

THE TRANSFER OF RIGHTS AND LIABILITIES IN RELATION TO CARRIAGE OF GOODS BY SEA

An analysis of the English approach

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1 INTRODUCTION

1.1 Introduction

In this thesis, I will be addressing two fundamental issues that carriers and cargo interests around the world are faced with everyday: -

- (a) Who is entitled to sue the carrier where there has been cargo damage or loss?

- (b) Who can the carrier sue when he has suffered a loss?

The first issue arises in every claim brought against a carrier. If a party does not have the right to sue the carrier, his claim against the carrier will fail even though the carrier may in fact be responsible for causing the loss or damage. The second issue arises whenever the carrier has suffered a loss arising from the carriage of goods (for example where freight has been unpaid or if the vessel was damaged due to the shipment of dangerous cargo). This issue is particularly important in cases where the carrier is unable to recover his losses directly from the shipper with whom he has entered the contract of carriage and needs to bring the claim against other parties instead. These two issues frequently arise because the party wishing to sue the carrier or the party whom the carrier wishes to make liable are often not the original contracting party in the contract of carriage.

The source of a party's rights and liabilities in carriage of goods by sea is most often a document that has been in use for hundreds of years – the bill of lading. The bill of lading has generally been the mechanism through which third parties such as buyers and banks who are not party to the contract of carriage entered between the shipper and the carrier acquire rights and liabilities under the contract of carriage.

Given the important role that the bill of lading plays in conferring title to sue and to be sued, there has been a need for clear and effective rules that define when and under what circumstances such rights and liabilities are acquired. The buyer in an international sale or the bank financing the purchase must be certain of whether he has acquired the rights and liabilities under the bill of lading. Likewise, the carrier must also be certain as to who has acquired rights under the bill of lading so that he does not find himself in the position where he has settled a claim with the wrong party.

Interestingly, although there have been a number of widely ratified international conventions¹ that deal with most other aspects of bills of lading, there are as yet no conventions in force which regulate when rights and liabilities under a bill of lading are transferred. It has only been in the past few years that attempts are being made to develop a uniform law dealing with the transfer of rights and liabilities under a bill of lading with the *UNCITRAL Draft Convention on Carriage of Goods [wholly or partly] [by sea]*. Presently, the rules regulating how a party acquires rights and liabilities under a bill of lading are still governed purely by domestic law. In the United Kingdom, the relevant rules are found in the Carriage of Goods by Sea Act 1992 and in Norway, the Maritime Code.

I will deal with the two fundamental issues set out in the first paragraph by examining and considering the manner in which these issues are dealt with from the English perspective. I am of the view that due to the characteristics of

¹ Namely the Hague Rules, the Hague-Visby Rules and the Hamburg Rules

English law², the question of whether a party has acquired the rights or liabilities under a bill of lading has had to be examined more thoroughly. Apart from the present regime, I will also consider the earlier law in England as found in the 1855 Bills of Lading Act as well as in the common law. This will enable us to trace the development of the law to suit the requirements of international trade over time. In my analysis, I will be asking the following questions.

- (a) When does a third party acquire contractual rights under the bill of lading?
- (b) When does a third party become subject the contractual liabilities under the bill of lading?
- (c) Does the original shipper continue to have rights and liabilities under the bill of lading after it is transferred?
- (d) Does the intermediate holder of a bill of lading continue to have rights and liabilities under the bill of lading even after he has transferred it?

Thereafter, I shall briefly compare the approach taken by the English law with that proposed in the UNCITRAL Draft Convention³. The issue in this regard is not only whether the UNCITRAL Draft Convention is an improvement over the existing law but also whether such a convention is necessary.

² Such as the doctrines of privity and of consideration.

³ The version of the Draft Convention to which I will be referring in this thesis is document A/CN.9/WG.III/WP.56 dated 9th December 2005.

The discussion in this thesis will be limited only to “negotiable” bills of lading (such as “to order” bills of lading or “bearer” bills) and not to “non-negotiable” documents such as the sea waybill or straight bill of lading.

1.2 Sources

In this thesis, with regards to the English position, I will be relying largely on the text of the UK Carriage of Goods by Sea Act 1992 and the earlier 1855 Bills of Lading Act, the reports of the Law Reform Committee, cases, articles in legal journals and textbooks. With regards to the UNCITRAL Draft Convention, I will be referring to the Draft Convention itself, the documents prepared by the UNCITRAL Working Group and legal articles.

1.3 Method

I will be using the ordinary legal method in this thesis.

1.4 Organization of thesis

In the second section of this thesis, I will deal with the English position. I will briefly discuss the evolution of the bill of lading and the role it has come to play in international trade. Thereafter I will deal with the problems faced under the early English common law prior to the enactment of the 1855 Bills of Lading Act. After that I will go on to the English position under the 1855 Bills of Lading Act and then the mechanism under the 1992 Carriage of Goods by Sea Act, which is presently in force. After examining these three regimes, I will finally, go on to deal with the rights and liabilities under English law that exist independently of the Acts.

The third section will consist of my analysis of the relevant articles of the UNCITRAL Draft Convention and whether this is an improvement over the existing English regime.

Finally, in the fourth and final section to the thesis, I will set out my conclusion and also make an assessment of whether the UNCITRAL Draft Convention is a step in the right direction.

2 The English Position

2.1 The Evolution of the Bill of Lading and the role the bill of lading plays in international commerce.

2.1.1 Historical development of the bill of lading

The bill of lading is an important document in international trade. While a discussion of the historical development of the bill of lading is not strictly necessary, a brief overview of the evolution of the bill of lading from its origins would assist us in gaining a better understanding of the basis for its role in international commerce and in particular its role in transferring contractual rights/liabilities.

The bill of lading probably had its origins in the 14th century (although it has been asserted that a document similar to the bill of lading had existed in Roman

times)⁴. The uncertainty as to when the first bill of lading came into existence is probably due to the fact that the use of the document had gradually evolved over time as a result of mercantile practice rather than through a single identifiable event.

The precursor to the bill of lading was probably the ship's register. With growing trade in the Mediterranean in the 11th century, the need to keep efficient track of the shipment of goods became increasingly important and the practice whereby a ship's mate would keep record of the movement of goods in a register began to develop. Although use of such register probably began informally, the register was soon, in some ports at least, recognized by the law⁵. The accuracy of the register became increasingly important and around 1350, a statute was even enacted providing that if the register entered the hands of anyone other than the clerk, the contents of the register could no longer be relied on and if the clerk stated false matters in the register, he should *"lose his right hand, be marked on the forehead with a branding iron, and all his goods confiscated, whether the entry was made by him or another"*.⁶

As at the time, the shipper's representative usually accompanied the goods during the voyage, there was no need for the shipper or the recipient of the

⁴ The assertion was made in McLaughlin "The Evolution of the Ocean Bill of Lading" (1925-26) 35 Yale L.J. 548, 550 but no further explanation was given.

⁵ Bennet, "The History and Present Position of the Bill of Lading" 1914 cites the Ordonnance Maritime of Tirani (1063) as the first reference to carriers having to employ a clerk to record the goods shipped. (as cited in Bools, "The Bill of Lading" 1997 p1)

⁶ Supra footnote 4, p551 citing 2 Pardessus.

goods to be given a separate record of the goods on board. This practice only changed later with the changes to mercantile practice as merchants, instead of traveling with the cargo, began sending their goods to their correspondents at the destination port, informing them by letters of advice of the goods shipped and how to deal with it. As the merchants no longer accompanied the goods, they began to require copies of the ship's register from the carrier that were then sent to the correspondents.⁷

The earliest bills of lading appear to have evolved from these ship's registers. Early examples appear to be simple instructions to the carrier to deliver specified goods to the shipper's named correspondent at the destination port.⁸ At this stage, there was still no intention that the bill of lading would be transferable or that it would give the holder any special rights or liabilities.

Although practice probably differed from port to port, it can safely be said that rudimentary bills of lading were in existence in the late 14th century but it was not contemplated that they would be transferred.⁹ Although the bill of lading performed a receipt function, possession of the document did not entitle the holder to delivery or to any rights against the carrier.

⁷ Bensa, "The early History of the Bill of Lading" 1925 as cited in Bools, *ibid.* p2

⁸ Bools, p3

⁹ *Ibid* p3

The bill of lading only became a “transferable” document some time in the 16th century when bills of lading issues came up in the High Court of Admiralty.¹⁰ The bills of lading at the time would contain clauses providing that goods be delivered to the “shipper or his assigns” or to a “named third party (usually the buyer) or his assigns” instead of to a named correspondent. This change in form was again probably caused by a change in trading practice.

