



ON APPEAL FROM
THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE NEW ZEALAND SHIPPING COMPANY LIMITED

Appellant

AND

A.M. SATTERTHWAITE & COMPANY LIMITED

Respondent

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CASE FOR RESPONDENT

Record

1. This is an appeal from a judgment of the Court of Appeal of New Zealand (Turner P., Richmond J. and Perry J.) given at Wellington on 29th June 1972 in which the Court allowed an appeal by A.M. Satterthwaite & Company Limited (hereinafter called "Satterthwaites") against the Judgment of the Supreme Court of New Zealand (Beattie J.) dismissing an action against The New Zealand Shipping Company Limited (hereinafter called "the Stevedore") for damages in connection with the negligent unloading of a valuable radial drill (hereinafter called "the drill") from the vessel "Eurymedon" at the Port of Wellington in August 1964.

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2. At the hearing in the Supreme Court the principal facts were set out by consent in an agreed statement of facts furnished to the Court which statement was expanded by brief evidence from one witness called by the Stevedore. The Stevedore admitted negligence but relied on certain terms of the Bill of Lading issued in respect of the drill as exempting the Stevedore from all

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liability to the owner of the drill for any damage whether attributable to the negligence of the Stevedore or otherwise.

3. Briefly the agreed facts stated that the drill (one Ajax AJ4 Radial Drilling Machine) consigned to the order of Satterthwaites was received on board the ship "Eurymedon" at Liverpool pursuant to the terms of a Bill of Lading No. 1262 dated 5 June 1964 issued by the agents for the Federal Steam Navigation Co. Ltd. (hereinafter called "the carrier"). No declaration as to the nature and value of the goods appeared in the Bill of Lading, no extra freight was agreed upon or paid and it was acknowledged by Satterthwaites that the liability of the carrier was accordingly limited to £100 by the application of Clause 11 of the Bill of Lading. The Rules scheduled to the Carriage of Goods by Sea Act 1924 of Great Britain were incorporated by reference in the Bill of Lading and Article III Rule 6 of such rules discharged the carrier and the ship from all liability in respect of damage to the drill unless suit was brought within one year after delivery. No action was commenced until April 1967. Satterthwaites became the holder of the Bill of Lading and owner of the drill prior to 14 August 1964 when it was damaged as a result of negligence on the part of the Stevedore during unloading. 10
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- p.9 and p.27-29 4. The statement of evidence and oral evidence given on the part of the Stevedore also established that:
- (a) the carrier was a wholly owned subsidiary of the Stevedore;
 - (b) for several years prior to the time when the drill was damaged during unloading, the Stevedore had carried out all stevedoring work in Wellington in respect of the ships owned by the carrier and although the carrier had a place of business in New Zealand the Stevedore generally acted as agents for the carrier in New Zealand; 40
 - (c) Clause 1 of the Bill of Lading No. 1262 was in the same terms as Bills of Lading issued by the Stevedore and its associated

companies in respect of ordinary cargo carried by its ships from the United Kingdom to New Zealand;

- (d) the Stevedore in its capacity as general agent for the carrier (but not in the course of its stevedoring functions) received the relevant Bill of Lading at Wellington on 31st July 1964. p.10
p.29

10 5. In the Supreme Court before Beattie J. it was contended on behalf of the Stevedore:

- (a) That the Stevedore as an independent contractor engaged by the carrier to carry out the work of unloading the drill was a party to the contract evidenced by the Bill of Lading and was under no liability whatever to Satterthwaites because of the provisions of Clause 1 of the Bill;
- 20 (b) That if the Stevedore was under any liability such was limited to the sum of \$200 pursuant to Clause 1 and Clause 11 of the said Bill of Lading;
- (c) That suit not having been brought within one year after delivery of the drill the Stevedore was accordingly discharged from all liability.

30 6. In his Judgment Beattie J. concluded that because the Stevedore had not given consideration for any promise on the part of Satterthwaites to release the Stevedore from liability or to exempt it from liability in certain respects (as set out in the Bill of Lading) it could not claim to be party to a contract made between the shipper of the goods (or the consignee) and the Stevedore at the time of the agreement between the shipper and the carrier contained in the Bill of Lading. p.50 1.22
et seq.

