

INSIGHT



ISSUE 001: January 2008 **Pauline Barratt**

Delivery Without Original Bill of Lading

In the case discussed in this article, a freight forwarder was held liable for the tort of conversion. Conversion, in a civil context, occurs where a defendant acts in relation to goods in a manner which is inconsistent with the plaintiff's title or possessory rights.

Facts

This case covered a range of issues. The facts relevant to the key issues arose from the employment of Bright Fortune Shipping, a freight forwarder, to ship goods from Hong Kong to Los Angeles. It issued a set of bills of lading to the shipper, Carewins Development, a China-based shoe manufacturer. The consignee was named as Artist Fashion. Bright Fortune was the contracting carrier.

When the goods arrived at Los Angeles Bright Fortune delivered them to Artist Fashion without requiring Artist Fashion to surrender an original bill of lading. The goods were then seized by Burberry which alleged that they infringed Burberry's trademark. Artist Fashion later settled its dispute with Burberry, but never paid Carewins the agreed purchase price for the goods.

Carewins held Bright Fortune responsible for its losses, and sued. It was unsuccessful at trial, and appealed.

"Straight" Bills of Lading

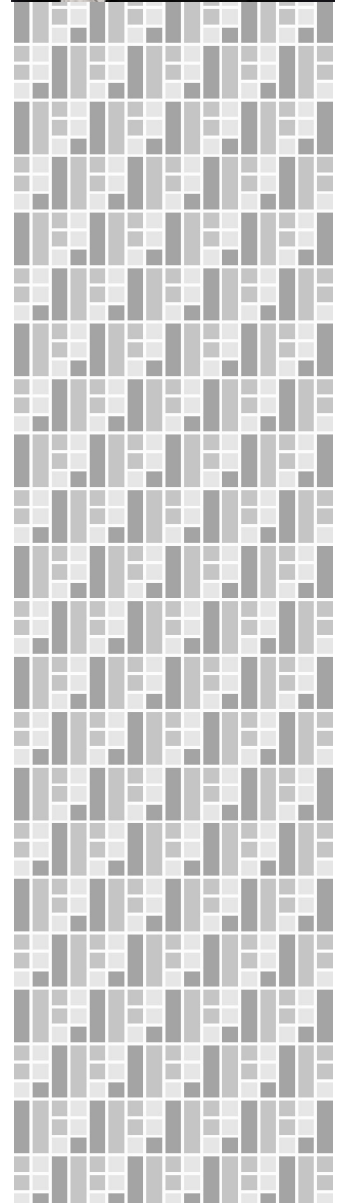
A bill of lading which identifies and specifically names the consignee (as opposed to the consignee being "to order") is called a "straight" bill of lading and is not negotiable – meaning that it cannot be transferred to a party other than the named consignee. By contrast, a bill which is "to

order" is negotiable and can be transferred from person to person. It follows that the carrier will not know to whom the goods ought to be delivered where an "order" bill is involved. Hence the reason for the rule that goods must be delivered only against presentation of an original bill.

However, the goods covered by a "straight" bill can only be delivered to the named consignee. Bright Fortune argued that as it knew the identity of the party who would be taking delivery, it was not necessary to require the original bill to be presented – in other words, that the presentation rule applicable to "order" bills does not apply to "straight" bills.

The first point considered by the Court was whether the Hague-Visby Rules applied. Those Rules apply to contracts of carriage "covered by a bill of lading or any similar document of title". Following English authority, the Court concluded that "straight" bills are indeed covered by the Hague-Visby Rules. They have the characteristics of documents of title, and must be treated as such in exactly the same way as are "order" bills. It therefore followed that a "straight" bill should have been produced before Artist Fashion was able to take delivery.

In reaching that conclusion the Court noted that, while the carrier knows the identity of the consignee under a "straight" bill, it has no knowledge of the terms or status of the underlying contract for sale and purchase. It could be, for example, that the consignee has not paid for the goods and the shipper has held onto the bill of lading for that reason. Where a consignee can produce the original bill, it gives the carrier an assurance that it will not become liable in conversion for delivering to a non-owner.



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That was the problem faced by Bright Fortune. The contract between Carewins and Artist Fashion stated that Artist Fashion would be sent the original bills after payment had been made; and it was clear that it had not been intended that Artist Fashion should be able to take delivery without first having paid for the goods. By delivering without requiring production of an original bill Bright Fortune acted inconsistently with Carewins' rights as owner of the goods and thereby committed the tort of conversion.

Exclusion Clause

The Court then considered whether Bright Fortune could escape liability by relying on a clause in its bill of lading that read:

The carrier shall be under no liability in any capacity whatsoever for loss or misdelivery of or damage to the goods however caused whether or not through the negligence of the carrier, his servants, agents or subcontractors.

The Court noted the ordinary rule of contract that any limitation or exclusion clause must be clear and unambiguous as to exactly what liability is to be limited or excluded. If it is not, the clause will be construed against the party who seeks to rely on it.

The Court said the clause was ambiguous, as it could be read to mean either "misdelivery however caused...through negligence" or "misdelivery...however caused...not through negligence". However, whichever way it was read, the clause did not apply to what had happened in this case, where the issue of negligence or otherwise was irrelevant – Bright Fortune had intentionally and deliberately ignored a clear term of the contract of carriage which required delivery only against presentation of the original bill. While Bright Fortune might have been able to exclude its liability for that, the wording of the exclusion clause would have had to be crystal clear. The wording in this case, was not.

Lessons to Learn

This case reinforces English authority to the effect that the presentation rule applies equally to both "order" bills and "straight" bills, and it should be assumed that this represents the law as it would be applied if the issue were to arise in New Zealand. Freight forwarders need to be conscious also, that liability arising from delivery without requiring presentation of an original bill is sometimes an exclusion under freight forwarders' liability insurance policies and P and I Club rules. Where it is clear that the parties do not require an original document to be surrendered, better practice would be to use a sea waybill rather than a bill of lading.

The apparently common practice of allowing delivery after first obtaining an indemnity from the consignee should also be treated with caution. In some circumstances, such indemnities will be treated as fraudulent and they certainly will not provide protection against claims by disgruntled shippers.

Finally, this case also confirms that there is no substitute for the clear and unambiguous drafting of contract terms.

Carewins Development (China) Limited v Bright Fortune Shipping Limited Hong Kong Court of Appeal, 13 July 2007

IATA Resolution 600B—Air Waybill Changes

The above IATA resolution makes changes to the mandatory terms and conditions printed on the reverse of air waybills. The changes came into effect on 18 March 2008. Forwarders who produce their own air waybills rather than purchase stock from IATA should ensure that the amendments are made; and all should ensure that only the new version is used from 18 March 2008.

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