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Is a Straight Bill of Lading a Document of Title?

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Introduction

One of the more important documents used in international trade transactions is a bill of lading. Its importance lies in the fact that the bill performs the function of a document of title and as such gives the shipper the ability to deal with the goods while in transit.¹ The shipper can if he so chooses sell the goods on board a vessel by transferring the bill of lading to a consignee who is said to have obtained constructive possession of the goods on board the vessel.² In the words of Bowen LJ ‘...a cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During the period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill operates as a symbolic delivery of the cargo’.³

Despite this general rule, there is much confusion as to whether the document of title characteristic of a bill of lading applies to all type of bills of lading. In shipping practice carriers issue hybrid forms of bills of lading which make it very difficult to ascertain their true legal status. The confusion is further confounded by the fact that the approach of English law and that of the United States law is rather different, and thus, the source of much litigation where the shipment involves the possible application of both United States and English Law. In a recent case decided in the English Court of Appeal the court had to entertain, *inter alia*, the question as to whether a straight bill of lading constituted a document of title.⁴ In coming to the conclusion that, although a straight bill of lading is a non-negotiable bill, the court held that such a bill is a document of title for the purposes of the Hague Rules and thus within the ambit of the Carriage of Goods by Sea Act 1971. This short article looks at the distinction between order bills of lading and straight bills of lading and examines the decision of the Court of Appeal in *MacWilliam Inc v Mediterranean Shipping SA (The Rafaela S)*.⁵

¹ *Lickbarrow v Mason* (1794) 5 T.R. 683.

² *Enichem Anic SpA v Ampelos Shipping Co Ltd (The Delfini)* [1990] 1 Lloyd’s Rep 252.

³ *Sanders v McClean & Co* (1883) 11 QBD 327 at 341.

⁴ *J I MacWilliam Co Inc v Mediterranean Shipping Co SA (Rafaela S)* [2004] 2 WLR 283.

⁵ [2004] 2 WLR 283.

The General Functions of a Bill of Lading

The vital importance of a bill of lading lies in the fact that it allows for the performance for the contract of carriage between the carrier and the shipper. This importance lies in the fact that a bill of lading performs three vital functions. In the first place, the bill of lading acts as a receipt for the goods shipped. Indeed this appears to have been the historical reason behind the development of the bill of lading since the seller did not contemplate travelling with the goods. Secondly, it is accepted that a bill of lading is evidence of the contract of carriage entered into between the carrier and the shipper. Although the bill of lading will have a number of terms and conditions set out on the reverse of the bill, the bill is merely evidence of the contract of carriage because the contract will have been made much earlier than the issue of the bill. There are a number of consequences arising from this characteristic feature of a bill of lading. In the first place, given that the bill of lading is merely evidence of the contract of carriage, both the shipper and the carrier can introduce oral evidence to ascertain the true terms of the contract.⁶ As between the carrier and any bona fide transferee of the bill of lading, the bill of lading is conclusive evidence of the contract.⁷ Finally, as mentioned earlier, the paramount importance of a bill of lading lies in the fact that it is a document of title. There are two advantages flowing from this characteristic. In the first place, the shipper is entitled to deal with the legal title to the goods on board the vessel by indorsement of the bill of lading to a third party. Secondly, the bill of lading can be used to secure credit using the goods as collateral from a financial institution.

Order Bills of Lading and Straight Bills of Lading

Order bill or bearer bills of lading are often referred to as negotiable bills in the sense that they are transferable. It is these types of bills that truly carry all of the general characteristics of a bill of lading identified above. In contrast to such bills is something called a straight bill of lading or sometimes referred to as a sea waybill.⁸ Such a bill is consigned to a named consignee only as opposed to a named consignee or to his order or assigns.⁹ The general position with regard to straight bills of lading, certainly in so far as English law prior to the decision in *The Rafaela S*, is that they do not constitute a negotiable document of title.¹⁰ In so far as United States law, The Federal Bills of Lading Act re-codified in 1994 states that a

⁶ *The Ardennes* [1951] 1 KB 55 and also *Cho Yang Shipping Co Ltd v Coral (UK) Ltd* [1997] 2 Lloyd's Rep 641.

