IN THE PRIVY COUNCIL No. 3 of 1973

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE NEW ZEALAND SHIPPING COMPANY LIMITED — Appellant

- and -

A.M. SATTERTHWAITE & COMPANY LIMITED — Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an appeal from a judgment of the Court of Appeal of New Zealand (Turner P. Richmond J. and Perry J.) dated 29th June 1972 whereby the Court reversed the judgment of Beattie J. dismissing the Respondent's claim. The case concerns the efficacy of a standard clause in a form of bill of lading in common use in the United Kingdom New Zealand and other shipping trades, such clause being commonly referred to as an "Himalaya" clause. p. 81

2. The Respondent was the consignee of a drilling machine which had been shipped from Liverpool to Wellington, New Zealand, on the ship "Eurymedon". The machine was carried under a bill of lading dated 5th June 1964 and issued by Dowie & Marwood Limited as agents for the Federal Steam Navigation Co. Limited ("the carrier"). p. 7 l.1

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p.11 The bill showed Ajax Machine Tool Co. Limited as shipper and was consigned to "Order".

p.7 l.13 At the date of shipment the machine was the property of the Ajax Machine Tool Co. Limited England, but prior to 14th August 1964 the Respondent became the holder of the bill and the property in the machine passed to the Respondent.

p.9 l.32 p.10. l.1 3. The carrier was a wholly owned subsidiary of the Appellant. There was an arrangement between the carrier and the Appellant under which the latter undertook all stevedoring work in Wellington for ships owned or operated by the Appellant or its associated companies, the carrier being one of such companies.

4. On arrival of the ship at Wellington on or about 14th August 1964, the Appellant carried out the work of unloading the machine.

p.7 l.29 In the course of the work the machine was dropped and damaged as a result of negligence on the part of the Appellant its servants or employees. The repairs cost $ NZ 1,760.

p.13 l.4 5. The bill of lading expressly provided that it should have effect as if the Carriage of Goods by Sea Act 1924 of Great Britain and the Rules scheduled thereto (the Hague Rules) applied

p.25 l.22 to it and were incorporated therein. By virtue of the Rules and clause 11 of the bill the liability of the carrier was limited to £100 in respect of any one package or unit unless the value had been stated in writing and extra freight agreed upon and paid and a declaration of the nature and value of the goods appeared on the bill. The value had not been so declared, nor had extra

p.27 l.24 freight been agreed upon or paid. The bill of lading expressly provided that the contract which it evidenced should be governed by the law of England.

6. The Respondent did not claim against the carrier but sued the Appellant in tort. The Appellant relied upon clause 1 of the bill which provided inter alia as follows :

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

7. Article III rule 6 of the Hague Rules provides (inter alia) :

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

8. The action was not commenced within the period of one year after delivery of the machine to the Respondent. The Appellant pleaded that p.9 l.13

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p.6 l.21 by virtue of clause 1 of the bill of lading they were entitled to rely on the immunity from suit arising under Article III rule 6. In the Supreme Court of New Zealand this defence was upheld by Beattie J. His judgment was reversed by the Court of Appeal from which judgment the Appellant now prefers this appeal to Her Majesty in Council, the Appellant having been granted final leave to do so by the Court of Appeal on 4th December 1972.

pp.29-52
pp.54-80

p. 83

9. The sole issue is whether the Appellant is entitled to the immunities sought to be conferred on independent contractors by clause 1 of the bill of lading.

10. Before setting out its arguments in detail, the Appellant respectfully makes the following general submissions.

11. First, the present case is in a different category from Scruttons Limited v. Midland Silicones Limited (1962) A.C. 446. In the latter case, the bill of lading did not purport to give the stevedore the benefit of its exempting and limiting provisions, so that there was nothing to found an inference that the shipper had consented to the qualification of the stevedore's duty of care. Nor was there any ground upon which the stevedores could argue that they had authorised the carrier to exact such a qualification on their behalf. Thus, it could not be said that there was a bargain between the shipper and the stevedore as to the terms on which the latter was to handle the goods.

12. The present case is different. The bill of lading sought to protect the stevedore; and the stevedore did authorise the carrier to secure him this protection. Accordingly, there existed a bargain between the stevedore and the shipper to the effect that the stevedore would handle the goods subject to the exemptions and limitations of liability set out in the bill of lading.

13. It follows that the Appellant's argument in the present case is different from, and less radical than, the one which failed in the

Midland Silicones Case. There, the stevedores were constrained to argue that although they were strangers to the carrier's contract, and had no direct relationship with the shipper, they were nevertheless entitled to participate in the carrier's contractual exceptions. In the present case, by contrast, the Appellant does not need to assert a jus quaesitum tertio. It was not a stranger to the transaction but was a party to a bargain with the Respondent. The only issue is whether this was a bargain which the Courts will recognise as effective.

