

July 2003

## Who's the Carrier?

### *House of Lords looks at contracting parties in bill of lading case*

In **The "Starsin"** [2003] UKHL 12 (March 13, 2003), the UK House of Lords ruled that the time charterer and not the shipowner was the contracting carrier under a bill of lading, despite indications to the contrary on the bill itself.

The court also said there was no action in tort when the cargo claimants acquired title *after* the shipowners had negligently stowed the cargo.

#### **Background**

The bulk carrier "Starsin" sailed from the Far East on a time charter with a number of consignments of timber and plywood. Already wet from rain, the cargo was stowed improperly before the voyage began with no consideration for the effects of condensation. Considerable water damage was discovered when the vessel arrived in Europe.

All but one of the cargo buyers had obtained title to their consignments during the course of the voyage. The consignments were shipped under transferrable bills of lading, and those bills provided that the carrier was responsible for negligent stowage.

The first issue to be resolved was who, as between the ship owners and charterers, was the "carrier" under the bill of lading.

#### **The Contracting Carrier**

In maritime matters, the identity of parties to a contract can be complicated by the number of actors. On the carrier side, the shipping arrangement is frequently initiated by cargo interests, often through their agent contracting an ocean carrier, which may be the charterer of vessels, the owner of vessels, or both.

Accordingly, when space is located, it may be on board a ship owned by a third party and chartered to the original contracting carrier.

The charterparty typically provides that the ship's crew, and her master, remain representatives of the ship's owner. At the charterer's request, however, the master is to sign bills of lading representing the contracts of carriage between the cargo interests and the ocean carrier.

In fact the charterer or its agents will often sign these bills of lading on behalf of the master. They typically contain "demise clauses" or "identity of carrier clauses" in the fine print on the back, which state that the shipowner, and not the time charterer, is the contracting carrier.

All of these factors existed for the cargo on board the "Starsin". The bills of lading, however, were signed by the representative at the port of loading appointed by the charterer, which described itself above its signature "as agents for the [charterer] as Carrier."

The issue was whether the printed clauses were operative, so as to make the shipowner liable, despite the description adjacent the signature.

#### **Charterer's, not Owner's bills**

The House of Lords held unanimously that the bills of lading were charterer's bills, not owner's bills, and the charterer alone was the carrier.

A number of reasons were provided. There was no basis in fact for suggesting that both the charterer and the shipowner should be regarded as carriers, a possibility raised by the trial judge.

As the words above the signature conflicted with the preprinted clause, the former prevailed: as Lord Hobhouse put it, "the signatures contradict the form," and the special words added to the form were to be preferred to the form itself.

The court also noted that the merchant / cargo owner would be looking to the signature on the face of the bill of lading, not the small print terms on the back, to see with whom they were dealing.

Indeed, under contracts for the sale of goods payment is frequently effected through a documentary letter of credit issued by the purchaser's bank. One of the documents the vendor must typically present to receive payment is a bill of lading, showing the goods loaded on board. All of the five law lords refer to the fact that, under Article 23 of the Uniform Customs and Practice 1994, concerning documentary letters of credit, the banks will look to the front of the bill of lading only, and not to the terms on the reverse, for identification of the carrier.

In the result, there was no contractual responsibility on the part of the shipowner, who was the only personal defendant. The claimants also sued the ship itself but, as with Canadian law, English law requires personal responsibility on the part of the shipowner before such an *in rem* claim is effective.

#### **No Recovery Outside of Contract**

One cargo owner had obtained title before the voyage began and the House of Lords determined that claimant alone could sue the shipowner in tort.

On this question the court rejected the conclusions of the trial judge, who had noted the various dates of sale and allowed recovery for damages *after* the remaining plaintiffs acquired title.

The House of Lords ruled instead that the cause of action arose out of improper stowage, a single breach of the duty of care. The shipowner owed no duty of care to those who later acquired title to the cargo.

#### **A Canadian Perspective**

With some consistency, Canadian courts in similar circumstances have reviewed the terms of the booking note, the charterparty and bills of lading, and affixed the shipowner alone with contractual responsibility. They have been careful, however, to underline the potential for the charterer, rather than the shipowner, to be treated as the carrier on particular facts.

**The "Starsin"** is therefore a stark reminder of the importance associated with the description of the issuer of the bill of lading, and, accordingly, the significance of the instructions provided to port agents when bills of lading are issued. Canadian courts will likely regard **The "Starsin"** as an important authority on this topic.

Canadian courts are more likely to recognize economic loss claims than English courts. **"The Starsin"** may be less significant locally on the extracontractual liability point, although it is difficult to say when Canadian courts will find that a duty of care exists in novel fact situations. Whether shipowners owe future cargo owners a duty of care to prevent economic loss has not yet been authoritatively determined in this country.

Another possible recourse, suggested by Lord Hobhouse in **The "Starsin,"** is an extra-contractual claim by cargo owners against a shipowner in similar circumstances, based on the shipowner's failure to properly discharge its responsibilities as a sub-bailee upon terms.

In other words, the shipowner as sub-bailee may owe a duty to the owner of the cargo to return it undamaged. Whether this argument will come to be generally accepted in either England or Canada remains to be seen.