

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 277

Suit 1602/1991

Between

Columbus Line Reederei
GmbH

... Plaintiff

And

Dodwell Shipping (Singapore)
Pte Ltd

... Defendant

GROUND OF DECISION

Admiralty and Shipping — Bills of lading — Bills of lading as contract of carriage

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**Columbus Line Reederei GmbH v Dodwell Shipping
(Singapore) Pte Ltd**

[1996] SGHC 277

Suit 1602/1991
Christopher Lau JC
03 December 1996

1 The claim by the plaintiffs against the defendants is for the sum of A\$53,880.91 being the loss the plaintiffs allege they have suffered as a result of the defendants' breach of duty and/or negligence in their acting as the plaintiffs' agents in Singapore.

2 **The facts**

3 The plaintiffs are shipowners and charterers with their head office in Hamburg and a representative office in Singapore.

4 The plaintiffs appointed the defendants as their agents in Singapore for their Western Australia Far East Service (Wafe Service) pursuant to an agency agreement dated 5 December 1988 entered into between the plaintiffs and the defendants in which agreement the plaintiffs were described as 'the Owner' and the defendants as 'the Agent'. Clause 3 of the agency agreement provided:

The agent shall ensure that all agency work, in particular the dispatch of the vessels of the owner, will be performed in a most efficient way and under safeguard of the interest of the owner.

5 The Wafe Service was a new liner service the plaintiffs had inaugurated in or about 1989. Two ships were employed by the plaintiffs for this service: the `Kapitan Silin` (the vessel) and the `Kapitan Babiyevskiy`.

6 On or about 5 May 1989, 77 bundles of steel pipes bearing the markings `NIAL SET-0821 FREMANTLE` (the cargo) were loaded on the vessel for carriage from Singapore to Fremantle. The vessel was not owned by the plaintiffs. She had been time chartered by the plaintiffs on the terms of the New York Produce Exchange Form. The cargo was stowed on deck. It is not disputed that both the plaintiffs` and defendants` representatives knew that the cargo was stowed on deck. Neither is it disputed that the cargo was accepted, stowed and shipped on deck with the approval of the plaintiffs. The bill of lading issued by the defendants, however, did not carry a notation that the cargo was shipped on deck.

7 Upon the cargo`s arrival in Fremantle, the cargo was found to be in a damaged condition. The cargo was covered with rust. Action was commenced in the courts in Australia by cargo interests against the plaintiffs and the shipowners in Australia for the recovery of the loss suffered by these cargo interests. The action did not proceed to trial as the plaintiffs were able to settle the cargo claim in the sum of A\$37,500.

8 The claim by the plaintiffs against the defendants in this action is for the defendants to pay to the plaintiffs this settlement sum of A\$37,500 and costs of A\$16,380.91 which the plaintiffs claim they had incurred in instructing Australian lawyers to defend and to settle the claim brought by the cargo interests against the plaintiffs in Australia.

9 **The issues**

10 It is the plaintiffs' case that had the defendants issued a claused bill of lading stating that the cargo had been shipped on deck at shippers' risk, the plaintiffs would have had a complete defence to the claim by the cargo interests in Australia. The plaintiffs claim that the defendants are responsible for this lapse because the defendants:

(i) had not followed the plaintiffs' express instructions to them to issue a claused bill of lading for this shipment; (ii) had not issued a claused bill of lading in conformity with the mate's receipt which the plaintiffs allege had stated the cargo had been stowed on deck; and (iii) knowing the cargo was stowed on deck ought to have issued a claused bill of lading.

11 These allegations call for the determination of the following:

(a) whether there were express instructions from the plaintiffs to the defendants to issue an on deck bill of lading in respect of the cargo; (b) whether the bill of lading was issued in conformity with the mate's receipt; (c) whether the defendants had a duty to clause the bill of lading with an on deck remark independently of what was stated on the mate's receipt as the defendants were aware that the cargo was stowed on deck;

12 and on quantum, in the event I decide any of the above in the affirmative, the issues of :

(d) whether the plaintiffs' settlement of the Australian action was proper and reasonable; and (e) whether the settlement sum was reasonable in light of the circumstances of the case.