14. The Appellant respectfully submits that where one businessman consents to the performance of services by another on terms laid down by the latter, the policy of the law should be, so far as possible, to give effect to the bargain. No question of oppression arises in a case such as the present, particularly since in most instances the extent of the liability assumed by the party who performs the service is reflected, directly or indirectly, in the amount paid by the party who ultimately bears the cost of the service. The parties were of full capacity and understanding, and there can be no commercial objection to holding them to the agreed terms.

15. The Appellant submits that this approach is consonant with the rule applied in the United States, where it has been recognised in series of decisions that an appropriately drawn clause in a bill of lading may confer protection on a servant or contractor of the carrier. See, for example, Virgin Island Corporation v. Merwin Lighterage Co. 1959 AMC 2133 Carle & Montenari Inc. v. American Export Lines Inc. 1967 AMC 1637; Middle East Export Co. v. Concordia Line 1971 AMC 64 Secrest Machine Corporation v. ss Tiber 1972 AMC 815; Bernard Screen Printing Corporation v. Meyer Line 1972 AMC 1919. This result is also achieved in European Systems which recognise a jus quaesitum tertio. It is submitted that it would be desirable for the same result to obtain in England and other Common Law jurisdictions, unless there are conclusive doctrinal reasons to the contrary.

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16. The Appellant submits that in the present case effect can be given to the bargain without encroaching on any established doctrine. The Appellant contends that the bargain took the form of a legally enforceable contract which either came into existence when the bill of lading was issued, or became enforceable when the Appellant performed services in relation to the goods. Alternatively, the Appellant submits that even in the absence of a full binding contract the law recognises that a party may effectively impose on another limitations on duties in tort which would otherwise be owed.

17. The Appellant's first submission is that a legally enforceable contract between the Appellant and the Respondent came into existence when the bill of lading was issued. The possibility that such a contract could exist was envisaged by Lord Reid in the Midland Silicones Case, at page 474. His Lordship stated five conditions which would require to be satisfied.

18. First, that the bill of lading made it clear that the stevedore was intended to be protected by the provisions in it which limited liability.

19. Second, that the bill of lading made it clear that the carrier, in addition to contracting for these provisions on his own behalf, was also contracting as agent for the stevedore that these provisions should apply to the stevedore.

p. 38
pp.60,70

20. It has not been disputed that in the present case the bill met these requirements.

21. Third, that the carrier had authority from the stevedore to do that (i.e. to contract as his agent); or perhaps later ratification by the stevedore would suffice.

pp.39-40
pp.60-71

22. Beattie J. held, and the Court of Appeal appears to have been satisfied, that this requirement had been met and in this respect attention is drawn to the special circumstance that by 31st July 1964, prior to the commencement of unloading, the bill of lading had passed through the Appellant's hands and accordingly

p.10 l.22

the Appellant was aware of the terms of the bill of lading.

23. Fourth, that any difficulties about consideration moving from the stevedore were overcome.

24. In the Appellant's submission the element of consideration can be found in two ways. First, in an implied promise on the part of the stevedore to carry out his duties in unloading the shipper's goods. Such promise is transmitted to the shipper through the carrier, who for purposes of clause 1 is acting as agent for the stevedore. Attention is drawn to the phrase "while acting in the course of or in connection with his employment" in clause 1. The unloading is the only point of time at which the stevedore's activities become concerned with the fulfilment of the contract of carriage between the shipper and the carrier. The Appellant submits it is a natural inference that the parties must have intended that the stevedore, receiving as he did on the one hand an immunity against liability, should on the other undertake to carry out his part to see that the contract of carriage was fulfilled.

p.14 l.6

25. Turner P. thought that in theory, it might be possible to devise a "more limited" clause which met the fourth of Lord Reid's requirements as well as the first three, "restricted, say, to exempting a named stevedore, and him only." With respect, it is difficult to see why the inclusion of more than one stevedore or of all stevedores who might handle the goods, should affect the matter in principle.

p.61 l.41

26. Alternatively, the Appellant submits that where the promise of exemption and limitation is given to the carrier and the stevedore together, and where the carrier's promise relates in part to a service which is to be performed on his behalf by the stevedore, the carrier's promise amounts to a sufficient consideration to sustain the shipper's undertaking, not only as regards himself but as regards the stevedore as well. In this regard, the Appellant relies on

27. Finally, the Appellant must demonstrate that its argument is available to found a defence not only to a claim by the original shipper but also to a claim by the consignee. In this respect, it relies first on section 1 of the Bills of Lading Act, 1855 and secondly on the fact that the Respondent tendered the bill of lading at the port of destination and took delivery of the goods thereunder.