7. Beattie J. went on to hold, however:

- 40 (a) That the exemption clause in the Bill of Lading was an offer of indemnity by the shipper made through the carrier as agent for the carrier's servants or agents; p.51
- (b) This offer was an offer to those persons who might be or turn out to be servants

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or agents of the carrier that if they performed their various functions in respect of the goods (namely the drill) it, the shipper, would exempt them from all liability;

(c) Such offer was made through the carrier as agent for its servants agents etc., and the carrier is only agent for such persons as far as receiving the offer is concerned;

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(d) That such offer is accepted and the contract completed when the servants and agents of the carrier perform their required functions in respect of the goods being carried.

He accordingly gave judgment for the Stevedore.

8. From this judgment Satterthwaites appealed and the appeal proceeding on the same agreed facts was unanimously allowed by the Court of Appeal on 29 June 1972.

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p.56 145

9. In his judgment Turner P., after adverting to the fact that neither Satterthwaites nor the Stevedores was an original party to the Bill of Lading, reviewed the finding by Beattie J. that the Stevedore had become a party to the Bill of Lading or at least to part of it, namely, the exemption clause, so as to enable it to claim the exemption which such clause purports to offer. The President accepted that the first two tests laid down by Lord Reid in Scruttons Ltd. v. Midland Silicones Ltd. [1962] A.C. 496 had been met by the terms of the Bill of Lading and that in the special circumstances of the case it might be thought to have been shown that the Stevedore had authorised the carrier to contract on its behalf but held in agreement with Beattie J. that it was impossible to regard the consignor and the Stevedore as bound inter se in contract at time when the Bill of Lading was signed and delivered because at that stage it was impossible to see what consideration moved from the Stevedore.

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p.60 1.29
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p.60 1.38
et seq.

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p.61 1.8

10. The President then considered the question of whether as held by Beattie J. the acceptance of the Bill of Lading by the consignor amounted to an offer to indemnify from any claim for negligence any Stevedore who might later make

its services available to unload such goods such offer being capable of conversion into a contract by being accepted by conduct by a Stevedore actually performing the unloading operations. He concluded that the terms of the Bill of Lading could not be so construed for the same reasons as those pronounced by Richmond J. in his judgment and that therefore Beattie J. was wrong in so finding. The President did not attempt to answer the question as to whether, if the particular terms of the Bill of Lading could be regarded as such an offer by the consignor, the consignee can be regarded as continuing to make it, he having already decided that the defence must fail for the reasons previously given.

p.61 1.28
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11. In his judgment Richmond J. proceeded immediately to consider the question of whether on the particular facts "any difficulties about consideration moving from the Stevedore were overcome" (per Lord Reid in Scruttons Ltd. at page 474). He first considered the argument advanced on behalf of the Stevedore that a contract between the shipper of the goods and the Stevedore came into existence at the time when the Bill of Lading was issued to the shipper or consignor by virtue of an implied promise by the Stevedore to unload the goods. He rejected this contention on the grounds that the language of Clause 1 of the Bill of Lading was of such a general nature as to confer protection on all employees of the carrier whether or not they have any particular duties in connection with the goods described in the Bill of Lading, that it was not intended to make the operation of the exemption clause in any way dependent on any undertaking given by the employees of the carrier in favour of the shipper and that an implied promise of such nature would run counter to the express purpose of the clause.

p.63 1.12

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p.64 1.30

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12. Richmond J. then considered the alternative approach put forward on behalf of the Stevedore being in the terms of the concluding paragraphs of Mr Justice Beattie's finding that the terms of Clause 1 of the Bill of Lading could be construed as an offer of indemnity by the shipper or consignor "to the world at large" made through the agency of the carrier which was capable of acceptance and which was accepted by the carrier's