13 The plaintiffs' case is encapsulated in para 4 of their amended statement of claim. That states:

On or about 5 May 1989, the said vessel loaded, inter alia, 77 bundles of steel pipes bearing the markings `NIAL SET-0821 FREMANTLE`. Prior to the shippers booking the said cargo with the plaintiffs (approximately seven days prior to issuance of the said bill of lading), the shippers had verbally agreed with the defendants` TC Wee that the said cargo would be stowed on-deck. Accordingly, the defendants knew that the said cargo would be stowed on-deck. Further, the shippers were informed by the defendants` TC Wee that the bill of lading for the said cargo would be cloused and the plaintiffs` representative (Franz Josef Lippold) verbally instructed the defendants` representative (TC Wee), before issuance of the bill of lading, that the said bill of lading was to be cloused with an on-deck remark and the shippers were to be advised accordingly. In addition, the mate`s receipt for the said pipes was signed by the master for other responsible officer of the said vessel and stated that the said pipes were loaded on deck.

14 Three witnesses appeared for the plaintiffs. They were Mr Franz Josef Lippold, Mr Bernd Grewe and an Australian solicitor, Mr Drew Scott James, a partner in Messrs Norton Smith, a firm of solicitors in Sydney, New South Wales, Australia. Mr Lippold`s and Mr Grewe`s evidence dealt with liability and Mr James` evidence related to quantum.

15 **The evidence**

16 Mr Lippold`s evidence is, on the instructions issue, that he gave express instructions to Mr Tay Chee Wee or in short Mr TC Wee, the defendants` sales and freight manager, to clause the bill of lading. Mr Lippold was at the time the plaintiffs` representative in Singapore for the Wafe service. He had been sent to Singapore by the plaintiffs and his responsibilities included looking after the plaintiffs` schedule of services, keeping contacts with shippers and consignees and assisting the defendants in their communications with the plaintiffs` head office in Hamburg. The plaintiffs and the defendants shared an office in Singapore. It was not a large office. The defendants` duties under the agency agreement included the issuing of bills of lading for cargo loaded on the

plaintiffs' vessels in Singapore. The plaintiffs had provided bills of lading to the defendants in open form for this purpose.

17 The three persons Mr Lippold principally dealt with in the defendants' company were Mr George Seow, a director in the defendants' company, Mr TC Wee and Mr Yeo Yong Guan, the defendants' operations manager.

18 Mr Lippold said that about a week before the vessel called at Singapore in May 1989, the defendants had received a booking request from a shipper in Singapore to carry the cargo on the plaintiffs' next available vessel to Fremantle. Due however to the stowage requirements of the vessel and other cargoes already loaded on board no suitable underdeck space was available for the cargo. Mr Lippold said he asked Mr TC Wee to inform the shipper that the cargo could only be carried on deck and he said after Mr TC Wee did so, Mr TC Wee told him the shipper had said the consignees' approval, amongst other things, had to be obtained for an on deck shipment. Mr Lippold said this approval was subsequently verbally obtained from the the consignees in Australia with the help of the plaintiffs' Fremantle office in Australia when Mr TC Wee told Mr Lippold that buyers' approval had been obtained for the on deck shipment against an on deck bill of lading.

19 Mr Lippold's evidence is that it was then that he said to Mr TC Wee and possibly even to Mr Yeo Yong Guan that because this was an on deck shipment and because of the nature of the cargo, it was necessary to clause the bill of lading to state the cargo was 'shipped on deck at shipper's risk' and that as far as he could remember, this information was passed on to the shipper by Mr TC Wee.

20 Mr Lippold also said that he had expected the defendants in any event to clause the bill of lading as they knew the cargo was loaded on deck.

21 In due course, the cargo was loaded on deck and the defendants issued a bill of lading. It was not claused. Instead they issued an underdeck bill of lading contrary, Mr Lippold said, to his instructions.

22 Soon after the vessel arrived in Fremantle and the cargo was discharged, Mr Lippold's evidence is that he received a fax from the plaintiffs' Sydney office informing him that a claim had been lodged by the consignees for damage to the cargo caused by its having been carried on deck. Mr Lippold said he was surprised by this fax and asked Mr TC Wee why the bill of lading had not been claused. Mr TC Wee, Mr Lippold alleged, could give no satisfactory explanation.