28. Section 1 of the Bills of Lading Act, 1855 and Section 13 of the Mercantile Law Act 1908 (N.Z.) are in almost identical terms. By virtue of these provisions, every consignee of goods named in the bill of lading to whom the property in the goods therein mentioned passes on or by reason of consignment or endorsement, has transferred and invested in him all rights of action 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 himself.

29. If as the Appellant submits, clause 1 of the bill of lading had the effect of creating a contract between the Appellant and the shipper contemporaneously with the issue of the bill, then such contract was a "liability in respect of the goods", in terms of section 1 of the Bills of Lading Act, to which the shipper was subject and to which the Respondent consignee became subject upon the property in the goods passing to them.

30. Alternatively the Appellant relies upon the provision set out at the foot of the front page of the bill of lading:

> "In accepting this bill of lading the shipper, consignee and owners of the goods, and the holder of this bill of lading, agree to be bound by all of its conditions, exceptions and provisions whether written, printed or stamped on the front or back thereof."

It is submitted that such a contract is a "condition" or a "provision" by which the holder of the bill of lading became bound on accepting the bill.

31. Alternatively, if the Appellant is not entitled to take advantage of the statutory assignment of the shipper's contract, under the Bills of Lading Act, it is contended that a new contract came into existence when the Respondent presented the bills of lading and took delivery of the goods. It is well established that such a contract is to be implied as between consignee and carrier: Brandt v. Liverpool (1924) 1 K.B. 575; Thompson v. Dominie (1845) 14 M. & W 403. The Appellant submits that a similar implication should be made where the person to whom the bill of lading is surrendered (the carrier) acts as agent for the stevedore, and where the terms which, as agent, he is authorised to obtain are set out in the bill of lading itself. This implication is reinforced by the words at the foot of the front page of the bill which have been cited in paragraph 30 above.

32. The Appellant now turns to its alternative argument, that a contract came into existence when it performed services in relation to the Respondent's goods. If the bargain made between the Appellant and the shippers when the bill of lading was issued was not enforceable in law for want of consideration, the Appellant submits that it became enforceable when it performed services in relation to the goods. This is so for two alternative reasons. First, because the performance of services supplied the missing element of consideration. Secondly, because the performance of service constituted the acceptance of an offer contained in the bill of lading.

33. As regards the first reason, the Appellant submits that if the bargain contained in the bill of lading was not enforceable because the necessary element of consideration was absent, it was nontheless a bargain; and the inchoate agreement so constituted matured into a completed contract when the Appellant supplied consideration by performing services. At law where the

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stevedore participates in the performance of the contract in reliance on the exemption or limitation clause, there is clear consideration moving from him. This view is supported by Carver, Carriage of Goods by Sea, 12th Edition, Vol 2, paragraph 1487. The Appellant submits that there is nothing inconsistent with principle in the injection of consideration after the event into an agreed but initially unenforceable bargain.

34. Alternatively, the performing of services amounted to the acceptance of an offer contained in the bill of lading. For this purpose the relevant portion of clause 1 of the bill may be summarised as follows :-

p.13 l.41 (i) No servant or agent of the carrier shall be liable.

p.13 l.42 (ii) "Servant or agent" includes independent contractor.

p.14 l.3 (iii) Exemption is from liability for loss or damage in course of the employment of such an independent contractor.

p.14 l.9 (iv) All immunities conferred on the carrier shall extend for the benefit of the independent contractor.

p.14 l.17 (v) For the purpose of this provision, the carrier is acting as agent for all persons who are now or might in the future be independent contractors.

p.14 l.23 (vi) "To this extent" the independent contractor is party to the contract in or evidenced by the bill of lading.

p. 51 35. It is submitted that the approach of Beattie J. in the Supreme Court in reading the clause as an offer of exemption to all who are or might be servants or agents, is correct. It is not straining the language of the clause to read it thus :

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"I the shipper hereby expressly agree that none of you (servants and agents of the carrier) ...shall....be under any liability to me..."