⁷ *Leduc v. Ward* (1888) 20 QBD 475.

⁸ However, after the decision in *The Rafaela S* [2004] 2 WLR 283, there is a clear distinction between a seaway bill and a straight bill of lading. Whereas a seaway bill is not a document of title and its presentation is not required before taking delivery of the goods from the carrier, it would now appear that a straight bill of lading is a document of title and one which requires presentation before the goods can be delivered to the consignee. This matter is dealt with in more detail later.

⁹ See generally, G.H. Treitel, *The Legal Status of Straight Bills of Lading* (2003) Law Quarterly Review 119, 608.

¹⁰ *Soprama v Marine & Animal By-Products Corp* [1966] 1 Lloyd's Rep 367.

straight bill of lading is not a document of title.¹¹ The legal importance of such a bill lays in the fact that it is a receipt for the goods shipped and evidence of the contract of carriage. Possession of the straight bill of lading does not confer rights over the goods or against the carrier to a person in possession of the paper who is not a consignee. It is equally clear, certainly from a U.S. law perspective that the consignee need not be in possession of the bill to obtain delivery from the carrier. In the words of one leading American text, ... thus for an export from the U.S. to the UK under a straight bill, U.S. law requires delivery without documentation in England whilst English law requires surrender of the bill first, even though it is not negotiable.’¹²

In recent times straight bills of lading and seaway bills of lading have been employed on an increasing scale, and in particular, in relation to ocean container transport.¹³ Given the fact that a straight bill of lading is not a document of title, certainly from a U.S. point, the question arises as to the reasons why a straight bill of lading is commonly used. There are a number of reasons why a straight bill of lading will be preferred over and above an order bill of lading. The obvious advantage is that, given the fact that the bill is not a document of title; the consignee need not wait for the arrival of the bill before taking possession of the goods from the carrier. All the consignee needs to do is to identify himself and claim the goods from the carrier. Straight bills of lading are frequently used between interrelated parties, for example, where the shipper transfers goods between branches of a company operating in different countries. In such a case there will not be the same degree of necessity to raise finance through a bank, which would otherwise require an order bill of lading to gain sufficient security. A straight bill of lading also reduces the scope for fraud, which might otherwise occur if the documents are lost or stolen.

Straight Bills of Lading and the Hague Rules and Hague-Visby Rules

Bills of lading are subject to international conventions such as the Hague Rules and the Hague-Visby Rules. The Rules attempt to afford protection to cargo owners by regulating the minimum terms by which contracts for the carriage of goods should be governed. The rules set about, *inter alia*, to protect cargo owners of widespread exclusion of liability as well as limiting liability to a minimum value per package or customary freight unit. The Hague Rules were adopted in 1924 and were then revised in 1968 as the Hague-Visby Rules. Not all nations have adopted the Hague-Visby Rules with the consequence that some disputes continue to be decided under the 1924 Rules whilst others under the 1968 Hague-Visby Rules. Whether the 1924 Rules apply or the 1968 is of significant importance when it comes to deciding the prescribed package limitation. The 1924 Hague Rules limit the liability of a carrier to a minimum of \$500 per package or customary freight unit whereas the 1968 Hague-

¹¹ The 1994 Act re-codified the Federal Bills of Lading Act 1916 otherwise known as the Pomerene Act. This Act only applies to shipments from the United States and to inter-state shipments.

¹² See Folsom, Spanogle, Gordon, *International Business Transactions: A Reader* 1997, West Publishing.

¹³ Gronfors identified that about 85% of all trans-Atlantic container transport could be carried out using straight bills of lading, see Gronfors: *Cargo Key Receipt and Transport Document Replacement*, cited in J.F.Wilson, *Carriage of Goods by Sea* 3rd Edition 1998.

