

HONG KONG / JUDGMENT

# CAREWINS DEVELOPMENT (CHINA) LTD v. BRIGHT FORTUNE SHIPPING LTD

COURT

Court of Appeal

DECIDED

13 July 2007

CASE / FILE NUMBER

CACV328/2006

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bjbj CACV 328/2006 AND CACV 329/2006 CACV 328/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 328 OF 2006 (ON APPEAL FROM HCCL NO. 49 OF 2004)

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BETWEEN CAREWINS DEVELOPMENT Plaintiff (CHINA) LIMITED and BRIGHT FORTUNE SHIPPING LTD Defendant

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AND CACV 329/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 329 OF 2006 (ON APPEAL FROM HCCL NO. 50 OF 2004)

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BETWEEN CAREWINS DEVELOPMENT Plaintiff (CHINA) LIMITED and HECNY SHIPPING LIMITED Defendant

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(Heard Together) Before: Hon Ma CJHC, Barma & Reyes JJ in Court Dates of Hearing: 4 and 5 July 2007 Date of Handing Down Judgment: 13 July 2007

## J U D G M E N T

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Hon. Reyes J:- I. INTRODUCTION Bright Fortune and Hecny (the Defendants) are freight forwarders. They issued 2 sets of bills of lading (Sets A and B) to Carewins (the Plaintiff). Both sets of bills named Artist Fashion as consignee. None of the bills were consigned To order . All

bills were straight or non-negotiable bills of lading. Both sets of bills of lading involved the carriage of goods by sea from Hong Kong to Los Angeles in California. Consequently, by section 3(2) of the Carriage of Goods by Sea Ordinance (Cap.462), the Hague-Visby Rules applied to the carriage under both sets of bills. The Defendants delivered the goods covered by the Set A bills to Artist Fashion without production of original bills of lading. Burberry later seized those goods from Artist Fashion on the ground that they infringed Burberry's trademark. Artist Fashion eventually reached a settlement with Burberry in relation to the latter's trade mark infringement suit. It is not known what Burberry and Artist Fashion agreed in respect of the goods which had been seized. However, Artist Fashion has never paid Carewins for the Set A goods. Following settlement of the Burberry action, the Defendants discharged the goods covered by the Set B bills in Los Angeles. Artist Fashion refused to take delivery of those goods and has never paid for them either. The Set B goods were instead kept in a Los Angeles warehouse until they were eventually sold. It is not known whether the sale proceeds were enough to meet any charges (including freight) incurred on the Set B goods. These facts gave rise to 2 main issues of dispute between Carewins and the Defendants. Those issues are:-

- (1) Did the Defendants breach their contractual obligations to Carewins under the Set A bills by delivering the relevant goods to Artist Fashion without production of bills of lading?
  - (2) Can the Defendants rely on clause 2 of the Set A bills to exclude their liability to Carewins arising from any misdelivery of goods to Artist Fashion? In addition to the questions just mentioned, the Defendants raise 4 subsidiary issues. Those issues as follows:-
  - (3) Was Hecny (as opposed to Bright Fortune) a party to the contracts evidenced by one or more of the Set A bills?
  - (4) Did Carewins retain property in the Set A goods at the time of any wrongful delivery to Artist Fashion?
  - (5) Given the Burberry litigation, are the Defendants entitled to rely on clause 15 of the Set A bills (allowing a carrier to discharge illegal goods at the shipper's expense)?
  - (6) Do the Defendants have a claim for the outstanding freight, demurrage and storage charges incurred in relation to the Set B goods? Separate actions were commenced by Carewins against Bright Fortune and Hecny, although the issues in both were largely similar. At first instance before Stone J, Carewins lost on Main Issue 2 in both actions (which were dealt with at the same time). Carewins now appeals against that decision. On all other issues (Main Issue 1 and Subsidiary Issues 3 to 6), the Defendants lost. They cross-appeal on those matters. The two appeals before us reflect the separate actions but as the same issues arise in both (save for Subsidiary Issue 3), they are dealt with together.
- II. DISCUSSION
- A. Main issue 1: Straight bills of lading
- A.1 The Defendants' argument
- Article I of the Hague-Visby Rules provides as follows:- In these Rules the following words are employed, with the meanings set out below:-

- (a) ... (b) contract of carriage applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea...
- (c) ... (d) carriage of goods covers the period from the time when the goods are loaded on to the time they are discharged from the ship. Article I of the Hague Rules is in nearly identical terms. I note that, for the purposes of this judgment, textual differences between the Hague Rules and Hague-Visby Rules are not material. Mr. Colin Wright (appearing for the Defendants) accepts that the Hague-Visby Rules applied to the straight bills of lading issued here. But his reasoning for so accepting, is obscure. Initially, in response to a question from the Court, Mr. Wright acknowledged that a straight bill of lading fell within the words any similar document of title in the Hague-Visby Rules, Art.I(b). Thus, Mr. Wright seemed to be accepting that for the purposes of the Hague-Visby Rules a straight bill of lading was a document of title. Such position would have been consonant with the House of Lords decision in *The Rafaela S*

[2005] AC 423. Later, Mr. Wright said that what he meant was merely that a straight bill of lading was a bill of lading (but not a similar document of title ) within the terms of Art.I(b). Contrary to his original stance, Mr. Wright thereby seemed to be denying that a straight bill of lading was a document of title . Given his position of a straight bill not being a document of title, Mr. Wright then disputed what he claimed were obiter dicta in *The Rafaela S* to the effect that a carrier should not deliver goods to a consignee under a straight bill of lading without production of the same. Mr. Wright submitted that instead:-