23 There then ensued telex correspondence between the plaintiffs' Hamburg office and Mr Lippold and between the plaintiffs' Hamburg office and the defendants. In those telexes, the plaintiffs attempted to persuade the defendants to accept liability on two grounds:

(a) that as the back of the relevant mate's receipt for the cargo contained a remark by the stevedores' checker - the stevedores having been appointed by the defendants - that the cargo had been stowed on deck, the defendants ought to have claused the bill of lading in conformity with this remark on the mate's receipt; and (b) that in any event, as the defendants were aware that the cargo was stowed on deck, they should have claused the bill of lading.

24 These telexes from the plaintiffs' Hamburg office were all sent by Mr Bernd Grewe. Mr Bernd Grewe who is the plaintiffs' claims manager essentially confirmed what Mr Lippold said in evidence and he also said Mr Lippold had

indeed told him in their telephone discussions after the cargo interests' claim had arisen that Mr Lippold had instructed the defendants to clause the bill of lading.

25 Were express instructions given?

26 Both Mr TC Wee and Mr Yeo Yong Guan denied Mr Lippold ever gave such express instructions and it is right that I should say at this stage, having heard and seen Mr Lippold, Mr Bernd Grewe, Mr TC Wee and Mr Yeo Yong Guan on the issue of the instructions, that I do not accept the defendants were instructed by Mr Lippold to clause the bill of lading as Mr Lippold alleged. The principal witnesses to this issue were Mr Lippold and Mr TC Wee. Both from Mr TC Wee's demeanour and bearing and from the evidence of certain answers that he gave, it was clear to me that he was a totally truthful witness. I find no difficulty in accepting as true and accurate the material part of his evidence of which the following is a brief summary.

27 Where Mr Lippold's evidence stops after asserting that the shipper was informed by Mr TC Wee that the plaintiffs could only accept the cargo if it was stowed on deck and that the shipper had agreed to an on deck bill of lading, Mr TC Wee went further to explain what happened thereafter. Mr TC Wee said he did speak to the shipper to tell him that the cargo would be stowed on deck and at shipper's risk. But he said the shipper refused and wanted a clean bill of lading, was not prepared to provide a letter of indemnity, wanted the cargo if it was to be shipped on deck to be protected by tarpaulin covers and above all insisted the consignees in Australia had to approve the use of the plaintiffs as the carrier. Mr TC Wee said, on being informed of this by the shippers, that he sought Mr Lippold's further instructions and Mr Lippold then called the

plaintiffs` Hamburg office following which call, Mr Lippold confirmed to Mr TC Wee that the plaintiffs would accept the cargo on the shipper`s conditions referred to above. Mr TC Wee said Mr Lippold had informed him that the plaintiffs would take out deck insurance to cover the on deck carriage of the cargo. It was, Mr TC Wee said, in those circumstances that no claused bill of lading was issued.

28 I did not consider Mr Lippold`s evidence satisfactory. Firstly, if Mr Lippold did in fact give such instructions, in the numerous telex correspondence between himself and the plaintiffs` Hamburg office that developed following the notification of the claim by the plaintiffs` Sydney office, Mr Lippold did not refer at all to the alleged express instructions. Indeed even some eight months after the claim first arose, by which time Mr Lippold must have had time to reflect on the circumstances under which this unclaused bill of lading was issued, Mr Lippold in writing to the plaintiffs` Hamburg office on 15 February 1990, still did not refer to it. What he said instead (at AB-37) was:

condition of pipes during loading unknown.

we are presently checking with terminal/psa reg delivery date n actual loading date n weather conditions during storage/loading. remember that pipes were stored in the open - uncovered. both ends of bundles were protected by gunny bags n pipes were treated with a special greasy film.

mates receipt issued with `deck` remark on it`s back.

pls adv your fax no that we can pass on to u.

dodwell informed accdly who will reply separately (sic).

29 Mr Lippold nevertheless maintained he had not omitted to mention instructions had been given and as written evidence he relied on his telex of 14 February 1990 to the plaintiffs` Hamburg head office (at AB-35) where he stated, amongst other matters:

even worse Dodwell/ Singapore missed to put deck-remark in bill of lading.

30 This statement Mr Lippold said meant that Dodwell, (at p 71 of the notes of evidence):

did not follow my instructions.

