Voss Peer v APL Co Pte Ltd
[2002] SGHC 81

Case Number : Adm Action in Personam 600213/2001, RA 600202/2001

Decision Date : 23 April 2002

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Ian Koh and Bryan Tan (Drew & Napier LLC) for the plaintiff/respondent; Gan Seng Chee (Ang & Partners) for the defendants/appellants

Parties : Voss Peer — APL Co Pte Ltd

Admiralty and Shipping – Carriage of goods by sea – Bill of lading containing only name of consignee – Nature of carrier's delivery obligation – Whether carrier can discharge cargo without production of bill of lading – Distinction between 'order bill' and 'straight bill' – Distinction between bill of lading and sea waybill

Words and Phrases – 'Order bill of lading' – 'Straight bill of lading' – 'Sea waybill'

Judgment

GROUNDS OF DECISION

1. The plaintiff, Mr Peer Voss, carries on business in Germany as a seller of automobiles under the style of Peer Voss Automobiles. In August 2000, Mr Voss sent out a circular to various customers in Korea in which he offered for sale one model CLK320 convertible Mercedes Benz motorcar with a silver body and black leather interior at a C&F price of DM108,600. This desirable vehicle was snapped up by a company called Seohwan Trading Co Ltd of Seoul, Korea ('Seohwan') on 15 August 2000.

2. Seohwan having made a down payment of DM48,500, Mr Voss arranged for shipment of the car to them. Through his forwarding agents he entered into a contract of carriage with the defendants, APL Co. Pte Ltd ('APL'), who agreed to carry the car on board the vessel 'Hyundai General' from Hamburg to the port of Busan, South Korea. The car was loaded on board the vessel on 28 August 2000.

3. In respect of the shipment and the contract of carriage, APL issued at Bremen, Germany, on 28 August 2000, a document entitled 'Bill of Lading' bearing the number 'APLU 701416646'. The bill of lading, as is customary, contained several blank boxes with printed headings which were then completed by the parties. In the box entitled 'Shipper', Mr Voss's full name and address were inserted. The box entitled 'Consignee' contained the following printed words:

> '(Name and Full Address/Non-Negotiable Unless Consigned to Order)
> (Unless provided otherwise, a consignment "To Order" means to Order of Shipper.)

Typed into the box were Seohwan's full name and address. That was all. The words 'Or Order' did not appear in this box. The consignee box was followed by a 'Notify Party' box and that was also completed by the insertion of Seohwan's full name and address. At the bottom of the front page of the document, just above APL's signature the following words appeared:

> 'A set of 3 originals of this bill of lading is hereby issued by the Carrier. Upon surrender to the Carrier of any one negotiable bill of lading, properly endorsed, all others shall stand void.'

The bill of lading also bore the endorsements 'Freight Prepaid', 'Shipped on board Aug. 28, 2000' and 'Original BL'.

4. The three original bills of lading were released to Mr Voss and he then sent an invoice dated 28 August 2000 to Seohwan for the full price of DM108,600. He retained the bills pending receipt of the balance due from Seohwan, ie DM60,100. Mr Voss asserts that todate this money has not been paid.

5. The vessel arrived at Busan sometime in the third week of September 2000 and the car was duly discharged into the custody of APL's Korean office. On 25 September, a man named Seoh Pyung Hwan went to that office and identified himself as being from Seohwan. He claimed delivery of the car. He produced two documents, namely a copy of a commercial invoice from Peer Voss Automobile to Seohwan dated 22 September 2000 for DM107,500, and a copy of an outgoing cable from the Korea Exchange Bank to a bank in Frankfurt purporting to show a remittance of DM207,500 to Mr Voss in respect of this vehicle and of another transaction as well. On the basis of these documents, APL's Korean office authorised the release of the car into Seohwan's custody the same day.

6. The next day, Mr Voss's forwarders told APL's Hamburg office not to release the cargo to Seohwan without production of the original bill of lading. Following this conversation Mr Kim of APL's Korean office spoke to the consignee on more than one occasion and the consignee insisted that payment had already been made to Mr Voss but that there were disputes between Seohwan and Mr Voss regarding other transactions which were not related to this shipment.