By that time, goods were beginning to be shipped before the shipper knew the identity of the buyer. The change allowed the shipper to have the goods shipped first and then to sell them while the goods were on route to the destination port. It therefore became necessary for the bill of lading to acquire the additional characteristic of being able to evidence entitlement to the goods. The mechanism evolved whereby the holder of the bill of lading would be entitled to collect the cargo at the destination port. This development was probably again based on the practice of merchants rather than on any enactment of the law.

The bill of lading only began to adopt a contractual function and set out the terms of the carriage in the 16th century.¹¹ The contractual functions prior to this time would have been fulfilled by the charterparty or other separate agreement entered between the shipper and the carrier. With the increasing cargo capacity of vessels and the increasing number of shippers per voyage, it became impracticable for carriers to enter into charterparties with every shipper. It was

¹⁰ Ibid p4

¹¹ Ibid p4

at this point that the contract of carriage became embodied in the bill of lading. The bill of lading was however not capable of transferring contractual rights to the transferee. The transferee's right to take delivery of goods by presenting the bill of lading to the carrier was a separate right based on mercantile custom and was independent of the transfer of any rights under the contract of carriage.¹²

Judging from the historical development of the bill of lading it is apparent that many of the fundamental characteristics of the bill of lading have developed through mercantile custom rather than through legislation or the courts. It is my view that mercantile custom has always taken the lead in defining the mechanism of the bill of lading and the purpose of the legislation has always been to aid and not hinder trade and to ensure that the bill of lading is able to adequately perform the role merchants intended for it.

2.1.2 What is a bill of lading?

It is interesting that for a document used so frequently in international commerce, there has been little legislative attempt to define the bill of lading in England.

In England, the bill of lading has no real statutory definition. The 1992 Carriage of Goods by Sea Act only defines the bill of lading negatively by stating what it

¹² Ibid p8

is not.¹³ It is still most effectively and commonly identified by its three main characteristics which it has developed over time, firstly, it acknowledges receipt of the goods by the carrier, secondly, it is usually evidence of the contract of carriage and thirdly, it is capable of operating as a document of title over the goods. These are functions that have been given to the bill of lading through mercantile custom and have since been accepted by the law.¹⁴

The Hamburg Rules and the Norwegian Maritime Code do attempt definitions of the bill of lading but such definitions are silent on the bill's function in transferring contractual rights and liabilities.¹⁵

2.1.3 Title to sue and the bill of lading as a document of title

The role of a bill of lading as a document of title is not to be confused with its other distinct but related role as a document that is capable of giving the holder title to sue. This thesis is concerned only with this latter aspect of the bill of lading.

The bill of lading has always commonly been described as a "document of title" but there has often been confusion as to what this actually means. In *The*

¹³ Section 1(2)(a) 1992 Carriage of Goods by Sea Act: "References in this Act to a bill of lading do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement.

¹⁴ Gaskell, "Bills of Lading" 2000 p3

¹⁵ Hamburg Rules Art. 1(7) and Norwegian Maritime Code section 292

Delfini,¹⁶ Mustill LJ held that the term “document of title” does not bear its ordinary meaning when used in the context of bills of lading. He went on to elaborate on the role of the bill of lading as a document of title as follows:

“It signifies that in addition to its other characteristics as a receipt for the goods and as evidence of the contract of carriage between the shipper and the shipowner, the bill of lading fulfills two distinct functions 1. It is a symbol of constructive possession of the goods which (unlike many such symbols) can transfer constructive possession by endorsement and transfer: it is a transferable “key to the warehouse”. 2. It is a document which, although not itself capable of directly transferring property in the goods which it represents, merely by endorsement and delivery, never the less is capable of being part of the mechanism by which property is passed.”

Therefore, although the bill of lading is described as a “document of title” this does not automatically mean that the holder of the bill of lading has title to the goods described in the bill or that he is the owner of the goods. The bill of lading does however entitle a third party to take delivery of the goods from the carrier. In this sense, the bill of lading acts as a key that unlocks the floating warehouse in which the goods are stored and therefore can be used to transfer constructive possession of the goods. This function as a key however makes the bill a useful tool in transferring title/ownership over the cargo. Whether or not a party does

¹⁶ [1990] 1 Lloyd’s Rep 252

indeed have ownership or title to the goods would depend primarily on the terms of the sale contract and the intention of parties rather than on the transfer of the bill of lading.

Generally, a party would be able to acquire constructive possession of the goods and would be able to demand delivery of the goods from the carrier where he presents the bill of lading to the carrier and he falls within one of the three following categories:-

- 1) He is the party identified as the consignee of the goods in the bill of lading;
- 2) The bill of lading contains a specific endorsement in his favour; or
- 3) The bill of lading provides that it is a “bearer” or “to order” bill, or the bill of lading is endorsed in “blank” (i.e. there is an endorsement on the bill of lading but no specific endorsee is identified).

The other related role of a bill of lading (which is the focus of this thesis) is that the bill may function as a document through which a party can acquire rights (and liabilities) under the contract of carriage even though he is not originally a party to the contract.

These two roles of the bill of lading are not to be confused. The first entitles the holder to demand delivery of the cargo from the carrier where as the second allows the holder of the bill of lading to have title to sue the carrier. The effect of the first function is that it would entitle the holder to bring a claim against the carrier if the carrier delivered the cargo to the wrong party. The effect of the second function is that it would entitle the holder to sue the carrier where the carrier is in breach of the contract of carriage for example where the carrier has damaged the cargo.

This thesis does not concern itself with when a bill of lading is a document of title or whether a third party is entitled to demand delivery of goods from the carrier. The focus of the thesis is on the latter role of the bill of lading as a mechanism through which the third party acquires contractual rights (and liabilities).

2.2 English common law before the 1855 Bills of Lading Act

2.2.1 When does a third party acquire contractual rights under the bill of lading? – The problem of privity

In international sales, the shipper (seller) usually contracts with the carrier to carry and deliver goods to a third party. Often the goods may be sold afloat and possibly resold many times before they reach the final destination. The person to whom delivery is to be made (the buyer) may not be known at the time of the contract of carriage and sometimes delivery may have to be made instead to the bank that financed the purchase of the goods (where the goods under the bill of lading are pledged to the bank as security).

It is very important that these third parties are able to acquire contractual rights under the bill of lading as they are often the ones who bear the risk of damage to the goods during the voyage instead of the seller / shipper who may have already been paid.¹⁷

Under the common law doctrine of privity, however, such third parties are not able to sue the carrier under the contract of carriage. This rule states that only

¹⁷ Risk passes to buyer at ship's rail in load port under most sale contract eg. INCOTERMS CIF, CFR, FOB, FAS.

parties to a contract may sue or be sued on it.¹⁸ In the simple case where A (a carrier) contracts with B (the shipper) to carry goods and to deliver them to C (the consignee), C cannot sue A on the contract of carriage as he was not party to it. Conversely, A also cannot sue C under the contract. The only parties who can rely on the contract in claims against each other would be A and B (even where C has suffered the loss).

Although the shipper would be able to sue the carrier, as the shipper is party to the contract of carriage, the common law did not allow him to recover substantial damages if he has not suffered the loss himself.¹⁹

This was clearly an unsatisfactory state of affairs as the buyer would often be left without remedy in contract in the event of cargo damage. Although the buyer could try to sue the carrier through other means, for example in tort, these other alternatives were more complicated and the grounds for such claims were more difficult to establish.²⁰

2.2.1.1 Dunlop v Lambert

¹⁸ *Tweddle v Atkinson (1861) B& S 393*. The problem of the consignee being unable to sue the carrier however existed even before the doctrine of privity was recognized under the common law.

¹⁹ Tetley, "Who may claim or sue?" 2006 p8

²⁰ Chapter 2.5 below.

A common law solution to the privity problem was developed in the case of *Dunlop v Lambert*²¹. In that case, the court permitted the shipper who entered into the contract of carriage with the carrier but who did not himself suffer any loss to recover substantial damages but obliged him to hold the proceeds in trust on behalf of the owner of the goods (the consignee). The principle in *Dunlop v Lambert* was reaffirmed in the more recent decision in *The Albazero*²².