31 However when he was asked whether his telex of 14 February 1990 was not in fact referring to the back of the mate's receipt which contained the entry:

Received No 1 deck (77) seventy-seven bundles only

32 which remark had been entered and signed by a cargo checker Mr Chua Cheng Guan, an employee of the stevedores engaged in the loading of the cargo, Mr Lippold said (at p 72 of the notes of evidence):

Yes, in that particular case, but I was also referring to previous instructions to Dodwell to clause bill of lading.

33 When he was then asked where in the correspondence did he refer to such previous instructions, he said (at p 72 of the notes of evidence):

In previous correspondence. At AB-35.

34 AB-35 was of course the telex dated 14 February 1990 which was sent by Mr Lippold to the plaintiffs' Hamburg office which I referred to earlier. Eventually Mr Lippold in cross-examination had this to say of the alleged instructions (at p 77 of the notes of evidence):

... I don't know why it was not mentioned. I did mention it verbally with Hamburg. It could be because Hamburg did not want it mentioned as it was only verbal.

35 But why should the plaintiffs, as the defendants' counsel submit and which I accept, want something so vital and central to their case kept out of the

telex correspondence between themselves? If express instructions to clause the bill of lading had in fact been given but not followed by the defendants, the plaintiffs had an indefensible case against the defendants.

36 Secondly, the evidence of Bernd Grewe, the claims manager of the plaintiff company, that in several telephone conversations he had with Mr Lippold, Mr Lippold had told him that he had instructed the defendants to clause the bill of lading does not, in my view, constitute evidence that Mr Lippold had given those instructions. It is inadmissible as it is hearsay: see *Gillie v Posho Ltd (in liquidation)* [1939] 2 All ER 196; *Lim Siew Neo v Pang Keah Swee* [1958] MLJ 111. It is further inadmissible because its purpose is to establish the truth of what was said to Mr Grewe by Mr Lippold. Even if it is admissible, all that Mr Grewe's assertion does is to show that there were conversations between Mr Lippold and Mr Grewe and what was said in those conversations. But it does not prove or support the truth of Mr Lippold's allegation which is that the defendants were instructed to clause the bill of lading with an on deck remark: see *Saga Foodstuffs Manufacturing (Pte) Ltd v Best Food Pte Ltd* [1995] 1 SLR 739.

37 Thirdly, in all the plaintiffs' telexes to the defendants, the plaintiffs did not allege as they could have, that such instructions were given. Although Mr Grewe, the author of these telexes, confidently alleged that Mr Lippold had told him specifically that the shipper had agreed to an on deck bill of lading, the telexes he sent to the defendants did not in fact assert this. He admitted as such when he said, in the course of his cross-examination (at p 127 of the notes of evidence at letter A):

Q: Do you agree the correspondence does not go so far as to say that shippers' agreement or awareness to stow on deck

is against an on deck bill of lading ? A: There may be nothing so specific but between the lines, this is clear.

38 I am unable however to discern or draw such an inference from any of the correspondence. Mr Grewe was unable to satisfactorily explain why this matter of express instructions or shipper's agreement to an on deck bill of lading was not raised in the correspondence. All he could say was that reading between the lines, it was clear that the plaintiffs were saying that express instructions had been given. I am not prepared to read into the correspondence what is not either impliedly or expressly referred to; to do so would be to go against the grain of what was being expressly discussed in the correspondence. Mr Grewe in fact subsequently admitted in cross-examination, as he had to (at p 146 of the notes of evidence) that he had assumed the existence of an agreement based on the fact that the cargo had been shipped on deck and there was no letter of indemnity.

39 Finally, the plaintiffs' solicitors themselves in their demand letter of 13 November 1990 (some one and a half years after the claim arose) to the defendants also made no reference to the alleged express instructions.