- (1) a consignee under a straight bill need not produce the bill to obtain delivery; or,
- (2) even if a consignee had to produce a straight bill to obtain delivery, it did not follow that a carrier was obliged to insist on production of the bill before delivering to the consignee. Mr. Wright contrasted the situation with an order bill of lading (that is, a bill made out To order ). An order bill is a negotiable document of title. The bill represents the goods. It can be endorsed by a consignee or a endorsee and transferred to some person X. Depending on the nature of such transfer (for example, a transfer by way of sale, pledge or mortgage), X thereby obtains proprietary rights (for example, as buyer, pledgee or mortgagee) in the goods underlying the bill. At any given time, the bill merely being made out To order , a carrier will not know to whom the goods underlying an order bill ought to be delivered without first having sight of the bill of lading. It consequently made sense (Mr. Wright stressed) to have a rule that goods covered by an order bill can only be delivered following initial presentation of the bill itself. On the other hand, a straight bill is non-negotiable. It can only be transferred to the consignee identified in the bill. A carrier thus has no difficulty in knowing to whom he ought to deliver. He might wish for a consignee to identify himself before delivering the goods. But there is no reason why the consignee cannot identify himself by some document (such as a passport or letter of authority) other than the straight bill itself. Production of a straight bill of lading to a carrier (Mr. Wright reasoned) was an unnecessary requirement. Any extension of the presentation rule applicable to order bills to

the straight bill situation could only give rise to inconvenience. This is because it often takes time before a consignee can get hold of a bill of lading from a shipper. During that time, goods may needlessly incur storage and other charges pending collection and the carrier and consignee would thereby be exposed to additional financial risk. In support of his argument, Mr. Wright relied on the *The Brij*

[2001] 1 Lloyds Rep 431. There *Waung J* held that, where a straight bill was concerned, it was unnecessary for a carrier to demand sight of the original bill before delivering the underlying goods to the named consignee. I do not think that Mr. Wright's argument is correct. In my respectful view, *Waung J* wrongly concluded in *The Brij* that presentation of a straight bill was not needed. To see why, I propose to look at the question of presentation of a straight bill both as a matter of general principle and of the specific construction of the Set A bills. A.1 General principle In *The Rafaela S* the House of Lords considered whether a straight bill was a bill of lading or any similar document of title within the meaning of Hague-Visby Rules Art.I(b). Their Lordships unanimously held that it was. The straight bill issued in *The Rafaela S* included the following attestation clause:- IN WITNESS whereof the number of Original Bills of Lading stated above all of this tenor and date, has been signed, one of which being accomplished, the others to stand void. One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order. Lord Bingham of Cornhill stated:-

5. It is always the task of the Court to determine the true nature and effect of a legal document, and in performing that task the Court is not bound by the label which the parties have chosen to apply to it. Where, however, the Court is considering a bona fide mercantile document, issued in the ordinary course of trade, it will ordinarily be slow to reject the description which the document bears, particularly where the document has been issued by the party seeking to reject the description. This document called itself a bill of lading. It was not a bill transferable by endorsement, and so was not negotiable ... But if this document was a mere receipt or sea waybill there was no purpose in following the traditional practice of issuing more than one original, and the time honoured language used in the attestation clause ... was entirely meaningless. The contract conditions clearly envisage that the consignee and bill of lading holder may become a party to the contract of carriage, and the conveyance of contractual rights by transfer of the bill of lading has been a, if not the, distinctive feature of a bill of lading, at any rate since the Bills of Lading Act, 1855. The conditions of this contract make no sense if the consignee, although holding the bill of lading, remains a stranger to the contract of carriage. They are unlike the standard terms of non-negotiable sea waybills .
6. The carrier responds to this argument by pointing out that the form may be used in the case of either an order bill or a straight bill, and that if it is used for the latter purpose some of the stated conditions (such as the attestation clause quoted in para 4(6) above) are inapposite. The first of these points is plainly correct: if order of or words to that effect are added in box (2) the bill becomes an order bill, and if they are not it is a straight bill. It is

also true that it is necessary in some cases (as in *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715) to reject some printed conditions of a contract as inconsistent with other provisions. Here the requirement that one of the bills must be surrendered duly endorsed in exchange for the goods could not in all cases be given effect, since even in the case of an order bill the named consignee might require delivery as holder of the bill, and in that case there could be no endorsement. It would, however, be extraordinary to treat the detailed terms of this contract as inapplicable to a named consignee holding a straight bill. In particular, I can see no reason not to give effect to the requirement that an original bill be surrendered in exchange for the goods. This provision is of course even more efficacious in the case of an order bill, since until such a bill is presented the carrier will not know the identity of the party entitled to delivery, and it has long been the undoubted practice to deliver without inquiry to the holder of such a bill of lading: *Glyn Mills Currie & Co v East and West India Dock Co* (1880) 6 QBD 475, 492; (1882) 7 App Cas 591, 603. But the requirement does not lack a commercial rationale in the case of a straight bill: the shipper will not wish to part with an original bill to the consignee or buyer until that party has paid, and requiring production of the bill to obtain delivery is the most effective way of ensuring that a consignee or buyer who has not paid cannot obtain delivery. In this case, therefore, as in the case of an order bill, the bill is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be : *Sanders Bros v Maclean & Co* 11 QBD 327, 341, per Bowen LJ. Lord Bingham examined the law relating to straight bills in England and other jurisdictions. He summarised the result of that investigation as follows:-