The justification for this exception to the rule that a party could only recover damages where he has suffered the loss was that the transferee of the bill would be unlikely to have acquired any contractual rights against the carrier so that if the shipper were denied a substantial remedy, there would be no effective remedy against the carrier even where the carrier's breach is clear and uncontested. The exception was rationalized on the basis that since the carrier must have contemplated that property in the goods might be transferred to third parties, after the making of the contract of carriage, the shipper must be treated in law as having made the contract of carriage for the benefit of all persons who might after the making of that contract acquire an interest in the goods.²³

As is often the case with the common law, the courts were trying to achieve a fair result while fitting their decision into the framework of the existing law, which in this case included the doctrine of privity. The most obvious problem however

²¹ (1839) 7 ER 824

²² [1976] 2 Lloyd's Rep 467

²³ *The Albazero* [1976] 2 Lloyd's Rep 467

with the *Dunlop v Lambert* solution was that the buyer who had suffered the loss could not compel the shipper to sue the carrier.

Although the shipper could sue the carrier for the third party's benefit, there was no *obligation* on him to do so. It would be difficult for a third party buyer to convince the shipper to pursue the claim against the carrier where he has himself suffered no loss unless the consignee had a close relationship with the shipper.

There was also the added complication of allocating the burden for costs of pursuing the claim. A shipper would have even less incentive to pursue a claim where he is personally liable for legal costs but without being able to benefit from the sums recovered. Furthermore, there was always a risk that a shipper who did not suffer a loss may recover sums from the carrier without passing it on to the consignee. In such a case, the unscrupulous shipper would have a windfall but the unfortunate consignee would be left bearing the loss.

Also, if the carrier settled a claim made by such a carrier, he would face the possibility of subsequently being sued in tort by the consignee who suffered the loss. In such a case, the carrier would be exposed to double recovery.

As can be seen, the *Dunlop v Lambert* rule was had serious shortcomings, and while providing a solution to the problem of privity, it created new problems. The rule was artificial and was really a stop-gap measure by the courts who were trying to prevent injustice without altering the common law doctrine of privity.

2.2.2 When does a third party become liable under the bill of lading?

The doctrine of privity makes sense since a third party who is not party to a contract should not be made liable under terms to which he has not agreed. Furthermore, as the third party is not entitled to rely on the terms of a contract when making a claim it is fair that a claim should not be made against him under those terms.

In the context of bills of lading, this meant that the carrier could not sue the transferee under the terms of the contract of carriage where the contract was entered between the carrier and the shipper. Examples of instances where the carrier would want to sue the transferee of the bill of lading would be for example where the shipper had failed to pay freight or where the carrier's vessel has suffered damage as a result of shipment of dangerous cargo.

While it was generally fair that the transferee of the bill of lading, like third parties to other ordinary contracts, could not be sued under the terms of the carriage, the transferee of the bill of lading is in a slightly different position.

For one thing, although the transferee of the bill of lading did not acquire any contractual rights under the contract of carriage, by virtue of being the holder of the bill of lading, he acquired one very significant right against the carrier, which was independent of the terms of the contract that is the right to demand delivery of the cargo. It can be argued that because of this right, the holder of the bill of lading is in a special position and it would not be inequitable if some contractual liabilities were imposed on the holder should he wish to take delivery of the cargo. Furthermore, unlike other third parties, the holders of the bill of lading would usually be merchants who are well aware that the carriage of goods was made subject to ordinary terms like the contractual obligation to pay freight.

Because of the privity rule, carriers would have found themselves in a difficult position where they had a claim against the shipper under the contract of carriage but were unable to recover due to the shipper's insolvency. With the privity rule, the carrier may also even be deprived of the right to rely on a contractual lien over the cargo since the consignee is not party to the contract of carriage and may demand delivery notwithstanding a lien clause in the contract.

It is conceivable that some cargo owners would take advantage of the privity rule in order to avoid liability under the contract of carriage. A party A wishing to ship cargo from Brazil to China may set up a company B with little or no assets to enter into contracts of carriage with carriers as shipper. A would be named as

consignee under the bills of lading. If the privity rule were to apply unaltered, the carrier having a claim under the contract of carriage will only be able to sue B and not A. As B has little assets, it may be wound up leaving the carrier without being able to recover anything. At the same time, although the carrier has a claim under contract of carriage, he is still under a non-contractual obligation to deliver the cargo to B as the holder of the bill of lading.

2.2.3 Does the original shipper continue to have rights and liabilities under the bill of lading after it is transferred? Does the intermediate holder of a bill of lading continue to have rights and liabilities under the bill of lading even after he has transferred it?

Under the doctrine of privity, all rights and liabilities under the contract of carriage would remain with the shipper who originally entered into the contract of carriage with the carrier. This is regardless of whether the bill of lading has been transferred to any parties. It therefore follows that any intermediate parties do not acquire any contractual rights or liabilities under the contract of carriage.

2.3 The 1855 Bills of Lading Act

Given the inadequacies with the common law, it became apparent that there was a need for effective legislation that would address the difficulties that were being caused by the doctrine of privity. The first attempt at a legislative solution came in the form of the 1855 Bills of Lading Act. The main purpose of this act was to regulate the acquisition of rights by and the imposition of liabilities on the consignee named in the bill of lading or the transferee of the bill of lading.

While the 1855 Bills of Lading Act did address the problem of privity of contract and clearly allowed a third party to acquire rights and liabilities under the contract of carriage, the act itself created new problems. For this reason, it was subsequently replaced in England by the 1924 Carriage of Goods by Sea Act. Having said that, the 1855 Act was an improvement over the common law and

remained in force unaltered for almost one and a half centuries. In fact, the 1855 Act still remains effective today in some jurisdictions such as Canada.²⁴

The relevant part of the 1855 Bills of Lading Act is found in section 1:-

“Every consignee of goods named in the bill of lading, and every endorsee of a bill of lading, to whom property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.”

The 1855 Act had two main characteristics. Firstly, the passing of contractual rights were linked to the transfer of property and secondly, liabilities would be imposed on the third party at the same time when the party acquired rights. Section 1 also made it clear for the first time that notwithstanding the doctrine of privity, the transferee or consignee of the bill of lading would acquire rights and liabilities even though he was not party to the contract of carriage.

2.3.1 When does a third party acquire rights under the bill of lading?

The consignee or endorsee of the bill of lading acquired contractual rights under the bill when property in the goods passed to him *“upon or by reason of”* such consignment or endorsement.

²⁴ The Canadian “Bills of Lading Act” (1889)

The intention behind linking the transfer of property with the acquisition of contractual rights was probably to reduce the possibility of multiple claims being brought against the carrier in respect of the same loss. It was perhaps thought that with such a link, the consignee/indorsee would most likely also be the owner and therefore title to sue in contract and in tort would be held by the same party.

This link between transfer of property rights and the acquisition of contractual rights however turned out to be a problem in certain cases. Under section 1 of the 1855 Act, in order for a consignee or transferee to gain rights of suit and to acquire contractual rights, property in the goods must have passed to him “upon or by reason of” such consignment or endorsement.

While parties in a sale transaction would usually intend for property in the goods to pass at the same time as the consignment or transfer of the bill of lading, this was not always the case. Under the English law, property in goods generally passed when parties intended for it to pass.²⁵ Therefore it was quite possible that property could pass independently of the consignment or endorsement of the bill of lading.

For instance, parties could have agreed that property in the goods would pass on payment instead of on transfer of the bill of lading or on a specified date independent of the date when the bill of lading was transferred. In such cases,

²⁵ Section 17 Sale of Goods Act 1979

the transferee or consignee of the bill of lading would find that he did not have any contractual rights against the carrier even though he was the consignee or indorsee in the bill of lading simply because property in the goods had not been transferred *“upon or by reason of such consignment or endorsement”*.

The Act created an arbitrary distinction between holders of the bill of lading who acquired property upon or by reason of consignment/endorsement of the bill of lading and acquired contractual rights, and those who acquired property through some other means and could not acquire any rights under the Act even though they were consignees or indorsees of the bill of lading. This problem has been described as the “property gap”.

The courts subsequently tried to rectify this problem by narrowing the “property gap”. In *The Delfini*, the court held that it was not necessary for property to pass at the same time as the consignment or the endorsement of the bill of lading and that the requirements of the section were satisfied where *“although the endorsement of the bill of lading is not the immediate occasion of the passing of property, never the less, it plays an important causal part in it.”*

In short, this removed the requirement that the consignment or transfer of the bill of lading had to take place at the *same time* as the transfer of property in the goods in order for the consignee or transferee to acquire contractual rights. It was still however not entirely clear how closely the endorsement of the bill of lading had to be linked to the transfer of property.

The Delfini however did not deal with the problem of the “property gap” in cases where property was simply being transferred by agreement and was totally independent of the transfer or consignment of the bill of lading. This was particularly a problem with the sale of bulk cargo such as oil or grain as under section 16 of the Sale of Goods Act 1979, property in the unascertained goods would only pass once the goods had been ascertained. Where bulk cargo was concerned, ascertainment would usually only be done at the discharge port when the cargo was divided into separate lots for delivery to the various consignees. *The Delfini* also did not provide a solution to the cases such as in

*The Aliakmon*²⁶ where property did not pass at all to the consignee although the consignee bore the risk of the goods being damaged.

