RECENT DEVELOPMENTS: LEE COOPER v. JEAKINS.*

Several years ago Mr. R. A. Wallace in delivering a paper at this summer school discussed the House of Lords decision of *Scruttons Ltd. v. Midland Silicones Ltd.*[1] which dealt with the status of third parties wishing to claim the benefit of exemptions contained in contracts to which they were not parties. This subject again came up for consideration in the comparatively recent Court of Appeal decision of *Lee Cooper v. Jeakins.*[2]

You may recall that in *Scrutton's Case* the facts were that the respondent plaintiffs were consignees of a drum of chemicals consigned to them at London from America by a ship under a bill of lading signed on behalf of the shipowners. The bill of lading incorporated the terms of the United States Carriage of Goods by Sea Act 1936 which limited the liability of shipowners as "carriers" for loss or damage to goods to the sum of $500 per package or unit.

For some years the shipowners had employed the appellant stevedores to discharge their vessels and deliver goods to the consignees at London. The contract between shipowners and the stevedores provided that the stevedores would have such protection as is afforded them by the terms of the bills of lading. The consignees were not aware of this contract. During discharge of the vessel, the stevedores negligently dropped the drum of chemicals causing damage amounting to £593. In an action brought against them by consignees, the stevedores contended that they were entitled to limit their liability to $500 in accordance with the terms of the bill of lading on the ground of the decision in *Elder Dempster & Co. v. Patterson Zochonis & Co.*,[3] or because the shipowners contracted as agents for the stevedores or because there was an implied contract independent of the bill of lading between the consignees and stevedores that the stevedores should have the benefit of the provisions limiting liability in the contract of carriage.

The House of Lords (with Lord Denning dissenting) held:

(i) The stevedores were not entitled to take advantage of the provision for limitation of liability contained in the contract of carriage because they were not parties to the contract.

(ii) (a) The stevedores were not within the term "carrier" either in

* A paper read at the 1966 Law Summer School held at the University of Western Australia.

1 [1962] A.C. 446.

2 [1964] 1 Lloyd's Rep. 300.

3 [1924] A.C. 522.

the bill of lading or in the United States Carriage of Goods by Sea Act 1936.

(b) The contract of carriage had not been entered into by the shipowners as agents for the stevedores so as to enable the stevedores to claim the benefit of its terms.

(c) There is no basis for implying a contract between the consignees and the stevedores limiting the latter's liability in accordance with the contract of carriage.

On the supposed authority of *Scrutton's Case* it would seem that there has been a tendency towards holding the view that under no circumstances can exemptions be invoked in favour of third parties to a contract. With respect it is submitted that that view is misconceived and that *Scrutton's Case* does not go so far as that. The argument that the shipowner was contracting as agent or trustee for the stevedore failed because it was held that the shipowner did not purport to contract as agent or trustee for the stevedore.

In *Scrutton's Case* the possibility of success of the agency argument was recognised if first the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability and secondly that the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, if also contracting as agent for the stevedore that these provisions should apply to the stevedore and thirdly that the carrier has authority from the stevedore to do that or perhaps later ratification by the stevedore would suffice, and fourthly that any difficulties about consideration moving from the stevedore were overcome.[4]

As a result, leading Queen's Counsel in London drafted an exclusion clause for use in bills of lading purporting to be not only for the benefit of the ship's owner but also for all agents and for all servants of the shipowner including independent contractors. The following is an example of the clause which shipowners have been recommended to insert in their bills of lading to cover the situation:—

> "It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any Holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default

[4] [1962] A.C. 446, at 473 *per* Lord Reid.

on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provision in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading."

So far this type of clause appears to have been left unchallenged, although Cheshire and Fifoot say:—[5]

"Suppose that, in an attempt to avoid the consequences of *Adler v. Dickson,* a new form of ticket were drafted whereby the contract purported to be made between the plaintiff on the one side and the company and all its servants on the other and that its terms expressly exempted both company and servants from all liability. It is suggested that, even on this extreme hypothesis, the servants would not be protected. They would, it is true, be parties to the contract and there would be privity between them and the plaintiff. But they would have furnished no consideration and would have broken the rule that consideration must move from the promisee."