40 Mr S Mohan who appeared for the plaintiffs attempted in his cross-examination of the defendants' witnesses to establish that there could not have been any good or valid reason for the plaintiffs to agree to the issue of an underdeck bill of lading being one of the conditions imposed by the shipper for the on deck shipment. Mr TC Wee's evidence however, which I accept, was that the plaintiffs were operating in a relatively competitive market and so were trying very hard to 'break into' the market as the plaintiffs were not known in the market. His evidence was that to maximize cargo liftings, the plaintiffs were prepared to:

41 (i) be flexible on freight rates (Mr TC Wee's evidence at p 82E of the notes of evidence);

42 (ii) be flexible to a certain extent to accommodate the reasonable wishes or demands of their shippers such as the backdating of bills of lading, absorbing certain charges and issuing clean bills of lading subject to the plaintiffs' head office's approval (Mr TC Wee's evidence at p 83 of the notes of evidence).

43 Mr S Mohan further attempted to discredit Mr TC Wee by submitting that as there was no indication on the bill of lading that it was negotiated through a bank it was reasonable to infer the shipper would have accepted a claused bill of lading had one been issued. But as Ms Belinda Ang, who appeared for the defendants, submitted and which I accept, it is really quite irrelevant whether the bill of lading was eventually negotiated through a bank. What is relevant is whether the shippers informed Mr TC Wee that they were not willing to accept a claused bill of lading and Mr TC Wee's evidence, which I also accept, is that they were not.

44 Mr S Mohan further submitted that Mr TC Wee's evidence was unreliable because Mr TC Wee had not made a memorandum in writing of Mr Lippold's instructions. Whilst with the benefit of hindsight, he ought to have done so, the fact that Mr TC Wee did not, does not in my view detract from the truth of his evidence. It is pertinent to note that the documentary evidence, viz the telex correspondence between Mr Lippold and the plaintiffs' Hamburg office, and between the plaintiffs and the defendants does not importantly show that such express instructions were given.

45 The plaintiffs finally attempted to discredit Mr TC Wee by establishing that Mr TC Wee had himself not also either verbally or in writing told the plaintiffs or Mr Lippold when the claim arose that the defendants had issued a clean bill of lading because Mr Lippold had agreed to accept the cargo against an underdeck bill of lading. The burden is however on the plaintiffs to prove their case on a balance of probabilities and on their evidence alone, in my view they have not. Further unlike Mr Lippold, Mr TC Wee was not actively involved in handling the claim by the cargo interests; his director Mr Seow was. Mr TC Wee said that he saw no cause to interfere and did not concern himself for that reason with the claim. I find his explanation (at p 179 of the notes of evidence) quite acceptable in the circumstances. He said in answers to questions put to him in cross-examination by Mr S Mohan:

Q: See AB-39. It is Seow's response to say Dodwell not at fault in not clausing bill of lading. Was this dispute handled by Seow ? A: Yes, it was handled by Seow. Q: Did Seow handle the dispute personally ? A: Other than short discussions we had, we didn't discuss it further. Seow handled the matter personally. Q: Were you kept informed by Seow about what was happening on this matter ? A: Not at all. He didn't ask me any further questions at all after our short discussion. Q: Although Seow didn't ask you any more questions about this matter, did he keep you informed of developments ? A: Nope. Q: Did you find out from Seow what was happening? A: I didn't.

46 For all these reasons, the conclusion I reach is that Mr Lippold did not in fact give express instructions to the defendants to clause the bill of lading. This disposes of the first issue in the defendants' favour.

47 **Were the defendants under a duty to clause the bill of lading in accordance with the mate's receipt?**

48 The second issue is whether, irrespective of whether express instructions were given, the defendants were under a duty to issue a bill of lading in conformity with the mate's receipt. This allegation pre-supposes a duty on the defendants (which the defendants do not dispute) to issue a bill of lading in conformity with the mate's receipt. The undisputed evidence is that on the back of the mate's receipt issued for the cargo there was the remark 'No 1 deck' written. It is also not in dispute that this remark was not made by the ship's officer. The plaintiffs' case is that this remark ought to have been transferred onto the bill of lading as the ship's officer had signed the front page of the mate's receipt. Mr Bernd Grewe's evidence was that that is the practice in Hamburg and Mr Lippold's evidence was to the same effect except that it was not restricted to port practice at Hamburg. The plaintiffs adduced no other evidence in support of such assertion. As I have already however discounted substantially the reliability of both Mr Lippold's and Mr Grewe's evidence, I place very little reliance on their evidence.