In cases where *The Delfini* did not provide an adequate solution to the “property gap”, consignees were left to rely on other legal techniques, such as, claiming under the *Brandt v Liverpool*²⁷ implied contract.

2.3.1.1 What rights were acquired by the third party?

The consignee or transferee was not bound by every term of the contract of carriage but only the rights and liabilities that were contained in the bill of lading. This meant that if the original contract entered between the shipper and the carrier contained different terms from that set out in the bill of lading, the bill of lading terms would prevail in determining the scope of the consignee/transferee’s rights and liabilities.

In *Leduc v Ward*²⁸, the contract between the shipper and the carrier permitted a deviation to Glasgow. However, no such deviation was permitted in the contract entered between the endorsee and the carrier. Since there was no indication on the bill of lading permitting such a deviation, the endorsee had a legitimate claim against the carrier for the deviation. This rule makes sense as the

²⁶ [1986] AC 785

²⁷ *Brandt v Liverpool, and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575. See also discussion of the rule in chapter 2.5.6

²⁸ (1888) 20 QBD 475

transferee or consignee in possession of the bill of lading can only be expected to be aware of the terms of the bill of lading and should not be bound by the terms of a contract of carriage of which terms he would be unaware.

2.3.2 When does a third party become liable under the bill of lading?

Apart from the “property gap”, the other significant problem with the 1855 Act was the link between the automatic imposition of liabilities on the consignee or transferee of the bill of lading. While at first glance, it would appear to be fair that the transferee or consignee who has acquired contractual rights under the bill of lading should also be subject to the contractual liabilities, these rules created difficulties in some cases particularly where the consignee or transferee was holding on the bill of lading merely as security and had no real interest in taking ownership of the cargo.

It is not uncommon in international sales for bills of lading to be consigned or transferred to the banks that are financing the purchase of the goods as security. The banks would generally not be interested in acquiring contractual rights (and certainly not liabilities) under the contract of carriage and would ordinarily indorse or transfer the bills of lading to the buyer once the bank had received payment. If however the buyer defaults and fails to pay the bank, the bank could then transfer the bill of lading to some other interested buyer in exchange for payment or less commonly, the bank could present the bill of lading to the carrier to take delivery of the goods before selling it.

The problem which the 1855 Act created for banks was that contractual liabilities under the bill of lading were imposed on the banks *automatically* once they became the consignees or endorsees of the bills of lading. This was unfair to the banks as it was not part of the commercial risk undertaken by a bank when it is holding a bill of lading as security to undertake to perform the substantive obligations under the terms of the bill of lading. A common problem would be where the bank became liable for unpaid freight or for damage caused by dangerous cargo just because it had financed the purchase of the goods.

A solution to this problem had to be found because, if banks who were holding the bills of lading merely as security were to continue to be subject to the liabilities under the contract of carriage, then, banks would simply be less inclined to finance international sales. This would of course have a detrimental effect on the international trade and the economy.

Instead of amending or revising the 1855 Act, a solution to the problem was formulated in the *Sewell v Burdick*²⁹. In that case, the English House of Lords adopted a narrow interpretation of the requirement of “*the property in the goods*” under section 1 of the 1855 Act and held that “*the property*” referred only to the *general* property in the goods and not a *special* property in them. A bank to which the bills of lading had been indorsed for the specific purpose of giving it security only acquired a “*special property*” in the goods. In the circumstances, the bank no longer became liable under section 1 of the 1855 Act since the endorsement would not pass “property” to the bank.

The solution in *Sewell v Burdick* was far from perfect and created difficulties in certain situations.

One criticism of the solution must be that the House of Lord’s interpretation of “property” in the 1855 Act is artificial. The Act made no distinction between persons holding the bills of lading as security and those who were holding the bills as buyers. Drawing such a distinction also arguably placed the carrier at a

²⁹ (1884) 10 App Cas. 74.

disadvantage because as long as the bank was holding on to the bill of lading, the carrier would be deprived of the right to sue the consignee or endorsee of the bill of lading. For example, where dangerous cargo has caused damage, the carrier would not be entitled to sue the consignee as long as the bank is the consignee of the bill of lading. Under such circumstances, the buyer could avoid being saddled with the liability for the damage simply by instructing the banks not to endorse the bills of lading over.

Another problem that *Sewell v Burdick* caused was that it diminished the effectiveness of the bill of lading as a document that identified the parties who were liable under the contract of carriage. In most instances, the contract for the carriage of goods by sea would have been entered between the shipper and the carrier. In such cases, the carrier may not be familiar with the consignee or transferee of the bill of lading and would in any event not be concerned with the reason behind a party being named as consignee in the bill of lading.

Prior to *Sewell v Burdick*, the bill of lading accorded some measure of certainty as the carrier could take comfort in knowing that the consignee or endorsee of the bill of lading could be made liable under the contract in the bill of lading³⁰. After *Sewell v Burdick*, there was less certainty as the carrier could not be certain he has a claim against the consignee or endorsee of the bill of lading until he inquired into the underlying reason for the endorsement/consignment

³⁰ Unless the necessary link between property and the endorsement of the bill of lading was absent.

i.e. whether the endorsee was really intended to be the owner of the goods or whether he only had an interest in the goods as security.

The biggest problem with *Sewell v Burdick* however is that although it stopped the bank from being made liable under the contract of carriage, it also prevented the bank from bringing a claim against the carrier under the contract of carriage. Under the reasoning of that case, if the goods had been damaged as a result of the carrier's breach of contract so as to diminish the value of the security, the bank would be unable to sue the carrier since the bank had acquired only "*special*" property in the goods and not the "*general*" property which section 1 of the 1855 Act was held to have referred to. In such cases, the bank would have fallen into the "property gap" and would only be left to rely on other common law remedies such as the *Brandt v Liverpool* implied contract which were harder to establish.

2.3.2.1 Which liabilities does the third party acquire?

Section 1 of the 1855 Act provided that the consignee or endorsee would be "*subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself*".

The Act is unclear on which liabilities were to be transferred to the consignee or endorsee and as to the continuing liability of the shipper after the consignment

or endorsement. It has been argued by some authors³¹ that the consignee or endorsee should only be made liable in respect of obligations arising *after* the goods have been shipped or the bill of lading endorsed, as the case may be. This would exclude liability in respect of the shipment of dangerous cargo and perhaps other matters such as demurrage incurred at the port of loading.

Another question that also arises is whether in addition to general contractual liabilities being transferred to the consignee or endorsee, the consignee or endorsee also becomes subject to liabilities that are specifically imposed on the shipper under the Hague / Hague-Visby Rules. In the *Giannis N.K.*³² however, the House of Lords seems to have accepted that as the consignee or endorsees would be “*subject to the same liabilities*” as the shipper, then the Hague and Hague-Visby Rules liabilities could be transferred. As the House of Lord’s view was only *obiter*, the question of whether such liabilities were transferred to the consignee under the 1855 Act remains open.

I would point out however that although section 1 of the 1855 Act states that the consignee is subject to the same liabilities as if the contract had been made with himself, it does not state that the consignee assumes all the shipper’s liabilities. If this were the intended effect of the Act, the Act could simply have stated as such. It is therefore at least arguable that although the consignee assumes the liabilities under the contract in the bill of lading, he will not assume

³¹ For example, Scruttons on Charterparties p320

³² [1994] 2 Lloyd’s Rep 171

liabilities that have been specifically imposed on the shipper either under the terms of the contract or based on the Hague / Hague-Visby Rules.

For example, if the bill of lading specifically provides that the *“shipper is liable for all damage caused to the carrier resulting from the carriage of dangerous cargo”*, the consignee should not have to assume such liability. However, where the bill of lading states simply that *“freight of \$100 to be paid upon discharge of cargo”*, without expressly stating the party who is liable for freight, the consignee should be liable for freight under section 1 of the Act.

2.3.3 Does the intermediate holder of a bill of lading continue to have rights and liabilities under the bill of lading even after he has transferred it?

Although the 1855 Act does not deal expressly with the rights of intermediate holders, it follows from the wording of the Act that once rights are “transferred to or vested in” the new consignee or endorsee, the intermediate holder loses such rights. In this respect, the intermediate holder is in the same position as a shipper who has transferred the bill of lading to the endorsee or consignee. Therefore, at any one time only the most recent endorsee will have acquired contractual rights against the carrier.