On the other hand, the editor of *Carver on Carriage by Sea* considers that such a clause has:—[6]

"a fair chance of standing up in England, though not in the United States where clauses relieving a person from liability for negligence are usually void."

The opportunity arose in *Lee Cooper Ltd. v. C. H. Jeakins & Sons Ltd.*[7] to take the question further, however unfortunately, although the argument of an agent being able to contract to exclude a third party's liability was raised, it was found as a fact that the agency did not exist. In this case the plaintiff Lee Cooper arranged for carriers

5 LAW OF CONTRACT (5th ed.), 113.
6 CARVER, CARRIAGE BY SEA (11th ed. 1963), 1215.
7 [1964] 1 Lloyd's Rep. 300.

—the Anglo Overseas Transport Company Ltd. (referred to as A.O.T.) to collect from a London dock a consignment of 38 cartons the property of Lee Cooper. A.O.T. forwarded to the plaintiff their conditions of carriage which excluded liability for negligence. A.O.T. however did not do the job but arranged for subcontractors, the defendants Jeakins, to use their own vehicles and do the job. One of the defendant's vehicles collected the goods, but the driver during the journey stopped for a cup of coffee in order to qualify for overtime and during this stop the vehicle and goods were stolen. The plaintiffs took the bold course of taking proceedings against the defendant subcontractors and not joining A.O.T. as defendants, as the contract between the plaintiffs and A.O.T. expressly excluded liability in the following terms:—

> "The servants, employees and agents of the company [*i.e.* A.O.T.] shall be entitled to the benefit of all provisions in these conditions which exclude or restrict tortious liability of any kind."

It was, however, held that A.O.T. were not acting as agents for the defendants.

Marshall J. did not express any views as to the legal situation had A.O.T. in fact been contracting as agents or trustees for the defendants. He said:—[8]

> "I am satisfied that they had always dealt with one another as principals throughout their trading relationship, and in the particular contract under review the documents nowhere show that the plaintiffs intended Anglo Overseas Transport Company Ltd. to act as their agents to contract as such with the defendants or any other carriers on their behalf. *Nor does the contract give any indication that Anglo Overseas Transport Company Ltd. agreed to act as agents only.* This was a contract between principals. No evidence was called or documents produced to show that either party had ever acted as agent for any third party."

It may perhaps be inferred from the words which I have italicised that the decision may have been otherwise if the contract did show A.O.T. were acting as agents only.

It is also interesting to note Marshall J. also found that even if there was a contractual relationship between the plaintiffs and the defendants the defendants by their driver's conduct have committed a fundamental breach of any such contract and in such circumstances the defendants cannot rely on any exemption clause in such contract.

[8] *Ibid.*, at 308. Italics added by author.

In commercial transactions the idea of a person serving as agent or trustee for a third party is recognised as "ancient mercantile law".[9]

A recent case in which the practice was recognised was the Court of Appeal decision of *A. Tomlinson (Hauliers Ltd.) v. Hepburn.*[10]

The facts of the case were that the plaintiffs who were road hauliers, carried cigarettes for Imperial Tobacco Company Ltd. The plaintiffs effected a Lloyds All Risk Policy underwritten by *(inter alios)* the defendant. Two of the plaintiffs' lorries having arrived at their destination with their cargo of cigarettes, were left overnight for unloading the following morning. During the night the lorries and cigarettes were stolen. The plaintiffs brought an action against the defendant underwriter under the policy at the expense and for the account of the Imperial Tobacco Company Ltd. in respect of the cigarettes stolen. The defendant denied liability contending:—

(1) That the cigarettes were off risk at the time of the loss, and

(2) (a) that the insurance was only against the plaintiffs' legal liability and that in the circumstances there was no legal liability on the plaintiffs to the Imperial Tobacco Company, and

(b) the Imperial Tobacco Company had no interest in the policy.

The Court found against the defendant on all points. The substantial issue in the case arose from (2)(b) of the defendant's argument. In discussing this Pearson L.J. refers to the principles involved in the following language:—[11]

> "Where goods are on bailment to a carrier, at least two parties have insurable interests. One is the carrier himself, who has a lien on the goods for his charges and will be liable for loss of or damage to the goods through his negligence and, if he is a common carrier, in some other events also. The other person having an insurable interest is the owner, who has his proprietary interest subject to the carrier's lien. Insurance of the goods to their full value is capable of covering the totality of the insurable interests, but does not necessarily do so. It depends on the intention of the person effecting the insurance. If the carrier insures for his own benefit only, then only his insurable interest is covered, and he can recover in respect of loss or damage only if and in so far as it imposes on him a liability or deprives him of his lien and thereby causes him loss. The principle of indemnity applies.