7. In November 2000, Mr Voss wrote to Seohwan demanding payment of the balance sum by 7 November 2000. No reply was received. In mid December 2000, he wrote to APL's Hamburg office regarding the alleged mis-delivery of the cargo and demanded that they pay the balance sum. APL refused to make payment as it took the position that it had been entitled to make delivery to Seohwan as the named consignee without production of the original bill of lading.

8. This action was commenced in May last year. Mr Voss claimed that in breach of the contract of carriage or in breach of their duty as bailee and/ or negligently APL had failed to exercise due care with the cargo and had failed to deliver the cargo against presentation of the original bill of lading and instead delivered it to Seohwan, the consignee, who did not have or present or produce the original bill of lading. He therefore claimed the balance sum of DM60,100 from APL.

9. In June 2001, Mr Voss made an application for summary judgment. This was followed by an application from APL for the determination of the following question under O 14 r 12 of the Rules of Court:

> Whether, on the construction of the bill of lading, APLU 701416646, APL was entitled to deliver the cargo described therein without production of the original bill of lading.

The two applications were heard together before the Deputy Registrar, Mr Foo Chee Hock, who found in favour of Mr Voss and consequently made the following order:

> (1) on the true construction of the shipping documents, in particular the bill of lading as exhibited at "PV-1" of the plaintiff's first affidavit filed the 19th day of June 2001, the Defendants were contractually not entitled to release the cargo described therein without production of the original bill of lading, the clear inference from the undisputed objective evidence being that the parties had contracted on the basis that the original bill of lading would be produced against

delivery of the cargo described therein.

(2) There being no defence to the claim, final judgment be entered for the plaintiff against the defendants for the sum of DM60,100.00 or its Singapore dollar equivalent.

The Deputy Registrar also ordered APL to pay interest and costs. APL appealed against the whole of this order.

Did the contract of carriage require production of the bill of lading for delivery of cargo?

10. The submission made on behalf of Mr Voss was that it is a firmly established principle of law in the mercantile world that in a contract for the carriage of goods by sea, delivery of the cargo is to be made at the discharge port by the carrier to the consignee only upon the production by the consignee of the original bill of lading. This principle is implied into all contracts for the carriage of goods by sea. In support counsel cited the well known observation of Lord Denning that 'It is perfectly clear law that a ship-owner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading'. See *Sze Hai Tong Bank v Rambler Cycle Co. Ltd* [1959] 25 MLJ 200 at 201.

11. APL's reply was that Lord Denning's observation and similar remarks made by other judges applied only to the situation where the bill of lading issued was a 'to order' bill of lading. If the bill made the goods deliverable to a specific person as consignee and did not contain any words importing transferability, the carrier's duty was simply to deliver the goods to the consignee on proof of identity. The carrier would not need to obtain the original bill of lading (or any one of the original bills of lading) from the consignee in order to make delivery. It was common ground that the bill issued by APL was not an order bill since the consignee box contained Seohwan's name only.

12. The basic issue therefore to be considered was whether when it came to delivery, there was a distinction between the delivery of goods covered by a bill of lading that was made out 'to order' or 'to bearer' and commonly known as an order bill of lading and one that specified the name of the consignee without the addition of the words 'to order' or 'assigns'. This latter type of bill of lading has been referred to variously as a 'non-negotiable' bill of lading, a 'straight consigned' bill and a 'straight bill'. In this judgment I will call it a straight bill.

13. This issue was last considered by this court in *Olivine Electronics Pte Ltd v Seabridge Transport Pte Ltd* [1995] 3 SLR 143, where the facts were practically identical with the facts here. In that case, the plaintiffs were the shippers of a cargo of colour television sets which was carried by the defendants on board the vessel *Leeward* from Singapore to Vostochny, Russia. A company called Orient Plus was named as the consignee and the notify party in the bill of lading. On arrival of the cargo at Vostochny, it was delivered by the defendants to Orient Plus without production of the bill of lading. The plaintiffs, who had not been paid, sued the defendants for the price and took out an application for summary judgment. The defendants resisted and the Assistant Registrar granted them conditional leave to defend. Both parties appealed and the appeal came on for hearing before Goh Joon Seng, J. The appeal was dismissed.