The question of whether the intermediate holder of the bill of lading remains liable under the contract of carriage after he has transferred the bill of lading was not addressed by the 1855 Act. On a plain reading of the Act, it would

appear that as with the original shipper, the intermediate holder would remain liable under the bill of lading even after he has transferred it. This would be unfair for the intermediate holder who (unlike the shipper) was not a party to the original contract of carriage and who would not have any interest in the goods after he had transferred the bill of lading.

In *Smurthwaite v Wilkins*³³ however, the court rejected the view that the intermediate holder remained liable and held that this was “*clearly repugnant to one’s notion of justice*” and further held that it was only the transferee who receives the cargo who was or remained liable under the bill. Although this decision created a fair result, the necessity for such a decision highlighted yet another shortcoming of the 1855 Act.

2.3.4 Does the original shipper continue to have rights and liabilities under the bill of lading after it is transferred?

Section 1 of the 1855 Act “*transferred to and vested in*” the consignee or endorsee all rights of suit. The intention of the act was to divest the shipper of rights of suit once the consignee or endorsee acquired rights.³⁴ In this respect, the section achieved a fair result as it ensured that the carrier would not be faced with the prospect of inconsistent claims being brought by the shipper as well as the consignee or multiple endorsees. The Act also protected the

³³ (1862) 11 C.B

³⁴ Gaskell, p129

consignee or endorsee's rights because if the shipper were to retain contractual rights, it would enable him to undermine the security of the new holder by anticipatory action. Under the section, only one party would have rights of suit under the contract of carriage against the carrier at a time.

Unlike the case of contractual rights, the 1855 Bills of Lading Act does not refer to contractual liabilities being "transferred" to the consignee or endorsee. The House of Lords in *The Giannis N.K.* emphasized that unlike the case with contractual rights, the consignee or endorsee's liability was by way of addition and not substitution. Therefore, the original shipper would remain liable to the carrier under the original contract of carriage notwithstanding that the bill of lading had been indorsed to a third party. This is fair as in most cases, most of the important contractual obligations under contract of carriage would have to be performed by the shipper. The consignee's role would in practice usually be limited to taking delivery of the cargo at the discharge port.

2.4 The 1992 Carriage of Goods by Sea Act

The 1855 Bills of Lading Act was finally repealed and replaced with the Carriage of Goods by Sea Act 1992 which entered into force in England on 16th September 1992. The English Law Commission and the Scottish Law Commission in the jointly prepared report "Rights of Suit in Respect of Carriage of Goods by Sea" proposed the terms of the new Act.

The new 1992 Act (which is still in force) is more comprehensive than the 1855 Act and seeks to rectify several of the problems that had surfaced with the use of the old Act. Rather than being an amendment or modification of the 1855 Act, the 1992 Act offers a fresh approach to the issue of the transfer of rights and liabilities under bills of lading and constituted a major revision and modernization of the English maritime law. Unlike the 1855 Act, which dealt only with transferable bills of lading, the 1992 Act relates to an expanded category of documents including sea waybills and delivery orders.

While the 1992 Act is far more detailed and more carefully worded than the earlier 1855 Act, the new Act was not conceived as a code which governs every situation where the transfer of rights and liabilities under a bill of lading is in issue, but only as a piece of remedial legislation. The intention behind the new Act is only to deal with existing problems with the 1855 Act and the common law and left open many areas, which it did not deal with expressly.³⁵

Amongst the most significant changes brought about by the 1992 Carriage of Goods by Sea Act are the removal of the link between the transfer of the contractual rights and liabilities under the bill of lading with the passing of property; and, the separation of contractual rights from contractual liabilities.

2.4.1 When does a third party acquire rights under the bill of lading?

The 1992 Carriage of goods by Sea Act introduces for the first time the concept of the “lawful holder” of a bill of lading.

Section 2(1)(a) of the 1992 Act explains that “*a person who becomes the lawful holder of a bill of lading shall...have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.*”

The definition of a “lawful holder” is found in section 5(2) of the Act.

³⁵ The Law Commission and The Scottish Law Commission, “Rights of Suit in Respect of Carriage of Goods by Sea”

2.4.1.1 Good faith

Section 5(2) provides that every lawful holder must be the holder of the bill of lading in *good faith*. The concept of “good faith” is not clearly defined or developed in the English law unlike in other civil law jurisdictions. While it would be clear that a thief who had stolen a bill of lading would not be entitled to sue the carrier under the contract of carriage, it is unclear what standard of care or “honesty” the holder of the bill of lading needs to show before being able to acquire rights under the 1992 Act.

A lack of “good faith” would seem to require some element of dishonest conduct and it is unlikely that mere negligence would be enough. In *The Aegean Sea*³⁶, the court noted that “*good faith*” connotes “*honest conduct and not a broader concept of good faith such as the observance of reasonable commercial standards of fair dealing in the conclusion of the transaction concerned.*”

The requirements of “good faith” and honesty were absent from the 1855 Act, which on the face of it allowed endorsees or consignees to acquire contractual rights under the bill of lading regardless of whether they had acquired the bill of lading through some deception or unlawful means. Therefore, under the 1855 Act, it was technically possible for a person who had stolen a bearer bill to sue the carrier under the contract of carriage. The requirements that the holder of the bill of lading must be the lawful holder of the bill of lading and must have acted in good faith prevent such situations from now arising.

³⁶ [1998] 2 Lloyd’s Rep 39

The “good faith” requirement however gives rise to the question of how far a carrier has to go to verify the honesty of the holder of the bill of lading. One of the hallmarks of the bill of lading as a document of title and as a document giving title to sue is its certainty. The effectiveness of the bill of lading has to a large extent depended on the ability of the carrier being able to easily ascertain on a quick examination of the bill of lading, the identity of the person entitled to delivery of the goods as well as the person acquiring contractual rights under the bill of lading.

It is my view that in order to maintain the effectiveness of the bill of lading, the carrier’s duty to ascertain that the holder of the bill of lading is a “lawful” holder should not be unduly onerous. It should be sufficient that a carrier who has settled a claim with a holder a holder that is *apparently* lawful should have a good defence if the real owner of the cargo subsequently makes the same claim. This less strict duty on the carrier would bring the interpretation of the 1992 Act in line with the rule in the earlier case of *Glyn Mills Currie & Co. v East & West India Dock Co*³⁷, where the court held that where the carrier delivers cargo against an original bill of lading, it will have a defence by the real owner for conversion.

In light of the case, a stricter duty being imposed on the carrier would give rise to the unsatisfactory situation where the carrier who settles a claim with a “bad

³⁷ *Glyn Mills Currie & Co. v East & West India Dock Co* (1882) 7 App Case 591

faith” holder of the bill of lading would have a defence against the real owner where the claim is for misdelivery but not where the claim is for cargo damage.

2.4.1.2 Consignee or endorsee

In addition to the requirement of “good faith”, section 5(2) of the 1992 Act describes the holder of the bill of lading as having to fall into one of the three following categories:-

- a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
- b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or , in the case of a bearer bill, of any other transfer of the bill;
- c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates.

Sub-paragraph (a) essentially describes consignees and sub-paragraph (b) endorsees and holders of bearer bills. Holders of the bill of lading who fall within these 2 sub-paragraphs would also have acquired contractual rights under the 1855 Bills of Lading Act.

2.4.1.3 Spent bills of lading

Sub-paragraph (c) (read together with section 2(2)) introduces a new category of holders of spent bills who may under certain circumstances have title to sue the carrier. Spent bills are essentially bills of lading relating to goods which have

already been delivered to the person entitled under the bill of lading to take delivery of the goods.

The bill of lading cannot operate as a “key to the warehouse” once delivery has been made to the person entitled to delivery³⁸ because by this time, possession of the bill no longer gives a right as against the carrier to possession of the goods. While this remains the position, section 2(2) of the 1992 Act allows contractual rights under the bill of lading to be transferred under certain conditions even after the goods described in the bill of lading has been delivered.

The 1855 Bills of Lading Act did not provide for the transfer of contractual rights under the bill of lading after goods had been delivered. Therefore, under the old Act, once bills of lading were “spent”, rights under the contract of carriage would be vested in the consignee or endorsee of the bill of lading at the time of delivery of the goods. The consignee or endorsee could not transfer the contractual rights under the bills of lading by transferring or endorsing the bills of lading to other parties after the goods had been delivered.