9 See Re King, [1963] 1 All E.R. 781, at 794. Also see Waters & Steel v. Monarch Life & Fire Insurance (1856) 5 El. & Bl. 870, 119 E.R. 705; North British and Mercantile Ins. Co. v. Moffatt, (1872) 41 L.J.C.P. 1.

10 [1965] 1 All E.R. 284.

11 *Ibid.*, at 288.

On the other hand the carrier may insure for the protection of the owner's interest as well as his own. If he does so he assumes fiduciary obligations; he holds the policy both on his own behalf and as trustee for the owners, and if loss or damage occurs he will receive the proceeds of the policy on his own behalf to the extent, if any, to which he is damnified, and otherwise in trust for the owner. This position, where the insurance covers the totality of the insurable interests and the carrier becomes a trustee for the owner's interest, arises only if the carrier intends to insure the goods for the owner's benefit as well as his own. It has to be ascertained as a question of fact in each case whether the carrier did so intend when he took out the policy. I have referred specifically to a carrier, because we are concerned with a carrier in this case, but I am not meaning to imply that different principles would apply to other bailees."

Russell L.J. says:—[12]

"What in law is the effect of such an insurance with such an intention? We were referred to a number of authorities on this matter. I have already indicated that insurance by a bailee or carrier on goods impliciter will not be construed as extending to the proprietary interest of another; but there is authority which in my judgment establishes that a commercial trustee—that is, a bailee—is capable in law of effecting an insurance on goods of another beyond his personal interest and extending to the full proprietary interest in the goods, and of recovering the value of that proprietary interest accordingly: that for this purpose it is not necessary that he should insure either as agent or expressly as trustee for that other: and that he will be accountable to that other for his successful recovery. I do not consider that this can be done by the mere existence of an intention in the mind of the assured: I do not think that the statements of Bowen L.J. in Castellain v. Preston (21) are to be taken at their full apparent width. I think there must be some indication in the form of the policy of an intention to insure the proprietary interest—though it is proper to remark that an equivalent burden may be thrown on an insurer under a personal liability policy if the contractual relationship between bailee and goods owner is such as to impose on the former absolute liability for loss of or damage to the goods."

12 *Ibid.*, at 295.

In *Macgillivray on Insurance Law* it is stated:—[13]

> "Assurance beyond assured's personal interest. In order that a policy effected by a commercial trustee may be held to afford an indemnity to the owner of the goods as well as to the carrier, wharfinger, warehouseman or consignee who has effected the insurance, there must be some wording in the policy to indicate either—(i) that although the insurance is on his own behalf, and on his own insurable interest and no other, it is nevertheless his intention to cover the proprietary interest of the owner of the goods as well as his, the assured's own personal interest in them, or—(ii) that the insurance was effected not only on his own behalf, and on the basis of his own insurable interest as commercial trustee, but also as agent for and on behalf and for the benefit of the owner on the basis of the owner's insurable interest in the goods. Whether or not the assured has effected an insurance beyond his own personal interest in either of these forms is a question to be determined in each case on a construction of the policy, and in the light of any relevant surrounding circumstances."

Russell L.J. refers to the Australian High Court decision of *British Traders Insurance Co. Ltd. v. Monson*[14] in which certain doubts were expressed, and says:—[15]

> "I do not think that criticism is valid. I think that the true view is that in cases such as this the law will import an intention in the bailee to insure the goods quoad the proprietary interest as trustee for the owner of the goods. It would be unfortunate if this view should not be taken, for it is obviously of commercial convenience that a carrier or other bailee should be able effectively and readily to insure the proprietary interest, since, as was pointed out by Crompton, J. in *London & North Western Ry. Co. v. Glyn* in the course of argument it avoids multiplicity of insurances. For my part I find it all the easier to hold that the carrier insured as trustee the proprietary interest of the owner in light of the fact that he had contracted with the owner that he would insure that interest."