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- p.65 1.48
et seq.
- servants and agents when they performed their "required functions" in respect of the goods being carried. This second contention was also rejected by Richmond J. on the grounds that such an offer must expressly or impliedly make known to the persons to whom it is addressed some particular method of acceptance as sufficient to make the bargain binding and that the language of Clause 1 of the Bill of Lading could not because of its generality be fitted into the category of an offer to the world at large being rather intended to confer an absolute and unconditional exemption on every one of the carrier's employees. 10
- p.66 1.30 13.
et seq.
- Richmond J. also considered whether if it had been shown that a contract between the shipper or consignor and the Stevedore had come into existence at the time when the Bill of Lading was issued the effect of Section 13 of the Mercantile Law Act 1908 (N.Z.) or Section 1 of the Bills of Lading Act 1855 (U.K.) would be to make the consignee (Satterthwaites) in respect of that contract "subject to the same liabilities in respect of the goods as if the contract contained in the Bill of Lading had been made with himself". He concluded that although the section would no doubt be effective as between the consignee and the carrier he was expressing no opinion as to whether it would be effective as regards the suggested collateral contracts between the shipper and the servants agents and independent contractors of the carrier. Applying the provision of the statutes mentioned to the contract based on acceptance by the Stevedore of an offer by the consignee to the world at large the learned Judge noted that the position becomes even more complicated because the Bill of Lading was transferred to the consignee before the goods were handled and damaged by the Stevedore. 20
- p.67
- In such circumstances he could not see how the words of the statute could turn an unaccepted offer by the shipper into an offer by the consignee. He was extremely doubtful as to whether the surrender of the Bill of Lading by the consignee could amount to an offer by it to the Stevedore in the terms of Clause 1 of the Bill of Lading. 30
- p.68 14.
- Finally Richmond J. considered the traditional attitude of the common law to clauses which 40
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limit or exclude liability for negligence and concluded that he would be reluctant to give efficacy to an exemption clause by reading into it some stipulation which the draftsman had not himself seen fit to formulate.

15. In his judgment Perry J. firstly proceeded to consider Clause 1 of the Bill of Lading in the light of Scruttons case with particular reference to the concluding or third paragraph of the clause. As to the Stevedore's contention that the Bill of Lading constituted not only a contract of carriage between the shipper and the carrier but also one between the shipper and the stevedore made by the latter through the agency of the carrier under which the stevedore agrees to unload the cargo in consideration of the promise of immunity given by the shipper, the learned Judge concluded that the first two tests suggested by Lord Reid seemed to be complied with and that the third test might perhaps be inferred in the special circumstances of the case but that as found by Beattie J. the fourth of Lord Reid's requirements - that any difficulties about consideration moving from the Stevedore be overcome - could not be met. This finding of Perry J. was based on the fact that nowhere in the Bill of Lading or elsewhere is there any promise by the stevedore or anyone except the carrier to unload the goods. The Stevedore is not named or designated in any alternative way to the carrier. No one but the carrier undertakes to perform the obligations of carriage and the shipper could not compel the Stevedore to unload or sue him if he refused to do so.
16. As to the remaining part of Beattie J's judgment in which he found for the Defendant on the basis of Carlill v. Carbolic Smokeball Co. Ltd. (1893) 1 Q.B. 256 holding the clause to be "an offer to the world at large" Perry J. decided that the clause could not constitute an offer to the world at large or to the servants or agents (including independent contractors) of the carrier such as the Stevedore, capable of being turned into acceptance by performance. Having failed as a contemporaneous collateral contract (as so held by Beattie J.) the clause could not in the view of Perry J. be properly treated as an offer made by the shipper to
- p.68 1.26
- p.70 1.37
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- p.72 1.20
- p.71 1.45
et seq.
- p.73 1.22

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p.74 1.12 the servants and agents of the carrier through its agency. His reasons were, firstly, that if so intended one would expect to find it clearly so expressed in a carefully worded document, and such was not the case it being suggested by inference or implication only;

p.74 1.17 secondly, the clause is silent as to the method of acceptance by performance of the offer; thirdly, that if the clause is an offer to the Stevedore it is also an offer to a large indeterminate number of servants and agents of the carrier and so contemplates an infinite variety of ways of acceptance -

p.75 1.28 "one offer and a multitude of acceptances by performance of endless varieties and of an unknown and unstated nature" a situation far removed from the one offer and one method of acceptance contemplated in Carlill's case; and finally, that such a finding would be inconsistent with the words of the clause itself which stated that "all such persons (servants and agents etc.) shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading" such contract being the contract of carriage between the shipper and the carrier and not some other contract.