14. In his grounds of decision, Justice Goh noted that the defendants' argument had been that the principle of law enunciated by Lord Denning in the *Rambler Cycle* case only applied to bills of lading which were made out 'To order' or 'to bearer' and did not apply to a 'straight consigned bill' which was one with a named consignee. In support they had relied on a passage from the fourth edition of

Benjamin's *Sale of Goods* (18-010). The plaintiffs on the other hand had relied on dicta from *Evans & Reid v Cornouaille* [1921] 8 LLR 76 where Hill J had stated the master of a vessel could not deliver cargo to a consignee named in a bill of lading without production of the original bill.

15. Justice Goh reached no concluded decision on the issue. In the event, the point was not finally decided in that case because the defendants were unable to furnish the security ordered and the plaintiffs consequently signed judgment in default. Interestingly enough, the law firms representing the plaintiffs and defendants in *Olivine Electronics* were the same law firms who represented Mr Voss and APL respectively before me and, having been given the opportunity to revisit this issue, they did so quite exhaustively.

16. The first decision that supported Mr Voss' arguments was *The Stettin* [1889] 14 PD 142. The plaintiff there shipped goods in London on board a German vessel belonging to the defendants, under a bill of lading, drawn in two parts by which the goods were to be delivered at a German port to the consignee named in the bill of lading or to his assigns. The master delivered the goods at the port of discharge to the consignee without the production of either part of the bill of lading. It was held by Butt J that according to English law (which he held to be the same as German law on the point) and the English mode of conducting business, a shipowner was not entitled to deliver goods to the consignee without the production of the bill of lading and that the defendants had to take the consequences of having delivered the goods without production of either of the two parts of which the bill of lading consisted. Although the bill of lading in that case was to the named consignee or his assigns thus making it an order bill, the learned Judge did not distinguish in his judgment between an order bill and a straight bill. This is significant since in the submissions before the court this distinction had been drawn and it had been strongly argued that under German law in the case of a bill of lading with a named consignee, the contract of carriage would be fulfilled by delivering the goods to such named consignee without calling for the bill of lading, as the master would have had in his possession the ship's copy of the bill of lading bearing the name of such consignee. That the Judge chose to use the term 'consignee' in his judgment instead of 'holder' or 'presenter' of the bill of lading was a firm indication that he considered that even a named consignee had to produce one part of the bill of lading in order to obtain delivery. In the 13th Edition of *Carver's Carriage by Sea* published in 1982, *The Stettin* was cited for the proposition that delivery to the consignee named in the bill of lading does not suffice to discharge a shipowner where the consignee does not hold the bill of lading. See 1593.

17. The *Cornouaille* decision came in 1921, some 32 years later. It appears from the report that *The Stettin* was not cited to Hill J. His views would therefore appear to reflect a general understanding of the law at the time. He stated:

> 'In this case the plaintiffs shipped at Cardiff a cargo of coal on board the French steamship *Cornouaille*, under a Bill of Lading for delivery at Nantes to the plaintiffs' order. The plaintiffs shipped the coal under a contract of sale entered into with the Cie. Charbonnire d'Armement et Transbordement Maritimes, of Paris, the terms of sale being a price f.o.b., cash against documents. The documents were presented to the buyers, and were not taken up. The Bill of Lading was still in the hands of the plaintiffs, in whom the property in the coal remained. In this state of circumstances, the defendants' agents at Nantes and the Master of the ship delivered the coal to the Socit Union Charbonnire et Mtallurgique, taking a receipt upon the Master's copy of the Bill of Lading, and obtaining from the Socit Union payment of the freight.
>
> …