By allowing the “spent” bills to be used to transfer rights under the bill of lading, the 1992 Carriage of Goods by Sea Act recognizes that in modern practice, where goods are being sold under a chain of sale contracts, bills of lading may take a long time to reach the ultimate holder and that the ultimate holder should not be deprived of his rights under the contract of carriage simply because he

³⁸ Debattista, “Sale of Goods Carried by Sea” (1990) p 41

receives the bill of lading only after the goods have already been delivered and bill of lading ceases to operate as document which transfers constructive possession of the goods.³⁹ In essence, the effect of section 2(2) of the 1992 Act is to remove the link between the passing of title of the goods and the passing of contractual rights. While the transfer of the bill of lading does not transfer constructive possession over the goods once the carrier has delivered them, it can still be used to transfer contractual rights.

The spent bill of lading may only be allowed to transfer rights under the contract of carriage to the holder of the bill of lading in two situations. A prerequisite in both situations is of course that the person acquiring contractual rights must be a lawful holder of the bill of lading.

The first situation is where the holder of the bill of lading has acquired the bill *“by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill”*.⁴⁰

Such a situation would usually arise where goods are sold in a chain of contracts. Let us take the example where goods that are to be delivered in November are sold by A to B in June and by B to C in July and C to D in August. Once the goods have been delivered in November to the person

³⁹ The Law Commission and The Scottish Law Commission, “Rights of Suit in Respect of Carriage of Goods by Sea” p22

⁴⁰ Section 2(2)(a) Carriage of Goods by Sea Act 1992

entitled to take delivery, the bill of lading ceases to perform the function of being able to transfer constructive possession over the goods. As the bill of lading would be passed through a chain of endorsements, it is conceivable that due to delays, C may be unable to endorse the bill of lading to D until December after the goods have already been delivered. In such a case, section 5(2)(a) of the 1992 Act would apply and D would be able to sue the carrier under the contract of carriage although the bill of lading had been transferred to him after the goods had been delivered because the sale had occurred before delivery.

It is fair in such situations that D be entitled to acquire the contractual rights against the carrier, since D would have been the buyer of the goods at the time of delivery and would be the party interested in suing the carrier since he would most likely be the party bearing the risk of damage to goods in transit.⁴¹

The second situation where a “spent” bill of lading would transfer contractual rights is where the holder of the bill of lading acquires the bill *“as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements”*. Using the above example, such a situation would arise where D, finding the goods to be damaged refuses to accept the goods and the bill of lading. In such a case, C would acquire rights under the contract of carriage even though the bill of lading has been “spent”. It would be reasonable in such circumstances for C to acquire the rights against the carrier since he would be the party that would have suffered the loss.

⁴¹ Under common INCOTERMS sales e.g. CIF, FOB

2.4.1.4 Removal of link with passing of property

While the 1992 Act introduces the “lawful holder” of the bill of lading as acquiring rights under the contract of carriage, the Act also does away with the need for property to be passed “*upon or by reason of*” the endorsement or consignment in order for the holder to acquire contractual rights.

The removal of the link between the transfer of property and the acquisition of contractual rights addresses the major weakness of the 1855 Act and removes the “property gap” that previously existed. As such, it has become simpler for parties to ascertain when contractual rights have passed since there is no longer a need to look at the underlying sale transaction to decide when property has passed. In order to ascertain whether a party has acquired contractual rights under the bill of lading it is only necessary to establish that he is the “lawful holder” of the bill. There is also no longer any need to rely on the rule in *Sewell v Burdick*. Under the 1992 Act, it is clear that a bank that is holding on to the bill of lading as security will acquire contractual rights under the bill of lading so long as he is the lawful holder of the bill.

The removal of the property link also brings the bill of lading’s role as a document transferring contractual rights in line with its role as a document of title. Under the 1855 Act, an inconsistency existed in that while the holder of the bill of lading was entitled to demand delivery of the goods from the carrier (regardless of whether he acquired property rights), he would not acquire the contractual rights under the bill if property had not vested in him by virtue of an endorsement or consignment. The 1992 Act removes this inconsistency and gives the holder of a bill of lading having the right to take delivery of the goods the right to sue the carrier under the contract of carriage for loss or damage to the goods.

The problem with the removal of the link between property and the acquisition of contractual rights however is that there is a greater risk of multiple claims

being brought against the carrier for the same damage or loss of cargo. Under the 1855 Act, since it was important that property be passed together with the consignment or endorsement of the bill of lading, it was more likely that the holder of the bill of lading would have property in the goods as well and would be the only party having the title to sue the carrier in both contract and tort.

With the removal of the link in the 1992 Act, it is more likely that the person having property rights to the goods is someone other than the holder of the bill of lading. As such the carrier may find himself faced with two claims, one by the lawful holder of the bill of lading under the contract of carriage, and the other by the person having property rights to the goods in tort. This problem is compounded by the fact that section 2(4) of the 1992 Act formally recognizes the common law rule in *Dunlop v Lambert* allows the lawful holder of the bill of lading to recover substantial damages even if he had not suffered the loss himself.

Notwithstanding the potential difficulty with multiple claims, I am of the view that the removal of the property link is an improvement over the previous law in that it ensures greater certainty. Although there is theoretically a greater likelihood of the carrier being faced with multiple claims, the situation would probably not arise so often in practice. Firstly, in a large number of cases, the holder of the bill of lading would still be the party with property rights over the goods. Therefore, there would be only one party with the right to sue the carrier in both contract and tort.

Secondly, although both the actual owner of the goods and holder of the bill of lading may have the right to sue the carrier, usually only the party which has actually suffered the loss would be interested in bringing a claim against the carrier.

2.4.1.5 Recognition of the rule in *Dunlop v Lambert*

Section 2(4) incorporates the common law rule in *Dunlop v Lambert* into the 1992 Carriage of Goods by Sea Act. The section essentially provides that where a party having an interest in goods shipped under a bill of lading sustains loss or damage resulting from the breach of the contract of carriage, the lawful holder of the bill of lading is entitled to exercise rights of suit for the benefit of the party who sustained the loss or damage to the same extent as if such rights were vested in the party who has suffered the loss or damage.

The effect of section 2(4) is to provide some measure of protection to the owner of goods who may not have acquired contractual rights under the 1992 Act since he may never have been the lawful holder of the bill. The section allows the holder of the bill of lading who would have acquired rights under section 2(1) to sue the carrier and recover substantial damages for the benefit of the owner of the goods. This section was thought to be necessary in the light of the decision in *The Albazero*, which appeared to have limited the scope of application of the rule in *Dunlop v Lambert*, and made it unclear when precisely the common law allowed the lawful holder of the bill of lading to recover substantial damages on behalf of the owner of the goods.⁴²

As with the rule in *Dunlop v Lambert*, section 2(4) causes some difficulties. Firstly, section 2(4) gives rise to the possibility for double recovery. Double recovery could arise where the lawful holder of the bill of lading sues the carrier for the cargo loss even where he has already been paid by the buyer. Double

⁴² Law Commission Report p16

recovery could also arise where the carrier is sued by the lawful holder of the bill in contract as well as the actual owner of the goods in tort.

Secondly, under section 2(4), the actual owner of the goods cannot compel the lawful holder of the bill of lading to sue the carrier for his benefit. In practice, the lawful holder may often be unwilling to spend the time and money in bringing a claim against the carrier under section 2(4) unless he has a strong relationship or close connection with the actual owner of the goods. If the lawful holder refuses to cooperate, the owner of the goods would have little choice but to consider alternative causes of action such as tort or implied contract which would be more difficult to establish than a claim under the contract of carriage.

2.4.2 When does a third party become liable under the bill of lading?

The 1992 Act abolishes the link, which previously existed under the 1855 Act between the acquisition of contractual rights and contractual liabilities. Rather than simply providing that the liabilities are transferred at the same time as rights, section 3(1) of the 1992 Act provides that the lawful holder of the bill of lading may become liable under the contract of carriage upon the holder taking certain positive steps.

In order to become liable under the contract of carriage, the lawful holder of the bill of lading would have to either:-

- (a) take or demand delivery from the carrier of any of the goods to which the document relates;
- (b) make a claim under the contract of carriage against the carrier in respect of any of those goods; or
- (c) be a person who, at a time before contractual rights under section 2(1) are vested in him, take or demand delivery from the carrier of any of those goods.

The effect of section 3(1) is therefore that the lawful holder of the bill of lading does not become liable under the contract of carriage until he takes steps to assert his rights under the bill of lading or contract of carriage.

Section 3(1) of the 1992 Act resolves the problem that previously existed under the 1855 Act of banks holding the bills of lading as security becoming liable under the contract of carriage. It is now clear under the 1992 Act that banks will not become liable under the contract of carriage until such time when they wish to assert their rights against the carrier. As such, there is no longer a need to rely on *Sewell v Burdick* and to draw the artificial distinction between general property and special property.