This would certainly appear to be proper approach from a commercial point of view.

13 MacGillivray, Insurance Law (5th ed. 1961) 243.
14 [1964] A.L.R. 845.
15 Tomlinson v. Hepburn, [1965] 1 All E.R. 284, at 296.

Another recent case of interest is the Court of Appeal decision of *Morris v. C. W. Martin & Sons Ltd.*[16]

The facts in that case as recorded in the headnote are:—

"The plaintiff sent her mink stole to a furrier for cleaning. He told her that he did not do cleaning, but would arrange for the fur to be cleaned by the defendants. She agreed. The furrier, contracting as principal not agent, arranged with the defendants for them to clean the plaintiff's fur on the current trade conditions, of which the furrier knew. The defendants knew that the fur belonged to a customer of the furrier, but did not know to whom it belonged. The current trade conditions provided that "goods belonging to customer" on the defendants' premises were held at customer's risk, and that the defendants should "not be responsible for loss or damage however caused". The conditions further provided that the defendants should compensate for loss or damage to the goods during processing by reason of the defendants' negligence "But not by reason of any other cause whatsoever." M., an employee of the defendants, was given the task of cleaning the fur. He had entered the defendants' employment only recently. They had no reason to suspect his honesty. While the fur was in M.'s custody he stole it. The plaintiff sued the defendants for damages."

It was held that the defendants were liable to the plaintiff for the fraudulent criminal act of M. for the following reasons:—[17]

"(i) (a) Because, where a master had in his charge goods belonging to another person in such circumstances that he was under a duty to protect them from theft or depredation, then, if he entrusted that duty to a servant or agent, he was liable for the servant's breach of it, notwithstanding that the breach was a criminal act.

(b) Because the defendants, as sub-bailees for reward, were under such a duty of care.

(c) Because the plaintiff, as owner of the goods bailed, could sue the defendants, as sub-bailees for reward, for breach of duty as bailees.

Kahler v. Midland Bank Ltd. (H.L.) [1949] 2 All E.R. 621 applied.

(d) Although the defendants, as sub-bailees, could rely as against the plaintiff on the exceptions contained in the

16 [1965] 2 All E.R. 725.
17 *Ibid.* See headnote.

contract of bailment with the furrier since the plaintiff had impliedly consented to his contracting for the cleaning of the fur on usual terms, the exceptions did not in the present case protect the defendants, since the "customer" in the context of the exceptions was the furrier, not the plaintiff, and the fur was not "goods belonging to" the furrier.

(ii) Because the defendants, by taking the fur into their possession for cleaning, knowing it to belong to a customer of the furrier, became bailees for reward towards the plaintiff; as such they were liable to the plaintiff (per Diplock L.J.) for conversion, or (per Salmon, L.J.) for negligence or conversion, it being immaterial in the present case for which, and (per Diplock and Salmon, L.JJ.) notwithstanding that M.'s act was criminal the defendants were vicariously liable for breach of duty, since he was the person whom they chose to discharge their duty to take care of the fur and to clean it."

This case is of interest really for two reasons:—

Firstly because the Court of Appeal overruling the decision of *Cheshire v. Bailey*[18] held that when a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depreciation then if he entrusts that duty to a servant or agent he is answerable for the manner in which the servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also if the servant or agent himself steals them or makes away with them.

Secondly because of the way in which Lord Denning M.R. deals with the question of whether the defendant cleaners can rely as against the plaintiff, on the exempting conditions. Lord Denning deals with the situation by regarding the defendant cleaner as a sub-bailee of the furrier (Bailee). He says:—[19]

"The answer to the problem lies I think in this: the owner is bound by the conditions if he expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise. i.e. the owner of the goods (though not a party to the contract) is bound by those conditions if he impliedly consented to them as being in the 'known or contemplated form'."

18 [1905] 1 K.B. 237.
19 [1965] 2 All E.R. 725, at 733.

Lord Denning did in fact express similar views in *Scrutton's Case*.[20]

In *Morris's Case* it was found that the plaintiff impliedly consented to the furrier making a contract for cleaning on the terms usually current in the trade; however Lord Denning managed to come to the plaintiff's aid by finding that the wording of the conditions was not sufficient to protect the defendants.

D. CULLEN.*

20 [1962] A.C. 446, at 489.

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