confirmed to be the discharge port, they issued further instructions that "You are kindly requested to follow **local instructions from 'Metro storage' coordinator**" (Emphasis added)

35. While delivery need not involve discharge in every case, in this case it clearly did. The defendants claimed that they had received and acted in compliance with the discharge instructions. The plaintiffs disputed that and maintained that their instructions were to discharge the fuel oil into the storage facilities at Fujairah. On the face of the plaintiffs' instructions the carrier was to discharge all the oil into the facilities, and anything short of that would not constitute full delivery according to their instructions.

36. The defence relied on the concluding words in the discharge instructions to 'discharge into M.T. Metrotank and or any other vessel and or shoretank as instructed by Metro local representative" as evidence that Metro were the plaintiffs' agents for the receipt of the cargo. The argument was that the defendants had acted on the instructions of Metro representatives at Fujairah when they unloaded part of the Cherry cargo, took on more oil, and carried on with her voyage from Fujairah.

37. The master of the "Cherry" knew that Metro operated the storage facilities at Fujairah. The vessel must liase with the Metro representatives on an operational level to discharge oil into the facilities. The master has to be told of the place, time, rate, etc of discharge. When the plaintiffs issued the instructions for the defendants to comply with Metro's instructions they were not constituting the Metro representatives their agents for issuing or changing discharge instructions. They were directing the "Cherry" to work with those representatives to carry out their discharge instructions.

38. The instructions received by the master of the "Cherry" from Metro were to comply with the "local instructions" of the Metro storage coordinator. That would be instructions in connection with the storage of the oil at the facilities because the storage coordinator has control over the facilities. It cannot be his role to determine for the vessel or the cargo owners whether to discharge, or to decide how much to discharge when a vessel had arrived at Fujairah. When instructions were received from the discharge coordinator to discharge only a part of the cargo the defendants should be aware that if they accepted them without question, they may be blamed for failing to discharge. In such a situation, they should seek confirmation whether the obligation to discharge was varied, or to give notice that compliance is not possible because of the storage coordinator's instructions.

39. Instead of doing that, the defendants became parties to reports and documents put up to represent that full discharge had actually taken place. These include a Dry Tank Certificate, a OBQ (On Board Quantity) Report, Tank Inspection Certificate, which the chief officer signed with the knowledge that they were untrue and a Discharge Time Sheet the master signed which was also untrue. The master and chief officer explained that false documents were necessary to "close the account for the previous voyage" and to protect the vessel from claims on the vessel and defence counsel suggested that Metro wanted the documents, and the defendants were happy to oblige. Apparently little thought was given to their contractual obligations as carriers.

The plaintiffs were bound by the fraudulent acts of Metro

40. The defendants contended that

> (T)he Defendants should not be liable for the balance of the oil cargoes. **The Instructions given by Metro to the Defendants were given by Metro as agents acting on behalf of and within the scope of the authority conferred by their principal, the Plaintiffs who had delegated to them the task of dealing with the Defendants and taking delivery of the goods.** The fact that this task was performed by Metro contrary to the instructions of their principal or even in fraud of their principal would not take their acts outside the scope of their employment, based on the classic principles stated by the House of Lords in *Lloyd v. Grace Smith* [1912] A.C. 716.
> (Emphasis added)

41. The principle in *Lloyd v Grace, Smith & Co* that a principal is liable for the fraud of his agent acting within the scope of his authority whether the fraud is committed for the benefit of the principal or the benefit of the agent is settled law. To avail themselves to the protection offered by the

principle, the defendants have to establish that Metro's instructions were issued within the scope of their authority. They faced two difficulties here.

42. First, in the voyage instructions, the Metro representatives at Fujairah were characterised as storage coordinators. By the instructions their role was to coordinate the storage of the oil at the facilities, not decide whether and how much of the oil is to be discharged. If they purported to do that, it was outside their authority as storage coordinators. Second, the defendants did not regard Metro as anyone's agents. Their case was that they believed that Metro were the owners of the cargo, and dealt with them on that basis. The principle in *Lloyd v Grace, Smith & Co* does not operate on these facts.

The plaintiffs had clothed Metro with the appearance of ownership of the cargo

43. The defendants complained that the plaintiffs did not reveal to them that they were the sub-charterers. They alleged that the plaintiffs wanted to hide or conceal their identity as sub-charterers.

44. While it is true that the plaintiffs did not notify the defendants directly of their interest in the cargo (their explanation being that they directed their communications on the shipment to Metro with whom they had the voyage charterparty), they did not conceal their interest. In the discharge instructions, they directed that they were to be identified as the receivers of the cargo.

45. In any event, the defendants knew of the plaintiffs' sub-charter. This came out through the evidence of Odisseas Valatsas, in-house chartering broker of Dynacom

> Q. If there is a subcharter from your time charterer to a subcharterer, is it also not uncommon that you, as a head owner, will not be aware of the identity of the subcharterer?
>
> A. No, your Honour. We would always know about that.
>
> There are no really secretive subcharters in this market.
>
> Q. Can you tell us how you would know of the identity of the subcharterer?
>
> A. Our charterer would know this.
>
> Q. Your charterer would tell you?
>
> A. Yes.
>
> Q. Are they obliged to tell you?
>
> A. They are, of course they are, because you are carrying somebody else's cargo, so you must be aware of that.