49 The defendants' case is that the remarks on the back of the mate's receipt form no part of the mate's receipt. Mr Chua Cheng Chuan, who was the checker in Khoo & Sons, the stevedores appointed by the defendants to supervise the loading of the cargo, gave evidence on behalf of the defendants. This is what he had to say in examination-in-chief (at p 139E and p 140 of the notes of evidence):

It is necessary for the tally clerk to sign on the reverse of the mate's receipt because it is for our reference and for the planning clerk to prepare the stowage plan. When I say for 'our reference', I mean for the checker's reference. ... It is the practice of the checker to ask the tally clerk to write on the back of the mate's receipt. Looking at the front of the mate's receipt, if the ship's officer wants to indicate the cargo is to be stowed on deck, it depends on the chief officer - we have three copies - but he will write it on the front of the mate's receipt. Q: Can the chief officer

adopt the notation on the back as cargo being shipped on deck ? A: No. What is on the back is for our use as stevedores only. He will have to write his own remarks on the front of the mate's receipt. Q: Would I be right in saying that if the ship wants to indicate cargo is shipped on deck, the ship will have to state it on the front. It is entirely up to the ship whether they want to write in this remark on the mate's receipt but if they do want to write, they have to write these remarks on the front. A: Yes.

50 I accept Mr Chua's evidence. The defendants were only expected to check what was on the face of the mate's receipt before issuing the bill of lading as only the front had been signed by the ship's officer. And the front of the mate's receipt, it was agreed, did not contain any notation that the goods were stowed on deck.

51 For these reasons and as in any event, I accept Mr TC Wee's evidence that the defendants had issued a clean bill of lading with the plaintiffs' approval, I decide the second issue also in favour of the defendants. The defendants did not act in breach of their duty to issue a bill of lading in conformity with the mate's receipt. The bill of lading issued was either in accordance with the mate's receipt or was issued with the plaintiffs' approval.

52 **Were the defendants under a duty to issue a claused bill of lading as they were aware the cargo was stowed on deck ?**

53 This brings me to the third and final issue on liability and that is whether the defendants had a duty to clause the bill of lading with an on deck remark independently of what was stated on the mate's receipt as they were aware that the cargo was stowed on deck.

54 For the reasons which I will briefly state below, I decide this issue also in favour of the defendants.

55 Where an agent is aware that cargo has been stowed on deck, there is a duty imposed on him, subject to his principal's instructions, to clause the bill of lading with an on deck remark, notwithstanding the absence of such a remark in the mate's receipt. That duty however does not arise where the principal having been informed by the agent that the shipper will agree to the on deck shipment of his cargo only if an underdeck bill of lading is issued, then approves and authorises the shipment on this basis.

56 I find on the evidence that the plaintiffs had been informed by the defendants the shipper would only agree to the on deck shipment on the plaintiffs' vessel of his cargo against an underdeck bill of lading and also that the plaintiffs had then approved and authorised the defendants to issue a bill of lading without any notation as to the cargo's being stowed on deck. In these circumstances, the defendants were not under a duty to issue a claused bill of lading even though they were aware the cargo was stowed on deck.

57 **Quantum**

58 I come then to the final issue between the parties, viz whether the plaintiffs' settlement of the Australian action was proper and reasonable and whether the settlement sum was reasonable in the circumstances of this case. In reality, no finding is necessary on this issue as I have decided all the issues on liability in favour of the defendants. Had I not found in the defendants' favour however, I would have decided in the affirmative on both these questions, viz that the plaintiffs' settlement of the Australian action was not only proper and reasonable but also reasonable in respect of the settlement sum. This issue is a question of fact; whether the settlement and the quantum was improper or

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unreasonable has to be determined under the laws of Australia: see Dicey & Morris *The Conflict of Laws* (1993 Ed) p 226.

59 The evidence of Mr Drew Scott James is that in the light of the laws as it stood then in Australia in 1989/1990, the settlement both in terms of the claim and the amount was reasonable.

60 In the absence of any expert evidence to the contrary, I accept Mr James' evidence.

61 There will be judgment for the defendants. The action is dismissed with costs to be taxed on the standard basis.

62 ***Claim dismissed .***

Christopher Lau JC

S Mohan (Gurbani & Co) for the plaintiff
Belinda Ang and Gladys Lee (Ang & Partners) for the defendant