> *The fact that the coal was intended to be delivered to the Socit Union did not entitle the Master to deliver to anybody without production of the Bill of Lading. It would not have entitled him to deliver even if the Socit Union had been the consignees named in the Bill of Lading. It is said that the plaintiffs ought to have informed*
>
> the defendants that the buyers of the coal had not taken up the documents. There is no such duty upon the plaintiffs. The transaction between the buyers and the plaintiffs had nothing to do with the shipowners. The latter were only concerned with the fulfilment of their Bill of Lading contract, and the plaintiffs were entitled to rely upon this, that the ship would not give delivery of the goods until the Bill of Lading, with the plaintiffs' endorsement upon it, was presented to the Master.' (emphasis added)

18. That such an understanding existed was also reflected in the first instance decision of *Thrige v United Shipping Company Ltd* [1923] 16 Ll.L. Rep 198 which concerned a bill of lading made out to a consignee. Rowlatt J in coming to a decision in favour of the plaintiff shipper of the goods stated:

> 'The bills of lading were in favour of the consignee; they were made in duplicate and the shipper got both parts, keeping one set and sending the other to the bank in London. … The retaining of the bills of lading is important, as it retains to the plaintiff the property or control of the goods so that he might have the right to bring an action. The position in regard to a steamship company would be clear. A bill of lading is a protection to them; they deliver goods and take back the document on which they are responsible to produce the goods and so they are safe: but it is known to everybody that the shipper may keep a bill of lading as this shipper did and not hand it over to the person to whom the goods are sent until he is paid; and therefore the shipowner owes a duty to the shipper not to hand over the goods until there is production of the bill of lading.'

In this case, the shipper had sued the agent of the shipowner rather than the shipowner himself and, on appeal, Rowlatt J's decision was reversed on the basis that there had been no contract between the shipper and the shipowner's agent. In the Court of Appeal, Scrutton LJ observed that it was not necessary for the purposes of the appeal to decide the question as to whether when a bill of lading is made to a consignee and the property passes on shipment, the shipowner who delivers to the named consignee without production of the bill of lading is or is not guilty of any breach of contract. He went on, however, to state that if *The Stettin* decided that there was such a duty it might require reconsideration (at [1924] 18 Ll.L. Rep 829). So far as I am aware Scrutton LJ's comment is the only instance in which the correctness of *The Stettin* has been judicially doubted.

19. Then came the *Rambler Cycle* case in 1959 where Lord Denning made the statement relied on by Mr Voss. APL says that that was a case of an order bill and therefore Lord Denning's comments should be looked at in that context. The complete passage from Lord Denning's judgment reads:

> 'It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case, it was "unto Order or his or their assigns" that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production

> of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected.' (at p 201)

It is clear from the above that as far as Lord Denning was concerned, there was a general rule that delivery was to be made only on production of the bill of lading to a person entitled under the bill and that in the situation of an order bill the delivery had to be made in accordance with the orders of the shipper. Nothing Lord Denning said can be read as restricting the principle he enunciated to the situation of the order bill only.

20. The next famous passage on this issue is the oft quoted statement of Lord Justice Diplock in *Barclays Bank Ltd v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep 81:

> 'The contract for the carriage of goods by sea, which is evidenced by a bill of lading, is a combined contract of bailment and transportation under which the shipowner undertakes to accept possession of the goods from the shipper, to carry them to their contractual destination and there to surrender possession of them to the person who, under the terms of the contract, is entitled to obtain possession of them from the shipowners. Such a contract is not discharged by performance until the shipowner has actually surrendered possession (that is, has divested himself of all powers to control any physical dealing in the goods) to the person entitled under the terms of the contract to obtain possession of them.
>
> So long as the contract is not discharged, the bill of lading in my view, remains a document of title by indorsement and delivery of which the rights of property in the goods can be transferred. It is clear law that where a bill of lading or order is issued in respect of the contract of carriage by sea, the shipowner is not bound to surrender possession of the goods to any person whether named as consignee or not, except on production of the bill of lading (see *The Stettin*, (1889) 14 P.D. 142). Until the bill of lading is produced to him, unless at any rate, its absence has been satisfactorily accounted for, he is entitled to retain possession of the goods and if he does part with possession he does so at his own risk if the person to whom he surrenders possession is not in fact entitled to the goods.
> (at pp 81-89)

It can be seen from that passage that Diplock LJ was endorsing the legal principle enunciated in *The Stettin* that it is a breach of contract to deliver the goods otherwise than in return for an original bill of lading and did not share the doubts as to its correctness evinced by Scrutton LJ.