Visby Rules set a minimum figure of \$663. The United States, by virtue of the Carriage of Goods by Sea Act 1936 adopted the Hague Rules of 1924. In England, the Carriage of Goods by Sea Act 1971 adopted the Hague-Visby Rules. It thus becomes very important from a legal point to determine which law governs a particular bill of lading simply because the limitation of liability will be different.

What is, however, of greater concern in so far as straight bills of lading are concerned is whether they are subject to the Hague Rules/Hague-Visby Rules. Article I(b) of the Hague Rules states that the rules apply 'only to contracts of carriage covered by a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea.' This approach is adopted in English law by section 1 of the Carriage of Goods by Sea Act 1971. Given the fact that a straight bill of lading or a seaway bill of lading is non-negotiable document and therefore not a document of title, such a bill of lading would not be covered by the rules unless they were expressly incorporated into the bill. The consequence of this is that the protection available to the shipper under the Hague/Hague-Visby Rules would not apply to shippers under a straight bill of lading. Certainly from United States law point of view, a straight bill of lading is not covered by the Hague Rules which have been adopted by the 1936 Carriage of Goods by Sea Act.¹⁴ In so far as English Law is concerned, it would now appear that a straight bill of lading is a document of title and therefore covered by the Hague Rules.

The *Rafaela S* in the Court of Appeal.

In so far as English law is concerned, the facts in the *Rafaela S* provided the necessary grounds to determine the legal status of a straight bill of lading and whether it was caught by the Hague/Hague Visby Rules. The facts of this case concerned the shipment of printing machinery from Durban in South Africa to Felixstowe in England and then to Boston in the United States. The shippers, Coniston International Machinery Ltd had entered into a sale contract, cost insurance and freight, with the purchasers MacWilliam Co Inc of Boston, USA. A straight bill of lading was issued consigning four containers to the purchasers. The containers were carried on two separate vessels, firstly, the *Rosemary*, which carried the containers from Durban to Felixstowe and then on the *Rafaela S*, which carried them to their final destination in Boston. The printing machinery suffered damage on its second journey to Boston and the question in the Court of Appeal was whether the straight bill of lading was governed by English law thereby incorporating the Hague Visby Rules or whether it was governed by US law in the form of the carriage of Goods by sea Act 1936 which had been expressly incorporated into the bill.

The consignees, MacWilliam, sought to argue that the bill was governed by English law and that, as a consequence, the Carriage of Goods by Sea Act 1971 applied which prescribed a package limitation of \$663 as enacted in the Hague-Visby Rules. In order to succeed the

¹⁴ Unless, of course, the rules are expressly incorporated into the contract of carriage.

consignees had to show that English law covered the bill of lading and that the straight bill of lading was a document of title for the purposes of the Hague-Visby Rules. Mediterranean Shipping Co Inc argued that English did not govern the contract since the shipment was from South Africa to the United States under one contract, which was expressly governed by United States Law. Furthermore, that the Hague-Visby Rules could not apply in any event since a straight bill of lading was not a document of title to which the Hague-Visby Rules applied. These matters can be discussed individually.

The Application of the Carriage of Goods by Sea Act 1971.

The Carriage of Goods by Sea Act 1971, which implements the Hague-Visby Rules, applies where the port of shipment is a port in the United Kingdom.¹⁵ The consignees in the *Rafaella S* argued that the 1971 Act applied to the bill of lading because the printing machinery had been shipped from Durban to Felixstowe and from Felixstowe to Boston. The fact that the shipment was from a United Kingdom port meant that the Rules applied to the second leg of the voyage. The second leg of the voyage therefore being covered by a separate contract governed by English law. Mediterranean Shipping Company Inc, however, argued that the shipment from Durban to Boston via Felixstowe was in fact one contract and the terms of that contract incorporated United States law.

