CONTRACT — EXEMPTION CLAUSE — FUNDAMENTAL BREACH

Sze Hai Tong Bank Limited v. *Rambler Cycle Co. Ltd.*[1] has strengthened the line of authority which would seem to offer some relief from even the most carefully drafted exemption clauses. Although the decision itself does not break new ground, the pronouncement of the Privy Council provides a welcome authoritative restatement of law.

16. *Browning* v. *Morris* (1778) 2 Cowp. 790, 792; 98 E.R. 1364: ". . .where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon the other; there, the parties are not in *pari delicto;* and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract."
17. See note 16.
18. *Harse* v. *Pearl Life Assurance Co.* [1904] 1 K.B. 558, 564.
19. (1760) 2 Doug. 696.
20. (1760) 2 Burr. 1005.
21. [1943] A.C. 32, 62-64.
22. [1960] 2 W.L.R. 127, 133

1. (1959) 25 M.L.J. 200; [1959] 3 All E.R. 182.

The facts in *Sze Hai Tong Bank Limited* v. *Rambler Cycle Co. Ltd.*[2] are as follows: The respondents shipped from England to Singapore, bicycle parts to the value of about £300 under a bill of lading requiring the goods to be delivered "unto order or his or their assigns." Clause 2 of the bill of lading contained an exemption clause, and the conditions material to the present case are that " *(c)* in all cases, the responsibility of the carrier, whether as carrier or as custodian or bailee of the goods, shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom."

After the goods had been discharged from the ship, and placed in the godowns of the Singapore Harbour Board, the shipping agents released them to the consignees, the Southern Trading Company against a written indemnity by the consignee's bank, the present appellants. There was no production of the bill of lading. The consignees, the Southern Trading Company did not pay for the goods and the Rambler Cycle Company brought an action against the shipping company claiming damages for breach of contract or for conversion. The shipping company brought in the Southern Trading Company and the Sze Hai Tong Bank as third parties, claiming that they were entitled to be indemnified by them.

The action was tried in the High Court of Singapore before Whitton J. He gave judgment for the Rambler Cycle Company and also made a declaration that the shipping company was entitled to be indemnified by the third parties. The Sze Hai Tong Bank appealed to the Court of Appeal, Singapore (Knight, Acting C.J. of Singapore, Thomson C.J. of the Federation of Malaya and Chua J.) who dismissed the appeal. The Sze Hai Tong Bank then appealed to Her Majesty in Council. The issue before the board was whether the shipping company was liable under the circumstances, for, if so, the Sze Hai Tong Hank would also be liable on the indemnity. The law relating to the duty of the shipowner to deliver cargo only on the production of the bill of lading that relates to it has been stated by Butt J., in *The Stettin:* [3]

> "According to English law and the English mode of conducting business a shipowner is not entitled to deliver to the consignee without the production of the bill of lading."

This principle is so well known in commercial law that Wright J. (as he then was) said in *Skibsaktieselskept Thor Thoresens Linge* v. *H. Tyer and Co. Ltd.:* [4]

> " It is not necessary to refer to authority for the proposition that such a delivery to anyone but the holder of the bill of lading is *prima facie* wrongful."

But he pointed out:

> " There may be cases where hills of lading are lost or destroyed or stolen, and in those cases, the shipowners would commit no conversion in delivering to the *rightful owner*[5] even if the bills of lading are lost or destroyed or stolen, and in those cases, the shipowners would commit no conversion in delivering to the rightful owner even if he has not the bill of lading, though they would *run the risk of adverse rights*[6] having been created....."

From the dicta above, we see how vital the bill of lading is, for it represents the goods, and possession of the bill of lading would mean possession of the goods, and the holder of it could sue in conversion anyone who deals with his goods adversely.

2. *Ibid.*
3. (1889) L.T. Rep. 200; 14 P.D. 142.
4. (1929) 35 Li. L. Rep. 163.
5. The italics are the contributor's.
6. The italics are the contributor's.

The *Sze Hai Tong Bank* case did not come within any of the exceptions justifying delivery without the bill of lading. It was contended however that the taking of an indemnity as the alternative (for the shipping agents knew that they were doing something which they should not do) was common practice — "an everyday occurrence." On this point, it was observed by Lord Johnstone in *Carlberg* v. *Wemyss Coal Company, Limited* [7] that:

> ".....neither the owner, his agent nor the master can, I think, be called upon to accept a banker's or any other guarantee of indemnity, though such a thing is not unknown, and in the event of total loss of the bill of lading might to be resorted to, if necessary at the sight of the court. There is no such custom of delivering on a guarantee as is alleged. It is neither part of the general law merchant nor is it a local custom of which both parties must be held to have been cognisant."