21. *The 'Houda'* [1994] 2 Lloyd's Rep 541 was a decision of the English Court of Appeal on a dispute arising out of the invasion of Kuwait by Iraq. One of the main issues involved there was whether time charterers could lawfully require shipowners to discharge cargo loaded on board their vessel without production of the bills of lading. In the course of answering this question in the negative, the three justices of appeal expressed their views on a shipowner's obligation in regards to delivery of cargo covered by a bill of lading. Neill LJ said (at p 552):

> 'I can see no good reason to depart from the general rule that the owners do not fulfil their contractual obligations if the cargo is delivered to a person who cannot produce the bill of lading. Of course if such a delivery is made and the person to whom the cargo is delivered proves to be the true owner no damages would be recoverable.'

Leggatt LJ agreed with that view stating that under a bill of lading contract a shipowner is obliged to deliver goods upon production of the original bill of lading and delivery without production constitutes a breach of contract even when made to the person entitled to possession (at p 553). The third member of the court, Millett LJ while citing the *Rambler Cycle* and the *Barclays Bank* cases to support the principle that under a bill of lading contract, the shipowners are obliged to deliver cargo only against presentation of a bill of lading, went further than his brethen in ascribing the reason for this principle to be the fact that, a bill of lading being a negotiable receipt for the cargo, once the master had signed it and part with it he would have subjected the owners to a contractual obligation, enforceable at the suit of any person to whom the bill had been negotiated, to deliver the cargo to that person. Millett LJ was therefore specifically dealing with a negotiable bill of lading but the views of the other two judges were not so circumscribed.

22. Now I must deal with two decisions by Justice Clarke in the English Admiralty Court. The first, *The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266, was decided in January 1994. The *Sormovskiy 3068* was chartered to the plaintiffs to carry a cargo of sugar. The plaintiffs subsequently acquired the original bills of lading for the cargo which were delivered to them endorsed in blank. The vessel then arrived at the port of discharge and began discharge without the knowledge or consent of the plaintiffs. None of the three original bills of lading was presented to the master before discharge began and by the time the plaintiffs learnt about the discharge and stopped it, about 2,070 tonnes of sugar had been discharged. The plaintiffs claimed against the defendants as owners of the vessel for the loss sustained by reason of delivery of 2,070 tonnes of sugar without presentation of an original bill of lading.

23. It was held by Clarke J inter alia that:

> (1) the defendants correctly accepted that under the bill of lading they were obliged to deliver the goods to the person entitled to possession of it; since the bill was expressed to be 'to order', those persons were the plaintiffs as holders of the bill of lading because it had been endorsed in blank.
>
> (2) subject to the terms of the contract and save in exceptional circumstances a shipowner must not deliver the goods otherwise than against presentation of an original bill of lading unless it was proved to his reasonable satisfaction both that the person seeking the goods was entitled to possession of them and that there was some reasonable explanation of what had become of the bills of lading.

In coming to the conclusions stated above, Clarke J undertook a survey of the existing authorities including *Barclays Bank*, *Rambler Cycle, The Stettin,* and *The 'Houda'*. He observed (at p 272) :

> 'None of those cases is my judgment inconsistent with the plaintiffs' case, namely that subject to the terms of the particular contract and save in exceptional circumstances, a shipowner must not deliver the goods otherwise than against presentation of an original bill of lading. That seems to me to be implicit in the express provision quoted above that any one of the bills of lading being accomplished the others to stand void. In my judgment it is implicit in that provision that, save perhaps in exceptional circumstances, one would expect of the bills to be 'accomplished' by being presented to the master or a shipowner. The above quotation from the judgment of Lord Denning in the *Sze Hai Tong* case suggests that he would have taken the same view. I observe that in Cooke on Voyage Charters at p. 387 the authors cite that case as authority for the proposition that

> '… the bill of lading, by implication if not expressly, makes the goods deliverable upon, and only upon, the surrender of the bill of lading.'"

