CASE NOTES

METROTEX PTY LTD v. FREIGHT INVESTMENTS PTY LTD[1]

Contract—Carriage of goods—Presumed conversion by servant of carrier or stranger—Exemption clause—Non-liability of carrier.

Few areas of law over the past two decades have been so frequently the subject of litigation as exemption clauses in contract. Even the simplest contracts in everyday life are often reduced to writing, apparently with the express purpose of including lengthy and seemingly all-embracing clauses which, if read literally, would protect the party responsible for drawing up the written contract from any liability in any circumstances whatsoever.

This attempt to circumvent common law remedies has been met by the courts with stiff opposition and numerous doctrines have been formulated to limit the effectiveness of the exemption clauses. The most radical rule was the doctrine of fundamental breach which reached its peak in the 1959 Privy Council decision of *Sze Hai Tong Bank Ltd v. Rambler Cycle Co. Ltd.*[2] In two recent cases, however, the House of Lords[3] and the High Court[4] have both rejected this doctrine as a substantive rule of law. 'Fundamental breach' is now simply a rule of construction.

Metrotex v. Freight Investments[5] is particularly interesting because it is the first Australian Supreme Court decision on exemption clauses since the doctrine of fundamental breach was disavowed. It is also interesting in two other respects: firstly, in that it involved the question of the liability of a carrier for the conversion of goods by his servant, and secondly, because, notwithstanding the court's bias against exemption clauses, the clause in question in this case succeeded in protecting the defendant carrier.

Before examining the facts and judgment of the case, it is helpful to first summarize the results of interpretation applicable to exemption clauses. Though the court divided on the correct interpretation of the exemption clause in the contract between Metrotex and Freight Investments, all three judges were agreed on what were the correct rules of interpretation that should be applied to it. Basically, there are two steps: gauge the intention of the parties from the wording of the clause and then, in the event of any ambiguity, construe the clause against the party that relies on the clause.

> The proper approach to construction in the first instance appears to be to endeavour to ascertain the intention of the parties by applying the language used as understood in its ordinary sense to the subject-matter and preferring a narrower operation to a wider operation where both are open, since the narrower operation is against the interests of the carrier who relies upon the clause.[6]

In addition to this, the 'fundamental breach' rule is still a rule of construction which must be applied wherever the language permits.

> It is now established doctrine that the language of such an exempting clause . . . is also to be read, if its language so requires and its language so permits,

[1] [1969] V.R. 9. Supreme Court of Victoria; Winneke C.J., Gowans and Lush JJ.
[2] [1959] A.C. 576; [1959] 3 All E.R. 182.
[3] *Suisse Atlantique Societe D'Armament Maritime S.A. v. N. V. Rotterdamsche Kolen Centrale* [1967] A.C. 361; [1966] 2 All E.R. 6.
[4] *Thomas National Transport (Melbourne) Pty Ltd v. May & Baker (Australia) Pty Ltd* (1966) 115 C.L.R. 353; [1967] A.L.R. 3.
[5] [1969] V.R. 9.
[6] [1969] V.R. 9, 13 *per* Winneke C.J. and Gowans J.

as subject to an implied limitation which would modify its operation so as not to allow that party to disregard performance of the main obligation of the contract.[7]

The conversion of 'fundamental breach' from a substantive rule of law to a rule of construction was in theory a major change, for under the former rule, a carrier of goods was unable, regardless of what wording he used in the exemption clause, to exempt himself from liability for failing to carry out his fundamental obligations (*e.g.* not to deviate from his regular route, to deliver the goods at the specified time or a reasonable time, not to wilfully destroy the goods, not to convert the goods for his own use). Now, however, the carrier may exempt himself from all liability provided the wording is sufficiently explicit. Only future judicial decisions will show just how clear the wording must be to achieve this result.