2.4.2.1 Type of liabilities

While the 1855 Act provided that the holder of the bill of lading would acquire liabilities as if "*the contract had been made with himself*", the 1992 Act provides that the holder would be subject to liabilities as if he "*had been party to the contract.*" The difference is that while the wording of the 1855 Act suggests that the holder of the bill of lading may be treated as the shipper, the 1992 Act clarifies that the holder is to be treated as an additional party to the contract of carriage. It has been suggested that this means that under the 1992 Act, the holder of the bill of lading is not subject to liabilities that have been expressly imposed on the shipper but only liabilities which are not directed at any

particular person for example where the bill of lading just specifies that freight is payable but not the party who should pay it.⁴³

2.4.3 Does the original shipper continue to have rights and liabilities under the bill of lading after it is transferred?

Under section 2(5)(a) of the 1992 Act, the shipper who is the original party under the contract of carriage loses all contractual rights once contractual rights have been transferred to the holder of the bill of lading under section 2(1) of the Act. Section 3(3) of the 1992 Act also confirms that although contractual liabilities may have been transferred to the lawful holder of the bill of lading, the shipper who is the original party to the contract of carriage will continue to remain liable under the contract of carriage.

This clarifies any doubt that may have existed under the 1855 Act as to the status of the shipper after the bill of lading had been transferred. The fact that the shipper may remain liable even after the bill of lading has been transferred is not unduly onerous since he is after all the original contracting party. Further, the shipper's position sits well with the common law assignment rules where a party to a contract can assign his rights under a contract to a third party but not his liabilities.

⁴³ Gaskell p137

2.4.4 Does the intermediate holder of a bill of lading continue to have rights and liabilities under the bill of lading even after he has transferred it?

Section 2(5)(b) of the 1992 Act makes it clear that intermediate holders do not have contractual rights under the bill of lading once the bill of lading has been transferred and contractual rights have passed to the new lawful holder of the bill of lading under section 2(1) of the Act.

As you would recall from chapter 2.3.3 above, a shortcoming of the 1855 Act was that on literal reading of the Act, it appeared that an intermediate holder of the bill of lading would remain liable under the bill of lading even where he had no interest in the cargo and had already transferred the bill to another party. This problem no longer exists under the 1992 Act since the lawful holder of the bill of lading would now have to take positive steps to assert his rights under the bill of lading in order to become liable under the bill. Therefore, an intermediate holder who simply endorses the bill on to another party would not be liable under the bill of lading.

The 1992 Act however, does not deal with the situation that arises where the lawful holder of the bill of lading does assert his rights and demands delivery of the cargo but subsequently transfers the bill to a new endorsee before delivery is actually made. While section 3(1) of the 1992 Act makes it clear that the original party to the contract of carriage remains liable, it is silent on whether such an intermediate holder should remain liable as well.

The question of whether such an intermediate holder should remain liable under the bill of lading came before the Court of Appeal in *The Berge Sisar*⁴⁴. In that case, the carrier made a claim against the intermediate holder of the bill of lading for damage to the ship. The intermediate holder initially demanded delivery of the cargo but subsequently rejected it after having carried out tests. The intermediate holder then sold the cargo to another party and endorsed the bills of lading to them.

The majority of the Court of Appeal held that until delivery had been made to the holder of the bill of lading and his position became irreversible, the intermediate holder could be discharged from liabilities under the 1992 Act where he withdraws his demand for delivery and indorses the bill to a third party.

This decision has been criticized as it creates uncertainty and makes it more difficult to determine the identity of the party liable to the carrier.⁴⁵

2.5 Transfer of Rights and Liabilities at common law

An analysis of the transfer of rights and liabilities under a bill of lading would not be complete without a brief discussion of the available common law mechanisms for making a claim for cargo damage or loss without relying on the bill of lading or the 1992 Act. As the 1992 Carriage of Goods by Sea Act was

⁴⁴ [1997] 1 Lloyd's Rep 635; [1998] 2 Lloyd's Rep. 475

⁴⁵ Gaskell p137

not intended to deal was only conceived as a remedial legislation, there is still room for the application of the common law.

2.5.1 Agency

A cargo receiver who wishes to make a claim against the carrier under the contract of carriage could take the position that the shipper entered the contract of carriage as agent for the receiver. If this can be established from the facts, a direct contractual relationship would form between the carrier and the receiver. The receiver would thereby acquire both contractual rights and liabilities under the contract of carriage.

It would however be difficult for the receiver to make out a case that the shipper was his agent in situations where the seller/shipper has retained title to the cargo or where there has been a string of sales and the shipper did not even know who the ultimate receiver was.

2.5.2 Tort

A cargo claimant could also sue under the tort of negligence. In order to do so, the claimant must have either legal ownership of or possessory title to the property concerned when the loss or damage occurred.⁴⁶

⁴⁶ The Aliakmon [1986] AC 785, 809

A claim in tort would not help a claimant where only risk but not title passes to him. In such a case, he would have suffered the loss but would not be entitled to sue. Another difficulty with suing in tort would be in ascertaining the party having title to the cargo at the point in time when the cargo was damaged (especially where ownership has been transferred several times).

2.5.3 Bailment

A cargo claimant may be entitled to sue under bailment. The advantage of this cause of action is that the burden would be on the carrier to show that he had taken proper care of the cargo and the damage was not due to his fault. The bailment relationship would be between the consignee as bailor and the carrier as bailee on the terms of the bill of lading. As with a claim in tort, the bailor must have sufficient possessory title over the cargo in order to have title to sue.

While it may be possible to argue that an indorsee of a bill of lading becomes a bailor by attornment, a mere transfer of the bill of lading would not be considered sufficient to bring about the attornment.⁴⁷ As such, the effectiveness of the bailment as a cause of action by an indorsee is diminished.

2.5.4 Dunlop v Lambert

⁴⁷ Browne, "The rise and demise of the Brandt v Liverpool contract" (2005) II JIML 221, 224

The rule in *Dunlop v Lambert*, which has been discussed in some detail above, is yet another way a cargo claimant may make a claim against the carrier. This mechanism allows the shipper who entered into the contract of carriage to sue the carrier on the behalf of the cargo claimant even where the shipper has suffered no loss.

2.5.5 Assignment

The shipper/seller may assign his rights under the contract of carriage to the buyer/cargo claimant. Where written notice of the assignment is given to the carrier, the assignment is considered to be a statutory assignment and the cargo claimant will be able to sue the carrier in his own name. Where no notice has been given, the claimant would only be an equitable assignee and the shipper/seller would have to be joined as a co-plaintiff in an action against the carrier.⁴⁸

Assignment is therefore not a very useful option since in international trade since it would be rather cumbersome for every successive buyer in a chain of sales to notify the carrier of the assignment. Further, the assignment would only be effective in transferring contractual rights but not liabilities.

2.5.6 Brandt v Liverpool implied contract

⁴⁸ Ibid p224

The *Brandt v Liverpool* contract is a contract, which is implied by the courts in order to create a direct contractual relationship between the carrier, and the cargo claimant where the claimant has provided some consideration for the carriage such as by paying freight. The purpose of this rule was to get around the problems created by the doctrine of privity and the common law's failure to allow third parties to sue under a contract.

The rule has been criticized as requiring an artificial construction of the facts and as being obsolete given the effectiveness of the solutions provided by the 1992 Carriage of Goods by Sea Act.⁴⁹

3 UNCITRAL Draft Convention

The UNCITRAL Draft Convention is a very ambitious project that seeks to unify the laws governing a very wide variety of aspects regarding the carriage of goods, not just by sea but over all modes of carriage.

The essence if not the core of the project however is to unify the laws which regulate the transfer of rights and liabilities under a bill of lading.⁵⁰ As such, it is interesting to examine the solutions put forward by the Draft Convention, which

⁴⁹ Ibid p234 but see generally

⁵⁰ Swiss Delegation, "Paper on chapter 12: Transfer of Rights" Document No. A/CN.9/WG.III/WP.52

is the result of international discussion and to compare them with the solutions provided under English law, which has been the result of hundreds of years of evolution.

While the Draft Conventions stands at 21 chapters consisting of 105 articles, the articles which are relevant to the issue of the title to sue and the transfer of rights and liabilities is contained in only two chapters namely, chapters 12 and 14.

3.1 When does a third party acquire rights under the bill of lading?

The Draft Convention does not refer to bills of lading but only to “negotiable transport documents”. This term is defined under Article 1 and essentially refers to a negotiable bill of lading, which would be either an “order” bill or a “bearer” bill. The term bill of lading is not used since this is a term used only in carriage of goods by sea and it is not yet certain whether the Draft Convention is to have a wider application than just to sea carriage.