Such statement is made to the carrier who if necessary, as agent "for the purposes of this clause" of those employed by him will be the medium by which the offer is transmitted to those persons - "if necessary" because in the present case the facts are such that the defendant, having acted with knowledge of the contents of the bill, does not have to rely on the transmission of the offer by this route. Whether in other circumstances the employee could effectively rely on the transmission of the offer in that way need not be examined in this case. p.10 l.22

36. Clearly the protecting clause is intended to bring the shipper and the carrier's servants and agents into a contractual relationship. The Appellant does not contend that to say as much in a document is sufficient in itself to bring about the desired result, but it is certainly the best possible starting point and one that was absent in the previous cases where the stevedore's defence failed - the Midland Silicones Case, Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd. (1955-56) 95 C.L.R. 43 and in Krawill Machinery Corporation & Ors. v. Robert C. Herd & Co. Inc. [1959] 1 Lloyds Reports 305.

37. The clause does not spell out in full the manner in which the shipper and the carrier's servants and agents are to be brought into contractual relationship, but arguments that it does not have the effect contended for by the Appellant go to form rather than content. The language can reasonably be read as a statement of the shipper's position which is to remain open until the conclusion of the contract of carriage, contained as it is in the context of a bill of lading for a voyage which necessarily will take some time to complete, the whole clause has a sense of futurity about it. It is of course

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well established that an offer to an unnamed group of persons may be the foundation of a contract upon acceptance. See Carlill v. Carbolic Smoke Ball Co. Ltd. [1892] 2 Q.B. 484, affirmed [1893] 1 Q.B. 256. It is submitted that there is no difficulty in the concept of a series of such offers maturing into contracts upon implied acceptances as each "servant" takes up his duties in connection with the contract of carriage.

38. There is nothing artificial in such a concept. As a matter of commercial reality a carrier must use servants agents and independent contractors to assist to carry out the contract of carriage. Both the carrier and his "servants" have an interest in determining in advance what their respective liabilities are to be. This affects matters of remuneration and insurance.

39. It is true that the bill of lading does not stipulate the mode of acceptance of the offer, but this is commonly left to general principles in the case of offers to a group of persons. Mode of acceptance was equally left to implication in Carlill. The Respondent's contentions are tantamount to saying that the draftsman should have added words to this effect :

> "The foregoing is an offer on behalf of holders of the bill of lading and a contract will ensue when the agents of the carrier signify their acceptance by commencing to carry out work in the performance of the contract of carriage."

40. As to consideration for such a contract, this lies in the stevedore's performance of the work of discharging the goods shipped under the bill of lading. Of course in terms of the arrangement between Appellant and the carrier, Appellant owed the latter a separate obligation to carry out such work. Before the Court of Appeal the Respondent conceded that C's performance of a contractual obligation already owed to A may also provide good consideration for a promise by B. This was the conclusion reached by Beattie J. in the Supreme Court.

p.52 l.20

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It is submitted that such conclusion and the Respondents' concession were clearly right in view of the decision in Scotson v. Pegg (1861) 6 H. & N. 299, 158 E.R. 121, the academic support for it and the absence of any authority to the contrary. The Court of Appeal did not find it necessary to decide the point, although reference is made to it by Perry J. p.77 l.2

41. Again the final step under this branch of the argument is that the Appellant must show that the Respondent as a subsequent holder of the bill of lading is affected in this respect in the same way as would have been the shipper. In the Supreme Court Beattie J. accepted that this was so, but in the Court of Appeal Richmond J. without deciding the point expressed doubt about it while Turner P and Perry J. did not express any view. p. 37 p. 67

42. Reference has already been made to the Bills of Lading Act 1855 under which the consignee has transferred and invested in him all rights of action 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 himself. It is submitted that "rights of action" are what remain after deducting, as it were, any disabilities on the part of the original holder of the bill of lading. The original holder's "rights" were subject to the existence of the offer of immunity which the bill contained. No more than the holder's rights was transferred to the consignee. By way of analogy one may refer to the time limit for taking action in respect of damage to the goods. No one doubts that this affects the consignee. It is submitted that the "rights" transferred to the consignee are subject to the limitation of the outstanding offer in favour of stevedores just in the same way as they are limited by the time bar.

43. Further, it is submitted that an offer, still open for acceptance, which when accepted will have the effect of limiting the rights of the owner of the goods, is a "liability in respect of the goods" which passes from the shipper to the consignee.

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p. 11

44. Alternatively, the Appellant relies upon the clause set out at the foot of the front page of the bill of lading, under which the holder agrees to be bound by all of the conditions, exceptions and provisions of the bill. It is submitted that the offer is a "provision" within the terms of that clause.