However, notwithstanding the demise of the doctrine of fundamental breach, the courts have armed themselves with such an arsenal of restrictive rules of construction that one may wonder whether an exemption clause could in fact be drawn up which protected a party from liability in all conceivable circumstances. To list just the more important of these restrictive rules, when there is verbal ambiguity, a court will follow the narrow meaning (the *contra proferentem* rule);[8] where there is both a general and a specific clause, the court will read down the general clause to the limits of the specific clause;[9] where a clause is ambiguous in the context of other clauses, it will be read down, even though quite clear in itself;[10] where a word has a 'strict' meaning and a wider, ordinary meaning, the former will be followed;[11] where a clause is generally worded and the party relying on it is concurrently liable under two heads of damage, the clause is construed to cover only the stricter of the two liabilities;[12] there is a particularly strong presumption (called the 'four corners rule') against construing a clause to protect a bailee who treats the goods bailed in a way quite alien to his contract,[13] and a similarly strong presumption against carriers who deviate from their agreed, or regular route;[14] and finally, there is an 'implied limitation' in any exemption clause preventing a literal construction which would lead to an absurd result.[15] This last rule is perhaps the strongest weapon of all and Windeyer J. reconciled the High Court decision of *T.N.T. (Melb.) Pty Ltd v. May & Baker (Aust.) Pty Ltd*[16] with the Privy Council case of *Sze Hai Tong Bank Ltd v. Rambler Cycle Co. Ltd*[17] (which, as already mentioned, appeared to adopt the doctrine of fundamental breach as a substantive rule of law) on the grounds that the Board was merely applying the 'implied limitation' rule of construction.[18]

The facts of *Metrotex v. Freight Investments*[19] were quite simple. The defendants agreed to carry three parcels belonging to the complainants from Sydney to Melbourne. The goods were delivered to the defendants and were

[7] [1969] V.R. 9, 12.
[8] *John Lee & Son (Grantham) Ltd v. Railway Executive* [1949] 2 All E.R. 581.
[9] *Penny v. Grand Central Car Park* [1965] V.R. 323.
[10] *Metropolitan Gas Company v. Gas Union* (1925) 35 C.L.R. 449; *Akerib v. Booth Ltd* [1961] 1 All E.R. 380.
[11] *Wallis, Son & Wells v. Pratt & Haynes* [1910] 2 K.B. 1003.
[12] *White v. John Warrick* [1953] 2 All E.R. 1021.
[13] *Lilley v. Doubleday* (1881) 7 Q.B.D. 510.
[14] *Joseph Thorley Ltd v. Orchis Steamship Co. Ltd* [1907] 1 K.B. 660; *Bontex Knitting Works Ltd v. St John's Garage* [1943] 1 All E.R. 381.
[15] *Glynn v. Margetson & Co.* [1893] A.C. 351.
[16] (1966) 115 C.L.R. 353; [1967] A.L.R. 3.
[17] [1959] A.C. 576; [1959] 3 All E.R. 182.
[18] (1966) 115 C.L.R. 353, 382; [1967] A.L.R. 3, 19.
[19] [1969] V.R. 9.

weighed at their Sydney depot. From that moment, all trace of the goods disappeared, and they were never delivered to the complainants in Melbourne. The defendants were ordered by a court of Petty Sessions to pay damages for the loss of the goods, and they obtained an order *nisi* to review the decision returnable before the Full Court of the Supreme Court of Victoria. Counsel for the defendants submitted to the Full Court that the only possible inference from the facts was that the goods were stolen from the Sydney depot, either by one of the defendants' employees or by a stranger—and the court accepted this.

It was undisputed that, were it not for the existence of an exemption clause in the contract, the defendants would have been liable. As private carriers and bailees of the goods, the onus was on the defendants to prove that the goods had been mislaid without any negligence on their part,[20] and the defendants admitted that they had not discharged this onus. (The complainants in fact claimed that the defendants were common carriers, but this was not borne out by the facts and was ignored in the judgment of the court). The case thus turned entirely on interpretation of the exemption clause (clause 5). To make interpretation of the clause easier, the majority (Winneke C.J. and Gowans J.) broke up the clause into parts as follows:

> Clause 5. The carrier accepts no responsibility for any damage—
> including injury delay or loss of any nature arising out of or incidental to the carriage or any services ancillary thereto, or
> which may occur at any time after the goods have been delivered to the carrier and before the goods have been delivered to the consignor
> whether due or alleged to be due to misconduct or negligence on the part of the carrier or not and
> whether the cause of the damage is known or unknown to the carrier.[21]

It will be observed that the clause is thus divided into two alternatives, with two riders attached. The clause operates if there is 'damage' which falls under either the first part of the clause ('including injury delay or loss . . .') or the second ('or which may occur at any time . . .'), and further, it does not matter whether the damage (i) was caused by misconduct or negligence or (ii) was known or unknown to the carrier. The clause is undoubtedly very sweeping.