17. p.76 1.48 Perry J. also concludes that the first objection raised (and dismissed) by Beattie J. to his final proposition is a valid one by reason of the fact that even if the Stevedore's participation in the contract is limited by the words "to this extent" he is nevertheless a party to the contract in or evidenced by the Bill of Lading - not to any other contract and that this leaves no room for suggesting that the stevedore is party to some separate and independent (and undefined) shipper-Stevedore contract. As to Beattie J's second objection (also rejected by him) relating to performance of an existing contractual obligation as constituting consideration on the authority of Scottson v. Pegg (1861) 6 H & N 299. Perry J. concludes that such a proposition also contemplates a separate contract between shipper and Stevedore and the same difficulty exists in that firstly nowhere does the Stevedore undertake to do anything, and secondly, the clause purports to make the Stevedore a party to the shipper-carrier contract only and the agency conferred

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on the carrier is for such purpose only and not for the purpose of making a separate contract between the shipper and the Stevedore.

18. Perry J. also considered the question of international Comity and after noting that the decisions of the Supreme Court of the United States in Krawill Machinery Corporation & Ors. v. Robert C. Herd & Co. (Inc.) /1959/1 Lloyds Reports 305 and of the Supreme Court of Canada in Canadian General Electric Co. Ltd. v. "The Lake Bosomtwe" & Pickford & Black Ltd. /1970/2 Lloyds Reports 81 were both in conformity with the decision of the House of Lords in Scruttons case, concluded that the two United States District Judges whose decisions were referred to in argument and who appeared to have favourably considered clauses designed to exonerate stevedores may have been influenced by the "third party beneficiary" philosophy which has advanced more strongly in the United States than in England or New Zealand and if such Judges had not correctly applied Justice Whittaker's dictum in Klarwill's case. p.78
19. Finally, Perry J. adverted to the Carriage of Goods by Sea Act 1971 (U.K.) (giving effect to certain amendments to the Hague Rules in the 1968 Brussels protocol at present awaiting ratification by the United Kingdom Government) which will extend to the servants or agents of the carrier (not being an independent contractor) the defences and limitations of liability which the carrier is entitled to invoke under the rules and also to the notation in the Halsbury statutes on the significance of the exclusion of independent contractors. Perry J. did not consider it necessary to consider Clause 1 of the Bill of Lading as between the consignee and the Stevedore other than to say that the position of the latter cannot be any stronger than as between him and the shipper. p.79 1.15 et seq. p.79 1.32
20. The Respondent respectfully submits as follows:
- (a) The Stevedore cannot rely on the protections or exemptions from liability contained in Clause 1 of the Bill of Lading because such clause is not part of or contained in a contract to which the Stevedore is a

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party and under which it gave consideration.

- (b) The Consignee is in the position of an original party by virtue of Section 1 of the Bills of Lading Act (or Section 13 of the Mercantile Law Act) but the Stevedore is an independent contractor of the carrier as far as the contract in or evidenced by the Bill of Lading is concerned. It was not an original party and never became a party to that contract.

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See: Midland Silicones Ltd. v. Scruttons Ltd. /1962/A.C. 446 and /1962/ 1 All E.R. 1; and
Wilson v. Darling Island Stevedoring Co. Ltd. (1956) 95 C.L.R. 43 and /1956/A.L.R. 311.

- (c) Scrutton's case and Wilson's case reflect two main and well established principles, namely:

- (i) At common law a stranger to the contract, or the consideration, cannot enforce the contract even if it is made for his benefit.

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See: Price v. Easton (1833)
4 B & Ad. 433 and
Tweddle v. Atkinson (1861)
4 B & S 393

Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.
/1915/ A.C. 847

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- (ii) The common law does not favour exclusion or limitation of liability for negligence and clauses alleged to have that effect are construed strictly.

- (d) The principle of vicarious immunity of the agents of carriers of goods by sea enunciated by Denning L.J. in Adler v. Dickson /1955/ 1 Q.B. 158 and Scrutton L.J. in Mersey Shipping & Transport Co. Ltd. v. Rea Ltd. 1925 21 Lloyds Reports 378 cannot be supported since Scrutton's case was decided.

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- (e) Clause 1 of the Bill of Lading is an "Adler v. Dickson" or "Himalaya" clause and is designed to overcome the difficulty

10 experienced by the carrier in Adler's
case. If the school of thought accepted
by Lord Denning in that case had been
approved by the House of Lords in
Scrutton's case the clause would have
been an effective bar to the Plaintiff
in these proceedings but it has been
rejected and the Stevedore must show
it is party to the contract, that it
has provided consideration.