16. This brief survey shows that straight bills (however described) were a familiar mercantile phenomenon in the early 1920s and, as already observed, they were not ignored in the Hague Rules negotiations. Thus one would incline to infer that the Rules were intended to apply to straight as well as order bills unless either (a) there was any persuasive reason why they should be excluded or (b) the text of the Rules, broadly interpreted, suggests an intention to include them. Lord Bingham accordingly reviewed the Hague Rules for any sign that the straight bills had been excluded from their ambit. He could find no such indication. He concluded:-
18. .... It seems plain that the concern of those negotiating the Hague Rules was not to restrict the scope of the Rules but to prevent their circumvention ....
20. ....
21. I would accordingly give an expansive interpretation to the expression bill of lading or any similar document of title , which seems to me apt to cover the document issued in this case. I have no difficulty in regarding it as a document of title, given that on its express terms it must be presented to obtain delivery of the goods. But like Lord Justice Rix [at the appellate hearing] I would, if it were necessary to do so, hold that production of the bill is a necessary pre-condition of requiring delivery even where there is no express provision to that effect . Lord Steyn reached the same conclusion as Lord Bingham. Lord Steyn also

thought (at

- 45) that the attestation clause necessarily implies that delivery will only be made against presentation of the bill of lading . On the more general question of straight bill of lading as a document of title, Lord Steyn stated:-
46. .... The suggested comparison [between a straight bill and a sea waybill] is plainly unrealistic. In the hands of a named consignee the straight bill of lading is his document of title. On the other hand, a sea waybill is never a document of title. No trader, insurer or banker would assimilate the two. The differences between the documents include the fact that a straight bill of lading contains the standard terms of the carrier on the reverse side of the document but a sea waybill is blank and straight bills of lading are invariably issued in sets of three and waybills not. Except for the fact that a straight bill of lading is only transferable to a named consignee and not generally, a straight bill of lading shares all the principal characteristics of a bill of lading as already described.
47. Moreover, no policy reason has been advanced by the carrier why the draftsmen of the Hague Rules would have wanted to distinguish between a named consignee who receives an order bill of lading and a named consignee who receives a straight bill of lading. There is no sensible commercial reason why the draftsmen would have wished to deny the CIF buyer named in a straight bill of lading the minimum standard of protection afforded to the CIF buyer named in an order bill of lading.... Lord Rodger of Earlsferry delivered a concurring speech. He referred to the Privy Council's decision in *Henderson & Co. v. The Comptoir d'Escompte de Paris* (1873) LR 5 PC 253. It was apparent from the language of the Privy Council's opinion there that [t]he general view of the mercantile world ... had come to be that ... [straight] bills were not negotiable but ... they were regarded none the less as bills of lading . From this, Lord Rodger commented as follows:-
64. My Lords, once it is seen that a bill of lading for delivery to a named consignee simpliciter is indeed a bill of lading, it can also be seen that the contract of carriage in this case was covered by a bill of lading . Therefore, if the Hague Rules are not to apply to this contract, it can only be because the term bill of lading in art.I(b) is to be given a special, narrow, meaning which does not reflect commercial usage. In *The Happy Ranger*, [2001] 2 Lloyd's Rep 530, 539, at par. 28 Mr. Justice Tomlinson did indeed suggest, obiter, that the term bill of lading in art.I(b) should not be interpreted as including straight bills of lading. In reversing this decision, on other grounds, the Court of Appeal reserved their opinion on the point but expressed doubt about statements to a similar effect in some textbooks ... Since, however, there is no justification in the language or policy of the Hague Rules to narrow the class of bills of lading in art.I(b), I would respectfully reject Mr. Justice Tomlinson's suggested approach. Therefore, the contract in this case falls within the definition of a contract of carriage in art.I(b) of the Hague Rules. Lord Nicholls and Lord Brown agreed with the 3 speeches just mentioned. Consequently, *The Rafaela S* establishes the following propositions (with which I respectfully agree):-

- (1) From at least 1873 (if not earlier) mercantile practice treated straight bills as bills of lading having the characteristic of documents of title.
- (2) In the 1920s, the drafters of the Hague Rules must have been aware of this practice and would have intended the expression bill of lading or any similar document of title in Art.I(b) to reflect such established commercial usage.
- (3) It follows that the expression bill of lading or any similar document of title in Art.I(b) includes straight bills of lading. Once it is accepted that a straight bill is a bill of lading, it must be that a straight bill is a document of title in the same way that an order bill is a document of title. It must also follow that, as a document of title, a straight bill has been produced before the named consignee can obtain delivery of the goods. This is because, just as with an order bill, a straight bill is a key to the goods or, as it is sometimes described, the key to the warehouse. To obtain the goods, one has first to produce the key. This function of serving as a document of title or distinguishes a straight bill at common law from a sea waybill. The difficulty with Mr. Wright's analysis is that it draws non-existent distinctions. If he contends (which he apparently does) that a straight bill is a bill of lading within the terms of Art.I(b), he cannot then deny (as he seems to) that a straight bill is a document of title. If he cannot deny that a straight bill is a document of title, then he cannot maintain that it need not be produced to obtain delivery of the goods underlying the bill. Mr. Wright submits that, just because a consignee must produce a straight bill to obtain delivery, it does not mean that a carrier must require production of the straight bill before making delivery. But I cannot accept such hair-splitting argument. The corollary of a consignee having to produce a bill to obtain delivery must be that the carrier has to require production before effecting delivery. Otherwise, there would be little point to the straight bill as a document of title. In *The Brij* (decided before *The Rafaela S*) *Waung J* came to a different conclusion on the sole basis of a statement in Benjamin's *Sale of Goods* (5th ed.) at p.900. That said that under a straight bill the carrier is entitled and bound to deliver the goods to the originally named consignee without production of the bill. Unfortunately, the passage cited no authority in its support. By contrast, having had the benefit of the House of Lords decision in *The Rafaela S*, the 7th edition of Benjamin now acknowledges (at 18-071) that the weight of current judicial opinion seems to favour the view that the consignee named in a straight bill is entitled to delivery of the goods only on production or presentation of the bill to the carrier. In my respectful view then, as far as the presentation rule in respect of straight bills is concerned, *The Brij* cannot be regarded as correct. I would perhaps add here that, had *Waung J* had the benefit (as we have) of *The Rafaela S*, he might well have decided the matter differently. Nor can I accept Mr. Wright's contention that there is no good reason for the presentation rule where straight bills are concerned. It may be that, unlike the situation of an order bill, a carrier acting on a straight bill knows the identity of the consignee. But it is by no means the case that presentation of a bill of lading invariably serves only to identify the person to whom delivery should be made. Presentation of a bill of lading can serve other functions. For example, given that a straight bill is a document of title, seller (shipper) and buyer (consignee) will typically agree that property in goods is not to pass until the bill is