In the Court of Appeal the matter was resolved by construction of the bill of lading. Particular emphasis was paid to Clause 3 of the bill, which, inter alia, stated that 'the carrier agrees to carry the goods from the port of loading to the port of discharge'. Rix LJ explained that the port of loading was Durban and the port of discharge was Felixstowe and that Mediterranean Shipping Company Inc had not agreed to extend responsibility as carrier beyond Felixstowe.

A Straight Bill of Lading as a Document of Title

In *The Rafaella S* the carrier, Mediterranean Shipping Co Inc argued that negotiability was an essential criterion before a bill of lading could be regarded as a document of title. In other words, the ability to transfer rights and liabilities under the bill to a transferee or other third party. Therefore, given the fact that a straight bill of lading was consigned to a named consignee only, it did not have the characteristics of a normal bill of lading, which could be indorsed to third parties in succession.¹⁶ On behalf of the consignees, MacWilliam Inc, it

¹⁵ S1(3) Carriage of Goods by sea Act 171.

¹⁶ In support of their argument, the carriers pointed to the joint report of the Law Commission and the Scottish Law Commission on Rights of Suit in Respect of Carriage of Goods by Sea (Law Com No 196; Scot Law Com

was argued that, whilst a straight bill of lading could not be transferred down a series of transferees, it could be transferred once, that is, to the named consignee. Furthermore, by looking at the nature of the Hague Rules, the issue of negotiability was not central to the application of the rules, rather the rules were intended to bring about international unity on the minimum terms in a bill of lading. Also, and a point which was crucial to the decision in the Court of Appeal, was that presentation of the straight bill of lading was a necessary requirement before the goods could be discharged to the consignee. In this respect, the bill performed all the functions of a document of title since the carrier was not at liberty to discharge the goods without production of the bill.

The leading judgment in *The Rafaela S* was given by Rix LJ who proceeded to answer the question whether a straight bill of lading was a document of title by looking to the nature and objectives of the Hague Rules, subsequent authorities and statutes and the opinions of learned writers. In coming to the conclusion that a straight bill of lading was a document of title, and therefore caught by the regime of the Hague/Hague-Visby Rules, his Lordship gave a number of reasons. These reasons are both interesting and attempt to redefine the legal nature of a straight bill of lading.

In the first place, in his Lordship's opinion, it was a matter of common sense that a named consignee under a straight bill of lading, unless he was the same person as the shipper, is as much a third party as a named consignee under an order bill of lading.¹⁷ In so far as the authorities, his Lordship was not convinced that the authorities had decided in the absolute sense that a straight bill of lading was not a document of title. For example, one such authority was the decision of the Privy Council in *Kum v Wah Tat Bank Ltd*¹⁸ that concerned a non-negotiable mate's receipt. In the course of his judgement Lord Devlin explained that 'there appears to be no authority on the effect of a non-negotiable bill of lading.'¹⁹

The second argument, which appears to be the more important one, and which puts light on the nature of a straight bill of lading, relates to the need for presentation of the bill before the carrier can discharge the goods to the consignee. In the course of his judgement Rix LJ seems to have laboured hard to make the point that a straight bill of lading is required before the carrier can discharge the goods to the consignee. In the actual facts of *The Rafaela S*, the bill incorporated a clause that the bill was required to be produced before release of the goods by the carrier. It would therefore mean that, at least in the case of express incorporation of such a term, that only such a straight bill would be classified a document of title. However, the judgment of Rix LJ can be interpreted to mean that every straight bill of lading required presentation before delivery of the goods. If so, in his Lordship's opinion such a bill could only be regarded as a document of title. In coming to this conclusion his Lordship relied on a number of international cases. Firstly, the decision of the Singapore Court of Appeal in *Voss*

No 130), which treated a straight bill of lading as non-negotiable document. This being the position in the Carriage of Goods by Sea Act 1924 which enacted the proposal of the Law Commission.