Clarke J also stated that he preferred the plaintiffs' submissions because they appeared to be consistent with the tenor of the authorities and to make more commercial sense as:

> 'It makes commercial sense to have a simple rule that in the absence of an express term of the contract the master must only deliver the cargo to the holder of the bill of lading who presents it to him. In that way both the shipowners and the persons in truth entitled to possession of the cargo are protected by the terms of the contract.' (at p 274)

Although Clarke J was dealing with an order bill, it is clear from his judgment that he considered these principles on delivery to apply to all bills and not only to order bills.

24. In the next case, *The 'Ines'* [1995] 2 Lloyd's Rep 144, decided in March 1995, the plaintiffs were the owners of telephones shipped to St. Petersburg under a bill of lading naming one company as consignee and another as the notify party. The cargo was released by the port authorities, acting as agents for the shipowner, to the notify party without presentation of an original bill of lading to themselves or to anyone else before delivery. Clarke J held that the shipowners were liable to the plaintiffs for breach of contract because the goods had been delivered without presentation of an original bill of lading. In reaching this conclusion, he did not draw any distinction between an order bill and a straight bill.

25. The Malaysian High Court too has accepted the principle that it is a breach of contract for a shipowner to deliver cargo without the production of the bill of lading even when delivery is made to the consignee. See *'The Taveechai Marine'* [1995] 1 MLJ 413.

26. There are also several academic writers who believe that the above is the correct position. Among these is William Tetley who in the third edition of his well known text *Marine Cargo Claims* states (at p 985) 'if goods are delivered to someone who does not present the original bill of lading, even if that person is the named consignee, the carrier will be responsible for any resulting loss. In common law jurisdictions, the carrier would be liable for tort for conversion …'. In para 1.4.1 of *Bills of Lading and Bankers' Documentary Credits* by Paul Todd, it is stated that when a bill of lading is made out to a named consignee, he alone may validly present it to obtain the goods from the vessel and in the 20th Edition of *Scrutton on Charterparties and Bills of Lading* at page 292 the following passage appears:

> 'The shipowner or master is justified in delivering the goods to the first person who presents to him a bill of lading, making the goods deliverable to him, though that bill of lading is only one of a set, provided that he has no notice of any other claims to the goods, or knowledge of any other circumstances raising a reasonable suspicion that the claimant is not entitled to the goods. If he has any such notice of knowledge, he must deliver at his peril to the rightful owner, or must interplead. He is not entitled to deliver to the consignee named in the bill of lading, without the production of the bill of lading, and does so at his risk if the consignee is not in fact entitled to the goods.'

The 10th Edition of *Schmitthoff's Export Trade* (published in 2000) echoed (at pp 290-292) the view

expressed in the 9th Edition that even a bill of lading which was not negotiable operated as a document of title because the named consignee could only claim the goods if able to produce the bill of lading.

27. I now turn to the authorities cited by APL to justify their position. APL relied on three fairly recent cases and various passages from *Carver on Bills of Lading* (1st Ed, 2001) which equate a straight bill of lading with a sea waybill when it comes to obligations relating to delivery of cargo. A sea waybill is the maritime version of a document that has long been in use in the context of land and air carriage. It operates as a receipt for goods received for shipment and evidences the contract of carriage. One significant difference between it and a bill of lading is that it is never ever a negotiable instrument and is therefore usually used on short sea routes and where neither the shipper nor the cargo receiver needs to pledge shipping documents in order to raise finance. It is not issued in sets and the receiver is able to take delivery of the goods merely by establishing his identity. The original sea waybill need not be produced. Further, since it is not a bill of lading the Hague Rules and the Hague Visby Rules do not apply to it. See *Contracts for The Carriage of Goods* edited by David Yates.