delivered to the buyer following payment to the seller. Production of a straight bill by the consignee would prove to the carrier that the consignee has acquired a proprietary interest in the underlying goods and is entitled to possession. As far as the shipper is concerned, the requirement of production would ensure that the buyer who has not paid, cannot obtain delivery: see the judgment of Lord Bingham in *The Rafaela S* at paragraph 6 (see paragraph 28 above). If the underlying goods can be delivered without production of a straight bill, the carrier would have no idea whether any condition relating to the passing of property in the goods has been fulfilled. The carrier may then become liable in conversion for delivering goods to a non-owner. Production of a bill would be his assurance that any condition relating to the transfer of property in goods has been met. He would have an assurance that, in delivering the goods to the consignee holder of the straight bill, he was not converting the goods. I do not see how the application of the presentation rule with straight bills gives rise to any more inconvenience than there would be in the situation of order bills. It seems to me that the rule is an integral part of the usual documents against payment or letter of credit arrangements encountered in routine commercial practice.

**A.3 Specific construction of Set A bills** It will have been noticed that in *The Rafaela S* the House of Lords thought that, on a true construction of the attestation clause, the relevant bill was a document of title which had to be produced to obtain the underlying goods. A similar approach of construction was used by the Singapore Court of Appeal in *Voss v. APL Co. Pte Ltd.* [2002] 2 Lloyds Rep 707. Here the Set A bills all bore the following attestation:- Received for shipment in apparent good order and condition. Terms of this Bill of Lading continued on reverse side hereof. IN WITNESS WHEREOF, the carrier by its agents has signed three (3) original Bill of Lading all of this tenor and date, one of which being accomplished the others to stand void. I think that, just as in *The Rafaela S*, the attestation clause here clearly indicates that a Set A bill was a document of title which needed to be produced to obtain the underlying goods. There would be no point otherwise to having one effective and two void original copy bills of lading in respect of each straight bill in Set A. And, like the House of Lords in *The Rafaela S*, I would reject any argument along the lines that the attestation clause is to be ignored as being meaningless or inapposite in the case of a straight bill. If a bill of lading did not have to be produced by a consignee as a condition of delivery, there would be no reason to void or render 2 original copies ineffective. The voiding of 2 of the original copies must mean that only the remaining original copy bill can serve as the document of title or key to delivery of the goods. Mr. Wright submits that the attestation clause here should be distinguished from that in *The Rafaela S*. That is because the present clause does not expressly state that One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order. But again I think that this is a distinction without a difference. As I have just explained, the voiding of 2 original copies, must have (and been intended to have) the effect that the remaining effective copy is to be surrendered in exchange for the goods. I am fortified in this conclusion by the sale agreements between Carewins and Artist Fashion in respect of the goods shipped under the Set A bills. Those sales agreements (as evidenced by the pro forma invoices for each consignment) included the following term:- PAYMENT TERMS: 1) T/T SHOULD BE WIRED AFTER THREE WEEKS OF THE SHIPMENT.

- 2) THE ORIGINAL B/L WILL BE SENT TO BUYERS BY SPEED POST AFTER SELLERS RECEIVE THE PAYMENT. The term shows an intention on the part of Carewins (as seller) and Artist Fashion (as buyer) that the Set A bills were meant to serve as documents of title. The bills were to be delivered to Artist Fashion in exchange for payment and property in the underlying goods would only have passed then. Mr. Wright accepted that the parties to a sale contract could agree between themselves that delivery of a straight bill of lading in respect of the goods could have a conveyancing effect. That means that the parties could agree among themselves that property in underlying goods was not to pass from the seller until a relevant straight bill was delivered to the buyer. Mr. Wright suggested that such conveyancing effect required an express statement in the sale contract that property was not to pass until a straight bill was delivered. But I do not see why such an intention must be expressly stated and cannot be inferred from the language used in a sale contract. By the payment term here the parties manifested a clear intention that the straight bills comprising Set A were to serve as documents of title to the goods. That intention is entirely consistent with my construction of the attestation clause in the actual bills. A.4 Conclusion on delivery without production of Set A bills As a matter of general principle and on a specific construction of the attestation clause of the Set A bills, the Defendants could only deliver the goods to Artist Fashion (as consignee) upon production of the relevant straight bills. The Defendants, however, delivered the goods to Artist Fashion without requiring the bills to be produced. Accordingly, the Defendants acted in breach of the contracts of carriage contained in or evidenced by the Set A bills. At all times, the effective original copies of the Set A bills were in Carewins possession, custody or control. Carewins having reserved the right of disposal of the goods by the payment term examined above, property in the goods had not passed to Artist Fashion at the times of delivery by the Defendants. It follows that in delivering the goods without production of the relevant bills, the Defendants acted inconsistently with Carewins rights as owner of the goods. The Defendants thereby committed the tort of conversion. B. Main issue 2: Exclusion of liability B.1 The Defendants argument The reverse of the Set A bills provide as follows:-
1. DEFINITION .... The term Merchant means the shipper, consignee, the holder of this Bill of Lading and or the receiver or the owner of the goods. .... The terms Place of Receipt Intended Port of Loading Intended Port of Discharge and Intended Place of delivery mean respectively the place of receipt, port of loading (Ocean Vessel), port of discharge (Ocean Vessel), and place of delivery nominated on the front hereof, and The term Goods means the cargo received from the Shipper and includes any Container(s) supplied by or on behalf of any other than the carrier.
  2. CARRIER S RESPONSIBILITY
- (a) Subject to Clause 8 and 9 hereof [relating to containers packed by the Merchant and the Carrier s containers] the liability (if any) of the carrier in respect of the Goods during the period commencing with their being loaded onto any sea going vessel and continuing up to and during discharge from that vessel or from another sea going vessel into which the Goods