Briefly, the reasoning of the majority (Winneke C.J. and Gowans J.) was as follows. First, they rejected the argument of the defendants' counsel that goods that were totally lost were not 'damage' within the meaning of clause 5. They felt damage could only mean 'damage to the consignor' rather than physical damage to the goods themselves, and total loss was certainly damage to the complainant in this case. Second, they ruled that the second alternative head in the exemption clause was ambiguous, for 'before the goods have been delivered to the consignee' may either simply indicate a terminating point for the operation of the clause, or it may mean that this part of the clause is only to apply if delivery in fact takes place. The learned judges then construed the clause *contra proferentem* and ruled that as there was no delivery in this case, the second head of clause 5 did not apply.

The first head was then examined in the light of the four possible fact situations—that is, that the loss was due to (i) a negligent act of the defendants or their servants (ii) conversion by a stranger (iii) conversion by a servant outside the course of his employment (iv) conversion by a servant in the course of his employment. The first, second and third possibilities were clearly covered by

[20] *Paterson v. Miller* [1923] V.L.R. 36; (1923) 29 A.L.R. 3.
[21] [1969] V.R. 9, 11-12.

the exemption clause for, if the loss was due to negligence, the clause clearly covered the situation, and if (as might be the case in (ii)) there was no negligence, the carrier would not be liable even if there were no exemption clause. As regards the fourth possibility, a carrier would normally be vicariously liable.[22] Counsel for the complainant submitted that conversion by a carrier's servant within the course of his employment was an action so alien to the contract that it amounted to repudiation of the contract.[23] The court, however, rejected this argument on the grounds that if an employee of the carrier did convert the goods to his own use, then such an action, on the facts, was not authorized by the carrier, and *unauthorized* conversion by a servant did not amount to repudiation. The court based this on *dicta* of Lord Denning in *Sze Hai Tong Bank Ltd v. Rambler Cycle Co. Ltd*[24] which was followed in *John Carter (Fine Worsteds) Ltd v. Hanson Haulage (Leeds) Ltd.*[25] Conversely, if the conversion had been authorized, this would have amounted to repudiation.[26]

The complainant's counsel finally submitted that 'loss' could not cover an act of conversion. The court, however, felt that there was 'no justification for making a distinction between a loss due to a negligent act of a servant engaged in the conveyance of the goods and a loss due to conversion by a servant so engaged'.[27]

Thus, as the 'loss' clearly occurred 'incidental to the carriage or any services ancillary thereto', clause 5 covered all possible interpretations of the facts, and the defendants were not liable.

Lush J. used similar reasoning, except that he gave a wider meaning to the second head of clause 5, for he did not think, on a fair reading of the words, it was confined to cases where there was actual delivery. He also laid greater stress than Winneke C.J. and Gowans J. on the use of the word 'misconduct' in clause 5 which seemed, to him, to expressly cover conversion by employees. In his general approach, Lush J. seemed more conscious than the majority of the need to construe the true intention of the parties, and was less inclined to fall back on artificial rules of construction in interpreting that intention.

The court was thus unanimous in finding for the carrier. Perhaps the most intriguing aspect of the case was the attempts by the judges and the defendants' counsel to suggest what, if any, the true limitations on clause 5 were. Voumard Q.C., for the complainant (presumably thinking it advisable to suggest some implied limitation acceptable to his client rather than suggest that the clause was without limitation) submitted that the clause did not cover loss from criminal action to which the carrier was a party or wilful destruction of the goods but the majority seemed to dismiss this suggestion somewhat cursorily: 'this modification is achieved by virtue of an implication, the basis of which is not clear'.[28]

[22] *Morris v. C. W. Martin & Sons Ltd* [1966] 1 Q.B. 716; [1965] All E.R. 725; *Leesh River Tea Co. Ltd v. British India S.N. Co. Ltd* [1967] 2 Q.B. 250; [1966] 3 All E.R. 593.