The defendants did not cause the plaintiffs' loss

46. The defendants contended that even if they were in breach of the carriage contract, they were not accountable for the plaintiffs' loss. They asserted that the plaintiffs' case must be that the defendants had discharged all the oil at Fujairah, they would not have suffered loss. They went on to

say that if all the oil was discharged at Fujairah, Metro would have sold the oil to other parties and shipped it out by other vessels. That being the case, the plaintiffs' loss was "inevitable", and cannot be said to be caused by the defendants.

47. The whole argument was flawed. The onus on the plaintiffs was to prove that the oil was lost, and that the defendants caused the loss. They did not have to establish that they would not have suffered loss through other causes. No support was cited for this proposition. There is no basis for it because no one can tell that the oil would not be lost in other ways if it was discharged at Fujairah. It could, for example, be stolen or delivered to a wrong party. If the defendants assert that the oil would be lost, they have to establish that. There was also no basis for assuming that the oil would be sold and shipped by Metro if it was stored in the facilities. While that may happen, its fate in storage is entirely a matter of conjecture, and it was by no means inevitable that the oil would be lost.

48. There is another objection to the argument. Assuming that if the oil was discharged into the facilities, it would be sold and shipped by Metro, the plaintiffs would have recourse against Metro. When the oil was lost as it happened without being sold or shipped by them, there is no recourse against them. By the defendants' argument the plaintiffs' oil disappeared into a legal black hole with no recourse against the defendants or Metro.

49. The plaintiffs have established their claims against the defendants on the bills of lading and in conversion in relation to the Cherry cargo that was not discharged at Fujairah.

The "Epic" and "Addax" actions

50. The facts, issues and arguments discussed in the "Cherry" action were similar to those in the "Epic" and "Addax" actions. The findings I have made in the "Cherry" action apply to these two actions. There are factual differences, principally that 75,779 mt of oil was carried on the "Addax" and none of it was discharged at Fujairah, while 81,395 mt was carried on the "Epic", of which 30,000 mt was discharged, but they are not material to the resolution of the issues raised.

51. In line with my findings, the plaintiffs have established their claims on the bills of lading and in conversion for the undischarged cargoes on the "Epic" and the "Addax".

52. I therefore order that judgment be entered for the plaintiffs in these three actions for the cargoes which were not discharged or not fully discharged with costs, with damages to be assessed by the Registrar.

The Hyperion cargo

53. The plaintiffs had purchased another quantity of 72,781 mt of oil from Metro. They entered into a voyage charterparty with Metro to carry the oil from Bandar Mahshahr, Iran to Fujairah on the "Hyperion". After the "Hyperion" arrived at Fujairah on 4 December 1997 32,635 mt of the oil was discharged from the "Hyperion" and loaded on the "Cherry", was carried on to Pork Dickson, Malaysia and was lost to the plaintiffs. As in the case of the Cherry cargo, the bill of lading was not with the plaintiffs when the oil was lost, but was transferred to them later, before the action was commenced. The plaintiffs claimed in conversion for the transhipped oil, but they did not claim as holders of the bill of lading as the "Hyperion" was a Metro vessel.

54. The circumstances of the transhipment were not disclosed. The defendants admitted that they

carried the oil from Fujairah to Port Dickson on the "Cherry" but did not explain whether it was carried by them as carriers, owners or in any other capacity.

55. When a party interferes with the goods of another, his intention in so acting may be relevant when he has dealt with the goods as an agent or bailee, but it is not relevant if he took or used the goods as his own. As Atkin J explained in *Lancashire and Yorkshire Railway Company, London and North Western Railway Company, and Graeser Ltd v MacNicoll* (1918) 118 LT 596 at 598 –

> It appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, providing it is also established that there is an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right. But that intention is conclusively proved if the defendant has taken the goods as his own or used the goods as his own. … **The cases where the intention of the defendant becomes material are cases where the goods have come into the possession of somebody who acts as an agent or bailee**, and where the dealing with the goods is a transfer of the custody from himself to somebody else, and where it may well be that the intention is not to exercise any right inconsistent with the right of the true owner. In those cases the question of intention becomes material. In a case where a man deals with goods as his own, no such question can arise.
> (Emphasis added)

56. This reflected Blackburn J's statement in *Hollins v Fowler* (1875) LR 7 HL 757 at pages 766-7 that

> (O)n principle, one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the customer is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession

57. The facts before me were that oil from the "Hyperion" belonging to the plaintiffs was carried on the defendants' vessel "Cherry" from Fujairah to Port Dickson without their consent, resulting in the loss of the oil. That is *prima facie* a case of conversion. If the defendants had dealt with the oil innocently as contractual carriers, that could exonerate them from liability, but that was not raised or proved, and the defence is not available. Consequently the plaintiffs are also entitled to judgment and costs in this claim, with damages to be assessed by the Registrar.

Costs

58. In view of the length of the hearing, the multitude of issues raised and the exceptional number of documents involved, I certify that the plaintiffs' costs are to be taxed for two counsel.

Sgd:

Kan Ting Chiu
Judge

L