shall have been transhipped shall be determined in accordance with the provisions of the Carriage of Goods by Sea Act of the United States of America approved April 16, 1936 which shall be deemed to be incorporated herein and in accordance with the terms and conditions of the Bill of Lading or other contract of carriage of the sub contractor responsible for the carriage of such Goods by sea, all of which terms and conditions to the extent that they are not in conflict with the express provisions of this Bill of Lading, are incorporated herein.

- (b) Save as provided in (a) hereof the Carrier shall be under no liability in any capacity whatsoever for loss or misdelivery of or damage to the Goods however caused whether or not through the negligence of the Carrier, his servants or agents or sub contractors or for any direct or indirect loss or damaged caused by delay or for any indirect or consequential loss or damage.
  - (c) In the event of any loss or misdelivery or delay in deliver[y] of or damage to the Goods occurring between the time that the Goods are received by the carrier at the Place of receipt and the time of delivery at the Intended Place of delivery the onus of proving that such loss misdelivery delay in delivery or damage (or any part thereof) occurred during the period specified in Clause (a) hereof shall be upon the Merchant. In the event that the Merchant is unable to discharge such onus of proof the Carrier shall be under no liability for such loss misdelivery delay in delivery or damage to the Goods (or any part thereof) in accordance with (b) hereof.
  - (d) INSURANCE WILL NOT BE ARRANGED BY THE CARRIER EXCEPT WITH THE EXPRESS INSTRUCTIONS IN WRITING [OF] THE CONSIGNOR AND THEN ONLY AT HIS EXPENSE AND LODGEMENT OF A DECLARATION AS TO VALUE PRIOR TO SHIPMENT.
3. LIMITATION OF LIABILITY Insofar as loss of or damage to or in connection with the Goods is caused during the part of the custody or carriage to which US COGSA applies (1) the Carrier shall not be liable for loss of or damage in an amount exceeding the minimum allowable per package or unit (US\$500), unless the value (and nature) of the Goods higher than this amount has been declared in writing by the Merchant before receipt of the Goods by the Carrier and inserted on the face of this Bill of Lading and extra freight has been paid as required. If the actual value of the Goods per package or unit exceeds such declared value the value shall nevertheless be deemed to be the declared value and the Carrier s liability, if any, shall not exceed the declared value. Any partial loss or damage shall be adjusted pro rata on the basis of such declared value. If the declared value has been willfully misstated or is markedly higher than the actual value, the Carrier shall not be liable to pay any compensation. (2) If the Goods have been packed into a Container (as defined in Clause 1) or utilized into a similar article of transport by or on behalf of the Merchant it is expressly agreed that the number of such Containers or similar articles of transport shown on the face of this Bill of Lading shall be considered to be the number of package units for the purpose of the application of the limitation of liability provided for in this clause. The Hague-Visby Rules provide as follows:- listnum "WP List 1" \l 2 Article III:-

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with the goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.
- listnum "WP List 1" \l 2 Article VII:- Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea. Article III(8) nullifies any clause in a bill of lading which provides for a lesser liability than that imposed by the Rules. But Art.III(8) is subject to Art. VII. The latter allows a carrier and shipper to agree lower limits of liability or to exclude liability altogether for the period prior to the loading on and subsequent to the discharge from the ship of goods. Any limitation or exclusion clause must, of course, comply with the common law requirement of clarity. It must be clear and unambiguous what liability is to be limited or excluded by a clause. If not, any ambiguity in a clause will be construed against the party seeking to rely on the alleged limitation or exclusion. Mr. Wright contends that cl.2(b) of the Set A bills of lading are wide and clear enough to exclude liability on the part of the Defendants for misdelivery of goods without production of bills of lading. In particular, Mr. Wright stresses the words misdelivery ... however caused in cl.2(b). Any misdelivery without production of bills of lading must (Mr. Wright argues) have taken place subsequent to the discharge of the goods from a vessel, either after the goods were carried over the ship's rail or after the ship's tackle was removed, following unloading (discharge), from the containers stuffed with the goods. I am unable to agree with Mr. Wright's submission. This is because I believe that, on a true construction of clause 2 as a whole, it does not exempt the Defendants for the misdeliveries here. Put at its lowest, there are at least 2 ambiguities which are to be resolved against the Defendants.
- B.2 Ambiguity 1: True construction of clause 2(b) Assume first that misdelivery must have taken place after discharge. Clause 2(b) purports to exempt liability for misdelivery ... however caused whether or not through negligence. Had the clause excluded liability for misdelivery ... however caused and stopped there, it might have been sufficiently clear that any misdelivery whatsoever was exempted from misdelivery. But the words however caused have been qualified by the addition of the words whether or not through negligence. Thus, on one reading, exemption under cl.2(b) appears to be confined to either misdelivery however caused through negligence or misdelivery however caused ... not through negligence. Misdelivery can be committed in ways which do not involve any consideration of negligence or non-negligence. There can (as here) be a deliberate or intentional misdelivery of goods to a party despite non-production of a bill of lading. Such misdelivery constitutes the tort of conversion in respect of which considerations of negligence or non-negligence are irrelevant. Clause 2(b) may be wide enough to cover the situation where, having (say) been instructed by the shipper to deliver to X without production of the bill of lading:-