This proposition found support in *Strathlorne Steamship Company, Ltd.* v. *Andrew Weir & Co.*[8] where the Court of Appeal held that the shipowners were liable to the holders of the bills of lading as the goods never reached them (the goods having been released to some Chinese merchants who did not produce bills of lading but only letters of guarantee signed by a bank). [9]

The prime duty of a shipowner to deliver goods only on production of the bill of lading that relates to them cannot therefore be disregarded; nor can, in such circumstances, a shipowner escape liability to the holder of the bill of lading by the taking of an indemnity.

In order to escape the consequences of misdelivery, the appellants in the *Sze Hai Tony Bank* case contended that the shipowner was protected by the exemption clause in the bill of lading stating "the responsibility of the carrier.....shall be deemed.....to cease absolutely after [the goods] are discharged." The Board however held that the exemption clause did not protect the appellants as this was a case of fundamental breach.

Reliance was placed by the appellants on the case of *Chartered Bank of India, Australia and China* v. *British India Steamship Navigation Company* [10] where there was a similar clause that "in all cases and under all circumstances, the liability of the company shall cease when the goods are free of the ship's tackle." The goods in this case were discharged at Penang and placed in a shed at the jetty. Whilst there, a servant of the lading agents fraudulently misappropriated them in collusion with the consignees. Lord Macnaghten delivering the opinion of the Board of the Privy Council in the above case, held that although there had been no delivery under the bill of lading, yet the provision as to cesser of the defendant's liability directly the goods were "free of the ship's tackle" was perfectly clear, and was therefore operative and effectual to protect them. His Lordship even went so far to say that "the parties are perfectly free to make any stipulation they please, unembarrassed by any implied condition or any original underlying obligation." No doubt, if this *dictum* were to be pursued seriously, it might lead to undesirable results in view of the unequal bargaining position of parties in standard form contracts. Although the close analogy between the *Sze Hai Tong Bank* case and the *Chartered Bank* case might justify a similar decision, Lord Denning in the *Sze Hai Tong Bank* case has happily distinguished the latter case on the ground that the act there was that of a fraudulent servant which could in no wise be imputed to the master, whereas in the instant case, the action of the shipping agents at Singapore could be regarded as that of the

7. [1915] S.C. 616.

8. (1934) 40 Com. Cas. 168.

9. See also *Hannam* v. *Arp* (1928), 30 LI. L. Rep. 306.

10. [1909] A.C. 369.

shipping company itself.[11] By so doing, his Lordship narrowed down the decision in the *Chartered Bank* case purely to its own facts. Whether Lord Denning's distinction of the *Chartered Bank* case is convincing or not, the Board's pronouncement in the present case is probably influenced by public policy.

Lord Denning considered that the exemption clause was so wide as to be unreasonable. It could, for example, absolve the shipping company if they had burnt the goods or thrown them into the sea. His Lordship used the technique of implying a term in the contract, and was thus able to limit and modify the clause to the extent necessary to enable effect to be given to the main object and intent of the contract[12] — for one of the main objects was the proper delivery of the goods by the shipping company, "unto order or his or their assigns," against production of the bill of lading. If the shipping company were free to dispose of the goods to anyone they wished, this would be in direct contravention of the contract.

There have been dicta[13] expressing the view that even if the conditions were unreasonable, they would nevertheless still be valid, while in others the court has refused to consider the question of reasonableness at all unless it constituted fraud. Thus, in *Gibaud* v. *Great Eastern Railway,*[14] Bray J. expressly disagreed with the *dicta,* of Bramwell[15] and Byles[16] and said :

> " Every contract is avoided by fraud, and if the condition is so irrelevant or extravagant that the party tendering the ticket must have known that the party receiving it could never have intended to be bound by such a condition, then I do say that the assent of the party receiving the ticket was obtained by fraud and we would not be bound. The mere fact that the judge or jury considered the condition unreasonable would not in my opinion be sufficient justification for a finding that the assent was obtained by fraud."[17]

From an analysis of these cases it would be observed that no condition in a standard form contract can, apart from statute, be invalidated on the score of unreasonableness unless it is of a fraudulent nature. As Viscount Haldane L.C.[18] said in *Grand Trunk Railway of Canada* v. *Robinson* "if the law authorises it, such a contract cannot be pronounced to be unreasonable by a Court of Justice."

11. It is interesting to note that in *Compania Importadora de Arroces Collette Y Kamp S.A.* v. *Peninsula and Oriental Stream Navigation Company* (1927) 28 LI. L. Rep. 63, (King Bench Division) Wright .J. (as he then was) distinguished the *Chartered Bank* Case on the ground that the delivery to the landing agents (who acted as intermediary for both the shipowner as well as the consignees) could not be regarded as a mis-delivery — delivery to the wrong person.