[23] Quite apart from rules concerning interpretation of exemption clauses, any breach of a fundamental term of a contract entitles the innocent party to rescind the contract. *Suisse Atlantique Case* [1967] A.C. 361, 422; [1966] 2 All E.R. 61, 86 *per* Lord Upjohn.

[24] [1959] A.C. 576; [1959] 3 All E.R. 182.

[25] [1965] 2 Q.B. 495.

[26] The court comments that this 'presumably is the explanation of *Bontex Knitting Works Ltd v. St John's Garage* [1943] 2 All E.R. 690; [1944] 1 All E.R. 381, and *Thomas National Transport (Melbourne) Pty Ltd v. May & Baker (Australia) Pty Ltd* (1966) 115 C.L.R. 353; [1967] A.L.R. 3'. [1969] V.R. 9, 15.

[27] [1969] V.R. 9, 16.

[28] *Ibid.* 13.

Winneke C.J. and Gowans J. appear to indicate there is no middle ground between actions covered by the exemption clause and action (such as conversion by the defendants themselves as distinct from their servants) which would be a breach sufficiently fundamental to repudiate the contract.

Lush J., however, does suggest an implied limitation.

> It would, however, be proper in the light of the authorities cited to read down the clause so that it applies only so long as the carrier is maintaining the objective of moving the goods to Melbourne, even though he may have departed from the contract in point of method, route, time or otherwise. Thus if the carrier has stolen, destroyed, or given away the goods the clause will cease to apply.[29]

This is still a very wide interpretation of clause 5 and appears to be, in one respect, in complete contradiction of the High Court's decision in *T.N.T. (Melb.) Pty Ltd v. May & Baker (Aust.) Pty Ltd.*[30] In that case, the court held that any deviation in route, unauthorized by the consignor, was a breach of contract, thus making all clauses, including exemption clauses, inoperative. Yet Lush J. specifically states that deviation will be covered so long as the general 'objective of moving the goods to Melbourne' is maintained.

It would thus appear that the cases decided prior to the *Suisse Atlantique Case*[31] have by no means been rendered useless. The distinction between authorized and unauthorized conversion of goods by servants of the carrier, suggested in the *Sze Hai Tong Bank case*[32] clearly still survives. The justice of this distinction would seem to be very questionable. One would have thought that conversion of goods by the carrier's servants, whether authorized by the carrier or not, would have been so utterly alien to the basic obligations of the carrier under the contract as to bring the 'four corners' rule into operation and amount to a fundamental breach of the contract—but the Full Court held this was not the case.

The extraordinary result is thus obtained that where (as in *T.N.T. (Melb.) Pty Ltd v. May & Baker (Aust.) Pty Ltd*)[33] no negligence is proved against either the carrier or his servants but the carrier deviated from his normal route, the carrier is liable for any loss that would not have occurred if there had been no deviation, but where a servant actually converts the goods to his own use without the knowledge of the carrier, the carrier is not liable.

This position indicates that the High Court might at some future date reconsider some of the very artificial distinctions that currently operate in this branch of the law.

IAN RENARD

ANDREWS v. WILLIAMS[1]

Damage—Remoteness—Nervous shock caused by mother's death in motor accident—Reasonable foreseeability of damage

A car driven by an employee of the appellant, Williams, collided with a car driven by the respondent, Andrews. The respondent's mother was also travelling in the same car. The respondent suffered physical injuries in the collision.

[29] *Ibid.* 18.
[30] (1966) 115 C.L.R. 353; [1967] A.L.R. 3.
[31] [1967] A.C. 361; [1966] 2 All E.R. 61.
[32] [1959] A.C. 576; [1959] 3 All E.R. 182.
[33] (1966) 115 C.L.R. 353; [1967] A.L.R. 3.
[1] [1967] V.R. 831. Full Court of the Supreme Court of Victoria; Winneke C.J., Little and Lush JJ. The judgment was read by Winneke C.J.