- (1) the carrier delivers to X but is later told by the shipper that delivery ought to have been made to Y; or,
  - (2) the carrier delivers to Y because he inadvertently mistakes Y for X. But I do not think that cl.2(b) can be said to cover the situation here. In this case, having been instructed by the shipper to deliver only on condition of production, the carrier ignores that instruction and instead deliberately delivers without any production. What has happened here is beyond a matter of negligence or non-negligence, it is an intentional disregard of a term of the actual contract of carriage. It is possible for a clause to exclude liability for such an intentional disregard, but the clause must be crystal clear. Such clarity is essential particularly where what is sought to be excluded is precisely what the Defendants had contracted to do, viz, make proper delivery of goods. Some of the ambiguity inherent in cl.2(b) was manifest in Mr. Wright's own submissions. Possibly alive to the difficulty just highlighted, he suggested that the phrase whether or not through negligence could be read as qualifying the preceding word damage while the words however caused should be taken as referring to both the preceding words misdelivery and damage. That reading appears to me to be convoluted and strained. It seems more appropriate to take whether or not through negligence as circumscribing the ambit of however caused and the whole expression however caused whether or not through negligence as qualifying the preceding references to loss misdelivery and damage. Given that it is not evident that cl.2(b) covers what happened here (namely, the deliberate misdelivery of goods without production of bills of lading, this amounting to conversion), cl.2(b) does not exclude the Defendants' liability.
- B.3 Ambiguity 2: Correlation of clause 2 to the front of the bills** I have so far assumed in the Defendants' favour that misdelivery took place after discharge from the vessel. But what does discharge mean? It is not a term defined by the Hague or Hague-Visby Rules. Accordingly, when does it begin or end? In *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.* [1954] 2 QB 403 (at 418), Devlin J pointed out that the Hague Rules left it open to the parties to define the content of obligations such as loading and discharge in relation to a carriage of goods. He said:- The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide. It will be noticed that by cl.2(a) the Defendants accept liability (subject to limits in the US Carriage of Goods by Sea Act 1936 [COGSA 1936]) for what happens to goods during the period commencing with their being loaded ... and continuing up to and during discharge... Let me identify this range of time as Period A. The initial words of cl.2(c) refer to the event of misdelivery between the time that the Goods are received ... at

the Place of Receipt and the time of delivery at the Intended Place of Delivery . Let me identify this range of time as Period X. Clause 2(c) goes on to say that the Merchant has the burden of showing that a misdelivery during Period X in fact took place within Period A. Mr. Wright contends that Period A is a much narrower range than Period X. According to Mr. Wright, Period A begins either when goods are hoisted on board over the ship's rail or shortly before that time when the ship's tackle is attached to a container of goods for hoisting on board. By the same token, Mr. Wright says that Period A ends upon discharge when the goods are hoisted over the ship's rail and placed on the quay or shortly after that time when the ship's tackle is removed from a container of goods deposited quayside. That is one possible reading of cl.2 as a whole. But it is not the only possible reading. It is necessary to read the contract as a whole. And in the present case, construed in the context of the whole of a Set A bill, cl.2 should, I think, be read as treating Periods A and X as equivalent. To see how this arises (or, to put it another way, why there is ambiguity), it is necessary to look at the front of the Set A bills. There one sees that the Port of Discharge , the Place of Delivery , and the Final Destination are all described in identical terms, that is, Los Angeles, CA . The bills further identify the carriage as being CY-CY , that is, container yard to container yard . The reference to Los Angeles as being the Port of Discharge is ambiguous in that it may be referring, on the one hand, to the port area of the city of Los Angeles. On the other hand, the reference may be to the entire of Los Angeles as a port city. In the latter case, the place of delivery under the Set A bills would be the same as the place of discharge . Within the terms of cl.2 discharge from that vessel in sub-cl.(a) would then equate with the time of delivery at the Intended Place of Delivery in sub-cl.(c). As I have remarked earlier, the place of discharge and delivery are described in identical terms in the Set A bills. If Periods A and X are treated as synonymous, cl.2(c) would be stipulating that the burden of proving that loss, damage or misdelivery happened within Period X (that period being the same as the range specified in cl.2(a)) is on Carewins. On such reading, the Defendants would only be excluded from liability where loss, damage, or misdelivery occurred before goods were received or after they were delivered. The CY-CY reference does not take matters further. This is because it is not apparent where the end container yard is supposed to be. Thus, the CY-CY term may concern discharge at a container yard somewhere in the port city of Los Angeles with delivery taking place at the same yard. Alternatively, discharge may be in the port area of Los Angeles with delivery ultimately taking place in a container yard somewhere else in Los Angeles. Mr. Wright's reading would only be consonant with the latter, not the former possibility. What actually happened on delivery by the Defendants to Artist Fashion is unclear. At first instance, the judge found as follows:-