28. *Carver on Bills of Lading* takes the position that straight bills and sea waybills are actually one and the same thing. This is because a straight bill, like a sea waybill, is not a document of title since it cannot be used to transfer ownership of goods unlike an order bill. This view is clearly expressed in 6-007 which reads:

> '**Straight or non-negotiable bills and sea waybills not documents of title**
>
> A "straight" bill is not a document of title in the common law sense, so that its transfer does not operate as a transfer of the constructive possession of the goods. *It is not a symbol of the goods because the carrier is entitled and bound to deliver the goods to the named consignee without production of the bill.* It follows that a carriage document will not be a document of title in the common law sense if it is expressed on its face to be "non-negotiable". Sea waybills have the legal nature of "straight" or "non-negotiable" bills: they are similarly not documents of title in the common law sense, since under such waybills delivery is to be made to the named consignee, irrespective of production of the waybill, and not to the holder of the waybill as such.' (italics mine)

I point out here that whilst one cannot endorse a straight bill so as to transfer constructive possession of the goods, this does not mean that the straight bill does not impose a contractual term obligating the carrier to require its production in exchange for delivery. The sea waybill was developed to get away from such a legally imposed obligation.

29. For the proposition that the carrier is entitled and bound to deliver the goods to the named consignee without production of the bill, *Carver* cites reports by the English and Scottish Law Commissions and also the case of *The Brij* [2001] 1 Lloyd's Rep 43. The latter was a decision of the Hong Kong High Court on a dispute between a plaintiff shipper of garments and the owner of the vessel in which they were shipped. The facts are somewhat complicated because the shipment was effected by a freight forwarder (WTW) which also operated its shipping side under the name of Talent Express Line ('Talent'). WTW issued the plaintiff with Talent bills of lading which named the plaintiff as the shipper, the consignee to order and the buyer's agent Amaya as the notify party. The plaintiff used these bills as documents of title to try to obtain payment from the buyer under the appropriate letters of credit. At the same time, unknown to the plaintiff, by arrangement between WTW and the operator of the vessel, CAVN, CAVN issued bills of lading to WTW evidencing shipment of the goods but naming WTW as shipper and the consignee as Amaya. These bills were kept by CAVN. When the

ship arrived in Venezuela the goods were discharged into the custody of the Venezuelan customs and later released by the customs to agents for Amaya, the consignee under the CAVN bills. The actual buyer did not pay for the goods and the Talent bills were in fact never given to the buyer or Amaya. The plaintiff sued the defendant carrier for mis-delivery of the goods.

30. It was held by Waung J that the true position was that between the plaintiff and WTW they regarded Talent as the carrier under the Talent bill; WTW kept the CAVN bills because they were the contracts of WTW and not the contracts of the plaintiff; the plaintiff was not a party to the CAVN bills and its claim in contract failed. Secondly, the plaintiff failed in tort because there was no breach of duty of care since the duty of the carrier under the CAVN bills was only to deliver to the named consignee Amaya. In his judgment Waung J stated that the essence of straight bills is 'that they are not negotiable and the contractual mandate is to deliver to named consignee without the production of the original document' (at p 434). For this proposition, he relied on a passage from the fifth edition of *Benjamin on Sale of Goods* which reads:

> 'Two things follow from the fact that a document of this kind is not transferable by indorsement and delivery. First, the consignee (if in possession of the document) cannot, by purporting to transfer it in this way, impose on the carrier a legal obligation to deliver the goods to another person. Secondly, the shipper cannot oblige the carrier to deliver the goods to a different consignee from the one named merely by indorsing and delivering the bill to that other person; for under a straight bill the carrier is entitled and bound to deliver the goods to the originally named consignee without production of the bill, so that, when he delivers the goods, he may have no means of knowing of the purported transfer of the bill. This difficulty cannot arise in the case of an order bill, under which the goods are deliverable only on production of the bill.'

The text cites no authority for the proposition that under a straight bill the carrier is bound to deliver to the named consignee without production of the bill. Waung J relied only on this passage for his statement of the law. He seems to have treated it as an uncontentious point. The various cases that I have mentioned in 17 to 25 do not appear to have been brought to his attention. In my view, neither *The Brij* nor the passages of *Carver* which rely on it without consideration of contrary authority are strong support for APL's stand.