20 (f) The exemption clause was not designed
to meet the four suggested "requirements"
of Lord Reid in Scrutton's case and the
attempt by Counsel for the Stevedore
to stretch the clause to do so failed
because he could not meet the fourth
requirement. This naturally followed
because it had not been considered
necessary by the draughtsman of the
clause to do so.

(g) Because the exemption clause purports to
exclude any liability on the part of the
carrier's servants and agents for any
loss or damage or delay from any cause
it cannot be contended that the Stevedore
assumed some implied obligation of a
contractual nature to the shipper.

30 21. The Respondent further respectfully submits
that for the following reasons it is not
possible to consider the exemption clause as
constituting an offer or series of offers by
the shipper (made through the carrier or agent
for its servants agents etc.) to grant an
exemption from liability to all those persons
who might be or might turn out to be servants
or agents of the carrier and that such offer
or offers are accepted and a contract is
effected when the servants or agents of the
carrier perform their required functions in
40 respect of the goods being carried.

50 1 (a) If Clause 1 of the Bill of Lading fails
to make the carrier's servant and agents
parties to the contract in or evidenced
by the Bill of Lading, as intended, and
as found by Beattie J. and the Court of
Appeal, it cannot reasonably be construed
as something it did not set out to be,
namely, a standing offer by the shipper
capable of being converted into a series
of acceptances by conduct.

p.50 1.38
Beattie J.
p.60 1.41
Turner P.
p.72 1.20
Perry J.

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- (b) The use of the word "trustee" in Clause 1 emphasises that it was the "benefits" of the exemption clause created by the contract made between the carrier and the shipper and evidenced by the Bill of Lading which was to be held on trust by the carrier.
- p.34 1.35 (c) The exemption clause was recognised by Beattie J. as an attempt to create a contractual exemption on terms completely expressed in the clause. When it failed as such Beattie J. was constrained to "look at it in another way" in order to give effect to the clause notwithstanding that it had failed to achieve its clearly intended purpose. 10
- p.51 1.4
- 2 (a) The relevant sections of the Bills of Lading Act 1855 (U.K.) and the Mercantile Law Act 1908 (N.Z.) relate only to the contract in or evidenced by the Bill of Lading, namely, the contract of carriage. No other rights or obligations are transferred or affected, (See: Leduc v. Ward (1888) 20 Q.B.D. 475) so that even if the Stevedore could establish a separate contract between itself and the shipper no rights or obligations under such contract would be transferred to the consignee by the Statute. 20
- p.57 1.15 (b) The consignee does not rely on the Bill of Lading in any way to bring suit against the Stevedore. Its rights arise completely independently, and the Stevedore must establish "a valid contract binding on the person damaged" to escape liability. See: Krawill Machinery Corporation & Ors. v. Robert C. Herd & Co. Inc. 1959 1 Lloyds Reports 305 per Whittaker J. 30
- (c) If the exemption clause is an "offer" as found by Beattie J. such offer lapsed when the property in the drill passed to Satterthwaites prior to the purported acceptance of the Stevedore by commencing unloading it from the ship. An offer cannot be a "liability" of the kind envisaged by the Bills of Lading Act 1855 which are liabilities to the carrier created by the contract of carriage. If it is anything it is 40
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only a "contingent" liability dependent on acceptance.

10 3. The finding by Beattie J. that the exemption clause could be looked at as "an offer to the world at large" is merely as alternative description of the "collateral contract" theory previously considered and rejected by the Courts. It was rightly rejected as a fiction (See Denning L.J. in Adler v. Dickson) and the present wording takes the Stevedore no further.

20 4 (a) Performance of an existing contractual obligation can be good consideration for a further promise from a third party (Scottson v. Pegg (1861) 6 H & N 295 but to rely on such performance as consideration it must be shown that a real or factual agreement with the third party was made - that the performance was in fact carried out in reliance not only on the original or first promise but also in reliance on a second or additional promise of the third party to the bargain.

30 (b) There must be real consideration in the form of some disadvantage to the one party or advantage to the other but the Stevedore assumes absolutely no liability of any kind to the shipper or the consignee and neither the shipper nor the consignee receive any additional benefit.

40 (c) The exemption clause is too vague to constitute an effective offer in that no precise mode of acceptance by performance can be spelt out. What constitutes acceptance is subject to different interpretations in the case of the Stevedore and also in the case of all the other possible "offers" to other servants and agents of the carrier.