¹⁷ [2004] 2 WLR 283 at 329.

¹⁸ [1971] 1 Lloyd's Rep 439.

¹⁹ *Ibid.* at 446.

v *APL Co Pte Ltd*²⁰ the judge, Chao Hick Tin JA, distinguished with a seaway bill and a straight bill of lading. As mentioned earlier, these have often been treated as one and the same. However, the judge held that a seaway bill was different to a straight bill of lading in that a seaway bill of lading did not require presentation whereas a straight bill of lading did. In the case of a straight bill of lading there was nothing stopping the court from implying a term to the effect that presentation of the straight bill was a prerequisite before delivery of the goods could be made.²¹ In the opinion of Chao Hick Tin JA, the rule was simple one to apply and from the perspective of shipping practice. The fact that three straight bills of lading had been issued by the carrier seemed to have suggested that they intended the bill to have the features of a document of title. Furthermore, the rule for implication that the bill was required before delivery was justified in that it protected the interests of the seller and the buyer.

A second case cited was an unreported French case where the Court of Appeal of Rennes held quite clearly that a straight bill of lading was a document of title.²² The facts of this case involved the shipment of goods from Anvers to Durban under straight bills of lading issued by Mediterranean Shipping SA. The shipper diverted delivery of the goods from the named consignee and notified the carrier. The carrier had in fact mis-delivered the goods to the consignee when the consignee presented the straight bills of lading. The court in this case held that the straight bills of lading were documents of title and required the carrier to deliver the goods on presentation of the bills.

In this context Rix LJ concluded his judgement by stating that ‘whatever, the history of the phrase in English common or statutory law may be, I see no reason why a document which has to be produced to obtain possession of the goods should not be regarded, in an international convention, a document of title. It is so regarded by the courts of France, Holland and Singapore.

Conclusions

The decision of the Court of Appeal in *The Rafaela S* raises some very interesting points about the legal nature of straight bills of lading. No doubt these points will be the subject matter of much more academic and judicial scrutiny in the future. The position for the time being can be summarised as follows. In the first place, where a straight bill of lading is required to be produced before the consignee can take actual possession of the goods, such a bill is a document of title. The fact that such a bill is not negotiable in the sense that it cannot be indorsed to a series of successive third parties, it has an element of transferability by the mere fact that it can be indorsed to the consignee. Secondly, and perhaps what will be the subject matter of further debate, is whether there is any mandatory requirement for

²⁰ [2002] 2 Lloyd’s Rep 707. This was a decision where the judge in the Singapore Court of Appeal had considered the decision in *The Rafaela S* at first instance; see [2002] 2 Lloyd’s Rep 403.

²¹ *Ibid.* at 721.

²² *MSC Magallanes* 16 May 2002 (unreported).

presentation of the bill. In the facts of *The Rafaela S* there was an express clause requiring presentation of the bill in order to take delivery of the goods. However, a reading of the judgment of Rix LJ seems to suggest that a straight bill of lading, which calls itself a bill of lading as distinct from a seaway bill, would require presentation, and even where there was no express incorporation, there would be an implied term to the effect that presentation of the bill was a requirement in order to take delivery. Thirdly, the decision makes it quite clear that a straight bill of lading is a rather different creature to a seaway bill of lading. In the past there has been a tendency to treat these as one of the same, primarily because it was thought that both did not require presentation by the consignee to take delivery of the goods. In *The Rafaela S* the court appears to distinguish a seaway bill, which does not require presentation, from a straight bill of lading which does. Finally, whilst the decision seems to suggest that the construction of a straight bill of lading as a document of title puts English law in conformity to that of other countries, notably France, Holland and Singapore, it does however further divide the differences between English and United States law. In the United States, a straight bill of lading is not a document of title and nor is it required to obtain delivery of the goods. As such a straight bill of lading is not governed by the Hague Rules *per se*.