184. Admittedly, the available evidence is imprecise, but it is a strong inference from the known facts that the cargo was fully discharged before clearance by US Customs, at which point TUG, or its agents, appeared and took possession of the goods without production of a bill of lading -- which, as I have earlier held, is necessary even in the instance of a straight bill. By referring to cargo having been fully discharged , the judge was using discharge in the

narrower sense advanced by Mr. Wright. As we have seen, it is possible to construe the contract evidenced by the Set A bills as defining the operation of discharge from a vessel more widely to encompass the entire process of getting the goods off a vessel and delivering them to a consignee. The judge also refers in the passage to TUG. TUG had a non-exclusive agency agreement with Bright Fortune (see the Judgment below at 14). Nonetheless, at trial, Mr. Robert Wu of TUG accepted in answer to a question in chief from Mr. Wright that Artist Fashion was TUG's client. Mr. Wu also said in answer to a question from the Court that TUG was acting as Artist Fashion's forwarding agent. It appears therefore that the judge regarded the misdelivery as having taken place at some point before Customs clearance in (presumably) the port area of Los Angeles. At that point, on the evidence, TUG acting on behalf of Artist Fashion apparently obtained delivery of the goods from the Defendants, cleared them through customs, picked them up from a port area terminal, and then took them straight to Artist Fashion in Long Beach. If that is right, the circumstances of actual delivery corroborate the alternative reading of cl.2 proposed above. The port of discharge and place of delivery being in fact the same, it is plausible that the parties contractually regarded discharge and delivery as equivalent operations. On Mr. Wright's more restricted reading (which the judge below accepted), delivery would have taken place after discharge (narrowly construed) and the exclusion in cl.2(b) will bite. On the alternative reading, which I believe for the reasons stated to be the correct one, delivery would have been within Period A in cl.2(a) and the US\$500 per package limit in COGSA 1936 should apply. Although lower than the minimum 666.67 SDR limit in the Hague Visby Rules, the US\$500 limit is sufficiently generous to cover the amounts sought to be recovered here. Again at its lowest, there is an ambiguity as to which reading is the correct one and cl.2 must be accordingly construed against the Defendants who are seeking to rely on the provision to exclude liability. Mr. Wright belatedly suggested on per package limitation that the US\$500 COGSA 1936 limit should only be multiplied by the number of containers (23) covered by the Set A bills (as opposed to the number of packages or cartons stuffed into those containers). But that point neither having been pursued at trial nor raised in the Respondents Notice by the Defendants, was disallowed by this Court. If necessary, I would in any event have held against Mr. Wright's suggestion that a container is the operative package. Given that, at least on one reading of the Set A bills, the parties contracted to treat discharge as including delivery, the operation of discharge referred to in the Hague-Visby Rules must be regarded as covering delivery in this particular case. This conclusion would be a consequence of Devlin J's dictum, cited above, to the effect that the parties can agree precisely what activities are to constitute loading and discharging for the purposes of the Rules. In the specific facts here, delivery would then not have been an event subsequent to discharge. If the Hague-Visby Rules accordingly apply, then following *The River Guara*

[1998] 1 Lloyd's Rep 225 (CA), the package limitation relates to the number of packages within a container and not to the container itself. B.4 Conclusion on exclusion of liability Contrary to what Stone J concluded at first instance, I think that cl.2 is not in sufficiently clear terms to exclude the Defendants liability for misdelivery. C. Subsidiary issue 3: Hecny as carrier

Some Set A bills of lading expressly identified Bright Fortune as carrier. Others bills named Hecny as carrier. Mr. Wright submits that the latter bills identified Hecny by mistake and should be ignored in that respect. Looking at the front of those bills (Mr. Wright says) it would have been evident that Bright Fortune was the carrier. This issue arises only in the action against Hecny. Mr. Wright seeks to support this argument by reference to the shipping orders corresponding to the Hecny bills. Those shipping orders are headed with Bright Fortune's name. Mr. Wright reasons that the shipping orders evidence a contract between Carewins and Bright Fortune prior to the signature of the Hecny bills much later. The Hecny bills (Mr. Wright says) only evidence the terms of contracting with Carewins. The Hecny bills cannot substitute Hecny as the party with whom Carewins was contracting, if the original contract had been made with Bright Fortune. There is nothing in this point and, in my view, Stone J was right to dismiss it. I see no inconsistency between the front of the Hecny bills and their reverse. The front of the bills is signed by Bright Fortune solely as agents. To see for whom Bright Fortune was acting, one looks to the reverse of the bills and reads that Hecny is expressly named as carrier. The shipping orders may have been on Bright Fortune headed forms. But that does not preclude the possibility of Bright Fortune only acting for Hecny as (say) an undisclosed principal. I therefore see no inconsistency between the Hecny bills and the shipping orders. There is no evidence supporting the suggestion that Hecny was wrongly substituted as a contracting party in place of Bright Fortune.

D. Subsidiary issue 4: Passing of property Mr. Wright suggests that property in the relevant goods had passed to Artist Fashion prior to any misdelivery. This is because (according to Mr. Wright) property would have passed when goods were unconditionally appropriated to the operative sale contracts and shipped freight collect to Artist Fashion. I do not think that is right. As we have seen, Carewins implicitly reserved the right to the disposal of the goods by stipulating that bills would only be delivered to Artist Fashion following payment in full. This meant that property in the goods was not to pass until, having fully paid, Artist Fashion received original bills of lading. Mr. Wright says that it would be odd if, Artist Fashion having paid in full, property would still not pass until Artist Fashion had received the bills of lading. But I see nothing strange in this. It is a consequence of the simple documents against payment arrangement which the parties agreed among themselves. A more sophisticated arrangement whereby a letter of credit was employed and documents were released at the same time as payment could have been agreed between the parties. But they did not do so. There is accordingly nothing in this point. The judge below was also right to dismiss it. I should perhaps just add for the sake of completeness, that even if property in the goods had passed, as long as there was privity of contract between Carewins and the Defendants, an award of substantial damages was possible: see *Dunlop v Lambert* (1839) 6 CL. & F. 600; *The Albazero* [1977] AC 774, at 844-849.