31. The next case which APL cited was a very recent English decision. In *'The Chitral'* [2001] 1 LLR 529, two sets of bills of lading were issued for a shipment from Bremen to Dubai. The persons arranging for the shipment were freight forwarders in Dubai (Al Ghaith) and in Germany they acted through their agents IASC. The first set was issued by IASC to the sellers of the cargo and named them as shippers. The consignee was expressed as 'to the order of CBQ' (the bank financing the shipment). The second set of bills was issued on behalf of the owners of the vessel to IASC as shippers and Al Ghaith was named as consignee. The goods arrived at Dubai in a damaged condition and the issues before the court were first whether IASC or Al Ghaith had title to sue the carrier and if so whether, secondly, their claim was time barred. The case basically concerned the construction of the second set of bills of lading and whether the phrase within the printed section of this bill to the effect that delivery was 'to be unto the above-mentioned consignee or to his or their assigns' was capable changing what was on its face a straight bill into an order bill. Steel J concluded that it was not and that the bill was non-negotiable and that therefore under the *Carriage of Goods by Sea Act* 1992 the parties with title to sue on it were IASC as the original party to the contract of carriage and Al Ghaith as the person to whom delivery was to be made. The Judge did not make any comments on whether Al Ghaith as the party to whom delivery had to be made would have to produce the bill of lading in order to claim the goods. It was not necessary for Steel J to do so in view of the issues

before him. The case does stand as authority for the proposition that a bill of lading form may be drafted in such manner that it contemplates that it may be used both as a straight bill and as a negotiable bill as required by the carrier. It does not go further to propose different delivery obligations depending on what decision the carrier makes as to how the bill should operate.

32. Finally, APL cited *The River Ngada* reported in the 13th September 2001 issue of the Lloyd's Maritime Law Newsletter. In this English case, Belinda Bucknall QC sitting as a deputy judge stated that in a straight bill of lading naming X as the consignee, the carrier's obligation was to deliver the goods to X and he was entitled to require X to discharge any relevant liabilities. In such circumstances production of the bill of lading by X was not a necessary precondition for delivery or for the exercise by the carrier of his rights against X. The statement about production of the bill of lading was obiter since the issue in the case was who had title to sue. Further no authority was cited for that statement.

33. It appeared to me that the weight of the authorities was with Mr Voss. The position that he took had been one taken by many judges over a substantial period of time and, even though in most of the cases the views expressed were obiter, this did not detract from their weight as they reflected the common understanding of the legal position. Secondly, this position had also been endorsed by academics and writers of popular texts. It was in my view also consistent with commercial sense as stated by Clarke J. The straight bill of lading and the consequent delivery obligation it imposes on a carrier has been well known for decades. A shipper who, like Mr Voss in this case, asks for the issue of a straight bill of lading even though the alternative of a sea waybill is available to him, wants to retain some degree of control over the delivery of the goods. The shipowner is aware of this. If he is not prepared to accept the restriction on delivery rights that a bill of lading imposes he can insist on issuing a waybill instead. Once he issues a bill of lading instead, however, whether it is an order bill or a straight bill, he must not deliver the cargo except against its production. The contrary view had much less support and most of it was recent and cursory. Neither Waung J nor Belinda Bucknall QC undertook the extensive review of the authorities that Clarke J conducted in the *Sormovskiy 3068.*

34. There was no doubt in this case that the document issued in respect of the carriage of the car from Hamburg to Bremen was a bill of lading, not a waybill. It called itself a bill of lading. It was issued in a set of three and bore the endorsement 'Original B/L'. Although the format used contemplated that it could be used either as a non-negotiable bill or as an order bill as in the case of *The Chitral*, it contained no term that would vary the carrier's delivery obligation depending on which type of bill it was chosen to issue. Finally, APL accepted in their pleadings that they had issued a bill of lading. No assertion was made that the document evidencing the shipment of the goods was, instead, a sea waybill.

35. The other issue in the case was whether Mr Voss had in fact received full payment for the car. Though APL tried to raise doubts about his claim to have received only part payment, I was satisfied from the documents produced that their arguments had no merit.

36. Accordingly, I dismissed APL's appeal.

Sgd:

JUDITH PRAKASH
JUDGE