Article 61(1) provides that the holder of a negotiable transport document is entitled to transfer rights incorporated in such a document by transferring such a document to another person. The Article continues to set out an exhaustive list of ways in which the document can be transferred: including by endorsement where it is an order bill or without endorsement if it is a bearer bill or blank indorsed. This is broadly similar to section 2(1)(a) of the 1992 Carriage of Goods by Sea Act. As the Article speaks of the “*transfer*” of rights to the transferee, as with the 1992 Act, the transferor will lose his rights once rights have passed.

There are however some significant differences.

Firstly, from the wording of Article 61(1), it appears that rights under the bill of lading are not transferred automatically when the bill of lading is transferred but only when the holder of the bill intends for rights to transfer. The article states

that the holder is entitled to transfer rights but not that he must do so. I am of the view that this is a major weakness in the Draft Convention since there must be a greater level of certainty in order for the bill of lading to remain an effective mechanism for transferring rights. With the present wording of the Article, parties will never be able to easily ascertain whether or not rights have in fact been transferred. There is no such uncertainty in the 1992 Act since section 2(1) clearly provides that rights shall pass to the lawful holder of the bill.

Secondly, unlike in the 1992 Act, there is no requirement under the Draft Convention that the holder of the bill must be lawful holder of the bill or that he must have acted in good faith. This requirement is conspicuously absent given that there is quite a detailed definition of a “holder” in Article 1(j) of the Draft Convention. Therefore, a person who has stolen a bearer bill would presumably be entitled to sue the carrier under the bill of lading.

Thirdly, Article 61(1) does not clearly define the rights are transferred with the transfer of the bill of lading. It only provides that “rights incorporated in such a document” are transferred without setting out any mechanism for establishing what rights have been incorporated. Also, since it may be possible under the Article that the transferor is not obliged to transfer rights but is only entitled to do so, a situation may arise where the transferor has decided only to transfer some but not all of the rights. This would be cause for confusion. In my view, although not perfect, the wording of the 1992 Act which provides that the holder “*shall have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract*” is preferable.

Article 68(a) provides that the holder is entitled to assert rights under the contract of carriage irrespective of whether it has suffered loss. This is somewhat similar to section 2(4) of the 1992 Act where the holder of the bill of lading may sue for the benefit of the party actually suffering the loss. Article 68(a) would result in greater certainty and quicker settlement of claims since the only issue that will have to be dealt with in a claim by the holder is whether the carrier is liable for the damage and not whether the holder has suffered a loss.

In order to reduce the prospect of multiple claims being brought in respect of the same damage, Article 68(b) provides that when the claimant is not the holder, it must, in addition to proving loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made.

I have two criticisms of Article 68. Firstly, it is unfair to the innocent claimant who has in fact suffered the loss to be burdened with the additional requirement of having to prove that the holder did not suffer any loss. Secondly, it is not clear from Article 68(a) whether the holder is entitled to claim substantive damages where he has not suffered the loss or damage.

3.2 When does a third party acquire liabilities under the bill of lading?

The transfer of liabilities is dealt with under Article 62. Article 62(1) makes it clear that the holder of the bill, who is not the shipper, will not assume any liability under the bill so long as he does not exercise any rights under the contract of carriage. Article 62(2) has two alternative versions, with the common thread being that the holder will assume liability once he has asserted a right under the contract of carriage. Article 62(3) goes on to expressly deal with two situations where the holder does not exercise rights under the contract of carriage.

It is my view that Article 62 of the Draft Convention in its present form is extremely unwieldy. Article 62(1) is redundant since it does not add anything to what is already stated in Article 62(2), which is the essence of the entire Article. Article 62(3) also appears to be redundant since the two situations set out therein (i.e. replacement of a transport document with an electronic record; and transfer of rights under Article 61) cannot seriously be mistaken for the exercise of rights under the contract of carriage.

A major problem with Article 62 is that it does not define more clearly the steps that would have to be taken by the holder of the bill of lading before he

becomes liable under the contract of carriage. It does not address the issue of whether and to what extent and at what stage the third party holder becomes bound by the terms of the contract⁵¹. While it would be unduly onerous on the holder of the bill and against the intention of the article if every little exercise of contractual rights would trigger liabilities, in its present form, it is impossible to differentiate between steps that would trigger liability and those that would not.

Again, the 1992 Act provides a clearer and simpler solution. It sets the trigger point for liability at the time when the holder takes or demands delivery or makes a claim under the contract of carriage. It is my view that Article 62 would be improved dramatically by importing the 1992 Act liability triggers.

3.3 Does the original shipper continue to have rights and liabilities under the bill of lading after it is transferred?

Under Variant A of Article 67, the shipper would be entitled to assert rights under the contract of carriage against the carrier. The shipper would also have rights under Variant B of Article 67 provided he had a legitimate interest in the performance of the carriage at the time the loss or damage is suffered. The shipper's position under Article 67 is different from that under the 1992 Act as under the Act, the shipper would lose his rights under the contract once the bill of lading had been transferred. As such, the prospects of both the shipper and

⁵¹ Ibid

the holder of the bill of lading suing in respect of the same damage or loss are greater.

The solution to this problem of multiple claims is proposed in Article 68 which I have discussed above in relation to a third party's rights under the bill of lading.

The shipper would continue to be liable under the contract of carriage even after the bill of lading has been transferred. Article 62 speaks only of the transferee of the bill assuming liability and does not disturb the carrier's liability under the original contract of carriage. This is similar to the position under the 1992 Act.

3.4 Does the intermediate holder of a bill of lading continue to have rights and liabilities under the bill of lading even after he has transferred it?

The intermediate holder will lose his rights under the contract of carriage once he transfers the bill of lading to the next holder (Article 61(1)). Unlike the position taken by the English courts however, the general view under the Draft Convention is that the intermediate holder will not be relieved of his liabilities even if he has transferred the bill of lading to the next holder.⁵²

⁵² Ibid

4 Conclusion

It would have been rather easy to simply answer the two questions raised at the beginning of this thesis (and this thesis would have been much shorter). The short answer to both questions is simply that in order to ascertain the party that has title to sue the carrier and the party that the carrier is entitled to sue, one need only refer to the 1992 Carriage of Goods by Sea Act and the common law.

Having read this thesis however, I hope that you would have gained a better understanding of the manner in which contractual rights and liabilities are transferred under English law. I feel that it is important not just to understand how the present law operates but also to know how the law has developed and to identify the problems, which the law is meant to solve and to assess whether the law has achieved its objectives.

It is my view that the primary purpose of the law in this area must be to balance the commercial interests of the three parties that are involved in every bill of lading contract namely, the carrier, the shipper and the consignee/indorsee. If the law does not properly protect the interests of the various parties or imposes onerous duties on certain parties, then the law becomes ineffective and merchants will find some other way apart from bills of lading to meet their needs. This is after all the way international trade has evolved over the centuries.

The law would also be ineffective if a parties rights and liabilities cannot be easily ascertained. Thousands of bills of lading are issued every day and the bill of lading would be useless if a carrier or a merchant had to consult a lawyer, or worse still go to court, every time he needs to know what his rights and liabilities are.

I am of the view that while there is room for improvement; the present regime under English law (which includes the 1992 Carriage of Goods by Sea Act as well as the common law) has provided a relatively effective framework within which the carrier, shipper and transferee can operate. The 1992 Act is also

certainly an improvement over the previous English law in this area. Having said that, as I have shown, there are and will continue to be areas which are not as clear as we would like them to be. The English law is however dynamic and with new case law, will continue to improve and adapt to new situations and problems.

It is my view that while the intention behind the UNCITRAL Draft Convention is noble and that in an ideal world, it would be wonderful if there could be a uniform law on the transfer of rights and liabilities under a bill of lading, the Draft Convention in its present form is not effective and is certainly not any better than the existing English law.

The Draft Convention, as I have pointed out has as many, if not more problems than the existing English law. Furthermore, the Draft Convention is an entirely new invention and therefore there would be little or no case law or explanations to illustrate how the Draft Convention is to be applied to real life problems. The English law on the other hand can fall back on hundreds of years of case law and development to explain how the law was intended to be applied.

It is my final submission that although it would be good to have a unified practice on the transfer of rights and liabilities under bills of lading, it is unlikely that there will be any widely applied convention to regulate this area (at least not anytime soon). A more realistic solution, in my view, would be for countries to continue to develop and apply their own law in the area.

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