45. In the preceding paragraphs the Appellant has set out its grounds for alleging a binding contract with the Respondent, incorporating the exceptions and limitations of the bill of lading. In addition, however, it is submitted that the law recognises the efficacy of exemptions imposed by consent, even if the consent does not take the form of a contract. To take the simplest example, if the Appellant had directly notified the Respondent of the terms on which it was willing to handle the goods, and asked Respondent to agree, and if the Respondent had directly and explicitly indicated its agreement, there would (it is submitted) be every commercial reason for holding the Respondent to those terms, and no legal objection to doing so. The law already recognises, in different contexts, that a duty in tort may be qualified otherwise than by way of contract. Thus, the occupier of premises or the owner of a vehicle may by a suitably worded notice exclude the liabilities which he would otherwise incur to persons entering upon the premises or vehicle: Ashdown v. Samuel Williams [1957] 1 Q.B. 409; Cosgrove v. Horsfall (1945) 175 L.T. 334; Wilkie v. L.P.T.B. [1947] 1 All E.R. 258. Similarly in Heller & Parker v. Hedley Byrne 1964 A.C. 465 the House of Lords gave effect to a printed disclaimer of liability, so as to nullify a liability which would otherwise have arisen from a negligent misrepresentation. These and similar cases cannot be explained on the basis of a contract; for the defendants were not obliged to permit access to the land or vehicle, or to make the representation. Nor is it always sufficient to say that the effect of the notice is to alter the situation into one in which no duty of care is owed, or to raise a defence of volenti non fit injuria, for these explanations will not account for the efficacy

of a notice which merely limits the liabilities of the defendant, or limits the time within which claims are to be brought. The Appellant submits that the law recognises a general principle under which tortious obligations may be assumed "upon terms", and that terms may be imposed upon the performance of a service, just as much as on the grant of a licence or the making of a representation. If this submission is valid for the case where the potential plaintiff directly indicates his consent to the defendant's terms, it must (it is submitted) be equally correct where, as here, the terms are imposed and the consent is received by way of an intermediary.

46. In this context, the Appellant adds that the principle suggested above may provide the most satisfactory explanation of Elder Dempster & Company v. Paterson Zochonis & Company [1924] A.C. 522. There, the shipper delivered his goods direct to the Defendant's vessel, and received in exchange for his goods a bill of lading. From a relationship as close as this, it was possible to infer an acceptance by the shipper that the defendant's common law duties were qualified by the terms of the bill. This qualification did not derive from a direct contract between the shipper and the defendant, or (it may be said) from any indirect enforcement for the benefit of the defendant of the contract between the shipper and the charterer. The bill of lading exemptions operated directly as a qualification of the defendant's liabilities as bailee. See also Morris v. C.W. Martin & Sons [1966] 1 Q.B. 716.

47. In conclusion, the Appellant respectfully submits that if the decision of Perry J. was influenced by Article IV Bis 2 of the Carriage of Goods by Sea Act, 1971, the learned Judge was in error. The fact that a statutory rule is introduced conferring on the servants and agents of the carrier the benefit of the statutory exceptions and limitations does not derogate from the freedom of independent contractors to obtain such advantages consensually. The Act is based on an international convention and no inference can be drawn from Article IV Bis 2 as

p.79 l.32

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to the rights of the contractor under English law independently of the statute.

48. Accordingly, in the Appellant's respectful submission the appeal should be allowed, the judgment of the Court of Appeal dated 29th June 1972 should be reversed and the judgment of the Supreme Court dated 26th August 1971, restored, and the Respondent should be ordered to pay the Appellant's costs in the Court of Appeal and the costs of this Appeal for the following among other

REASONS

1. BECAUSE a contract between the Appellant and the shipper came into existence upon the issue of the bill of lading.

2. ALTERNATIVELY, because a contract between the Appellant and the shippers came into existence when the Appellant performed services in respect of the goods, either because such performance furnished consideration for the bargain made when the bill of lading was issued, or because it was the acceptance of an offer by the Respondent contained in the bill of lading.

3. ALTERNATIVELY, because even in the absence of a binding contract, the consent of one party to the performance of services by the other subject to certain terms is effective in law to qualify the liabilities which the latter would otherwise incur at common law.

4. BECAUSE the Appellant is entitled to avail itself of the exemptions and limitations in the bill of lading as against the Respondent, either by virtue of section 1 of the Bills of Lading Act 1855 or by reason of an implied contract which came into existence when the Respondent presented the bills of lading and took delivery thereunder.

6. BECAUSE the decision of Beattie J. was right and should be restored, and the decision of the Court of Appeal was wrong and should be reversed.

M.J.MUSTILL

No. 3 of 1973

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :

THE NEW ZEALAND SHIPPING COMPANY LIMITED — Appellant

- and -

A.M. SATTERTHWAITE & COMPANY LIMITED — Respondent

CASE FOR THE APPELLANT

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