12. Glynn v. *Margetson & Co.* [1893] A.C. 351; *G.H. Renton & Co.* v. *Palmyra Trading Corporation of Panama* [1957] A.C. 149 at 164.

13. For example, *Woodgate* v. *Great, Western Railway Company* (1884) 51 L.T. 820, 830 *per* Hawkins J.; and Pratt v. *South Eastern Railway Company* [1897] 1 Q.B. 718, 720 *per* Cave J.: "This is a common law contract of bailment, and the question of reasonableness does not arise. If it did, I should say the condition was reasonable." See also *Grand Trunk Railway of Canada* v. *Robinson* [1915] A.C. 740 at 747; *Ludditt* v. *Ginger Coote Airways, Ltd.* [1947] A.C. 233 at 242.

14. (1920) 125 L.T. 76, 78.

15. *Parker* v. *South Eastern Railway Co.* (1877) 36 L.T. Rep. 540; 2 C.P. Div. 416 at 428: "I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document . . . . no condition not relevant to the matter at hand."

16. A similar dictum by Byles in *Van Toll* v. *South Eastern Railway Co.* (1862), 12 C.B.N.S. 76.

17. It is interesting to that his Lordship did not classify irrelevance under the category of fraud but merely considered that if the condition was so irrelevant as to be outside the ambit of contract then it would be invalid. He instanced a case where the article deposited would be forfeited if not reclaimed within five minutes. His Lordship was thus able to avoid the 'delicate' question of unreasonableness in standard form contract.

18. (1915] A.C. 740, 747; Lord Loreburn in *F.A. Tamplin S.S. Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* [1916] 2 A.C. 397 at p. 404 made the same uncompromising assertion that "no court has an absolving power" *cf.* Lord Simon in B*ritish Movieto-news, Ltd.* v. *London Cinemas, Ltd.,* [1951] 2 All E.R. 617 at 624.

On the other hand, there are *dicta* especially in more recent cases which incline towards regarding unreasonable conditions invalid. In *Thompson* v. *L.M.S. Railway Co.,*[19] Lawrence and Sankey L.JJ. expressed the view that if there was a condition unreasonable to the knowledge of the company tendering a ticket, the passenger would not be bound. However, no indication was given of the degree of unreasonableness that would suffice to invalidate a condition, except that Sankey L.J. spoke of conditions "so unreasonable that nobody could contemplate that they exist." However, it is only during the last decade that this approach has been more pronounced. In *Bonsor* v. *Musicians Union,*[20] Denning L.J. (as he then was) in considering the terms of the contract imposed by the association, approached the matter as if they were bye-laws and said "any rule found to be contrary to natural justice or what comes to the same thing, to what is fair and reasonable will be held to be invalid."

As authorities stand, the question as to whether unreasonableness will invalidate the condition has not been judicially settled, but there is a definite trend towards limiting conditions which are unreasonable and the case of *Sze Hai Tong Bank* has strengthened this approach. Lord Denning has declared that "there is therefore an implied limitation on the clause, which cuts down the extreme width of it: and, as a matter of construction their Lordships declined to attribute to the unreasonable construction contended for." [21]

The policy behind the interpretation of fundamental breach[22] is discernible in the same learned Judge's dictum in *John Lee & Son (Grantham), Ltd.* v. *Railway Executive*[23] where he provocatively declared: ".....there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused. It would therefore be a very serious question whether the defendants are free to exempt themselves in the wide terms which are here contended for. It seems to me preferable that a limited construction should be put on the clause so that it should be valid....."

But this is *obiter* and one may be permitted to doubt whether the history of the common law reveals any substantial support for this claim. In particular, the laissez-faire attitude of the nineteenth century provides scant evidence of the courts 'vigilance' in preventing abuses of the freedom of contract. It is however significant that in recent years the need for such alertness has been recognised by some judges at least and the *Sze Hai Tong Bank* case represents yet another stage of development in this general trend.

LIM KHENG LIAN.

19. [1930] 1 K.B. 41, at p. 56. It is interesting to note that other legal systems have prevented monopolies and large-scale organizations from contracting out of liability for negligence. Thus the American courts have declared void on the ground of public policy any clause in a contract by a common carrier seeking such an exemption.

20. [1964] Ch. 479, at p. 485; [1954] 1 All E.R. 822 at p. 826. See also *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329; [1952] 1 All E.R. 1175, see especially the judgment of Romer L.J.

21. (1959) 25 M.L.J. 200 at p. 202; [1959] 3 All. E.R. 185.

22. The same is true in the other canons of construction employed in the interpretation of exemption clauses namely, the 'contra proferenteur' rule, the 'four corners' rule, the 'main purpose' rule and the rule that where the defendant has protection under a contract, it is not permissible to disregard the contract and to allege a wider liability in tort.

23. [1949] 2 All. E.R. 581.