E. Subsidiary issue 5: Liberty to discharge under clause 15 Clause 15 of the Set A bills entitles the Defendants to discharge illegal goods as they see fit at the shipper's expense. Mr. Wright submits that the Defendants are entitled to rely on that clause because the goods underlying the Set A bills infringed against Burberry's trademark. The judge dismissed this point because there was no evidence supporting the

allegation of a trademark infringement. In my view, the judge was right. Insofar as it was being alleged that the goods infringed Burberry's mark, that mark was not even put in evidence before Stone J. As evidence of infringement, Mr. Wright relies on the fact that Burberry sued Artist Fashion and seized the goods corresponding to the Set A bills. But that litigation was compromised on terms that were not placed before the judge in evidence. Burberry's preemptive seizure was merely the outcome of an interlocutory application. No final judgment was ever handed down by any US Court. Finally, Mr. Wright refers to an e-mail between Artist Fashion and Carewins referring to wanting the Burberry in the pastel. It seems to me that such correspondence can hardly be compelling evidence of an infringement. People often use a well-known brand name to refer to a product style by way of shorthand. A Burberry pastel might thus merely refer to a pastel colour similar (or even identical) to that used in Burberry products. But that is far from acknowledging that the rest of the product is to bear Burberry's distinctive mark (as opposed to some other design).

F. Subsidiary issue 6: Defendants counterclaim

The Defendants counterclaim for freight, storage and demurrage charges in connection with the goods covered by the Set B bills of lading. In fact, the Defendants have not themselves paid any storage or demurrage charges in respect of the goods. They have not been asked to do by the ocean carrier engaged by them to ship the goods to Los Angeles. They instead seek a declaration of a right to be indemnified against any storage or demurrage charges payable. On the declaration for storage and demurrage charges, the judge observed the following:-

236. ... [T]he hard fact is that the events the subject of this case took place fully three years ago [from July 2006], and that no claim whatever has been received in this regard by either the defendant or by TUG. The judge then refused (at
- 237) to grant any declaration when very obviously the court is not in possession of all relevant information, and when the counterclaiming defendants appear to have made no effort to assist or to inform in this regard. Despite the time that had elapsed, there was no adequate evidence as to what storage or demurrage charges had accrued prior to the sale of the Set B goods. In those circumstances, the judge was plainly entitled in the exercise of his discretion to decide against making any declaration. In respect of freight, the judge referred to the auction of the Set B goods. No evidence was produced at trial of the amount which such sale fetched. The judge therefore had no idea if and to what extent all or any outstanding freight charges have been defrayed. The Defendants had a right, by themselves or through their ocean carriers as sub-bailees or sub-agents, to exercise a lien over the Set B goods. If any freight was left unpaid, the Defendants were entitled to sell the Set B goods to pay off the outstanding amount. The ocean carriers sold the goods. But it is not known how much was fetched. It is therefore impossible to say whether the freight of US\$24,436 claimed by the Defendants has or has not been fully recovered from the proceeds of sale. In the circumstances, I think the judge was right to express doubt as to whether the Defendants had indeed suffered any loss in the form of unpaid freight. The evidence of such loss was absent. Consequently, I do not think the judge's decision to refuse the claim for freight can be faulted. The judge also held that freight was in any event not payable by

Carewins because the bills had been endorsed freight collect . I doubt that the judge was right in this, since it seems to me that under the terms of the bills of lading Carewins as shipper was contractually obliged to pay freight. Nonetheless, in light of the judge s refusal of freight on the alternative ground of a lack of evidence of loss, it is not necessary for me to decide whether the judge rightly construed the freight collect endorsement. III.

CONCLUSION The Defendants delivered Carewins goods without production of the relevant straight bills. That amounted to a breach of the contract of carriage and the tort of conversion. Clause 2 of the Set A bills does not exclude the Defendants liability. The result is that the Defendants have lost on all issues. I would therefore propose an Order along the lines sketched out in the paragraphs below. Carewins appeals are allowed. Carewins is entitled to US\$111,788.10 (corresponding to the invoice value of the goods underlying the Bright Fortune bills) in HCCL 49 of 2004 and US\$761,239.90 (corresponding to the invoice value of the goods underlying the Hecny bills) in HCCL 50 of 2004. The parties are to have liberty to make further submission as the appropriate interest to be awarded on the said judgment sums. The Defendants cross-appeals are dismissed. There will be an Order Nisi that the Defendants are to pay Carewins costs on appeal and at first instance, such costs to be taxed on a party-and-party basis if not agreed. Hon. Barma J: I agree. Hon. Ma CJHC: For the reasons contained in the Judgment of Reyes J, I would allow the appeals. Accordingly it is ordered that:-

- (1) The appeals are allowed and the cross appeals be dismissed.
  - (2) There be judgment for the Plaintiff against Bright Fortune in the sum of US\$111,788.10 (in HCCL 49 of 2004) and against Hecny in the sum of US\$761,239.90 (in HCCL 50 of 2004).
  - (3) The parties be at liberty to make further submissions with regard to interest on the said judgment sum.
  - (4) There will be an order nisi that the Defendants pay the Plaintiff s costs here and below in both actions, such costs to be taxed on a party and party basis, if not agreed. (Geoffrey Ma) (Aarif Barma) (A T Reyes) Chief Judge, High Court Judge of the Court of First Instance, High Court Judge of the Court of First Instance, High Court Mr Benjamin Chain, instructed by Messrs Ho, Tse, Wai & Partners, for the Plaintiff/Appellant in both appeals Mr Colin Wright and Mr George Hui, instructed by Messrs H H Lau & Co., for the Defendants/Respondents in both appeals
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Prepared on 28 October 2026 · Esheria