50 (d) Because the exemption clause purports to grant total exemption wrongful or even malicious acts of the carrier's servants and agents would be exonerated by the clause if the interpretation now contended for by the Stevedore was applied and this cannot be presumed as intended.

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(e) The exemption clause purports to exempt "all persons who are or might be /^{the} carrier's/servants or agents from time to time." This exemption is granted irrespective of whether such persons had knowledge of the Bill of Lading or the exemption clause contained in it but persons not having such knowledge could clearly not claim to be parties to a contract of the Carlill v. Carbolic Smoke Ball Co. Ltd. kind which requires knowledge of the offer and acceptance by conduct relying on such offer.

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p.36 l.29
and
p.38 l.32

5. In the Supreme Court the Stevedore case was based on it being a party to the contract in or evidenced by the Bill of Lading even if only to the extent of the exception clause and the "offer to the world at large " interpretation of the exemption clause is an afterthought which is not compatible with the original proposition because it relies on a further or collateral contract made at subsequent time based on Carlill's case which was not even referred to in the list of authorities given to the Supreme Court.

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22. It is further submitted that there is no defence to the claim based on the carrier being a Trustee for the Stevedore of the benefits of the exemption clause in that:

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- (a) such a trust would be void as being contrary to public policy in that it is designed to exonerate a beneficiary from his wrongful acts;
- (b) the Stevedore cannot directly enforce any "benefit" to which he may be entitled under the "trust";

See: Beswick v. Beswick 1968 A.C. 58

- (c) the "trustee" position of the carrier in respect of the benefits of the exemption clause is incompatible with the clause being a mere offer in that the carrier is stated to be the trustee of the immunities created by the contract between the carrier and the shipper as set out in the Bill of Lading.

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23. It is further submitted that Beattie J. was correct in holding that the provisions of Section 56(1) of the Law of Property Act 1925 (U.K.) do not confer any rights on the Stevedore and that Section 7 of the Property Law Act 1952 (N.Z.) is to the same effect. (See: Beswick v. Beswick and MacLeod v. MacLeod 1931 N.Z.L.R. 12)
- 10 24. It is further submitted that the defence of volenti non fit injuria is not available to the Stevedore.
- (a) It was rejected by Beattie J. in the Supreme Court and was not raised by Counsel in the Court of Appeal.
- (b) It is discounted by all the judges except Denning L.J. in Scrutton's case and also by the Court in Wilson v. Darling Island Stevedoring Co. Ltd. (per Kitto J. at page 82-3 and 87.
- 20 (c) Whether a Plaintiff is volens or not is a matter of fact which must be pleaded and proved and it is not lightly inferred. No attempt was made to prove this allegation and it was not pleaded.
- (d) As far as the consignee Satterthwaites are concerned, acceptance of the Bill of Lading could not amount to more than an agreement to take it subject to such obligations as are transferred by operation of the Bills of Lading Act or the Mercantile Law Act.
- 30 (e) Acceptance of this defence would amount to the acceptance of the theory of vicarious immunity in such cases which was rejected in Scrutton's case.
25. It is further submitted that on the grounds of international Comity the decision of the Court of Appeal is correct in that
- 40 (a) It is in agreement with the decisions of the Courts of the United States Supreme Court (Krawill) Canada (The Lake Bosomtwe) Australia (Wilson) and the United Kingdom (Scruttons and Adler.
- (b) It also accords with the 1968 amendment to

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the Hague Rules contained in the Brussels Protocol and the Carriage of Goods by Sea Act 1971 (U.K.).

- (c) The United States District Court decisions of Carle & Montenari (Inc.) v. American Export Isbrandtson Lines (Inc.) /1968/ 1 Lloyds Reports 260 and Cabot Corporation v. The "Mormacsan" /1969/ 2 Lloyds Reports 638 were affected by the "creditor or donee beneficiary" philosophy widely accepted in the United States and are not in line with the Supreme Court decision of Justice Whittaker in Krawill's case.

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26. The Respondent respectfully submits that the decision of the Court of Appeal was right and that this appeal should be dismissed with costs for the following among other

REASONS

1. The Stevedore is not a party to any contract with the consignee (Satterthwaites) relating to the drill and containing the exemptions set out in the Bill of Lading effected at the time when the Bill of Lading was issued to the shipper because:
- (a) The only contract which includes such exemption as a term is that made between the carrier and the shipper at the time when the goods were shipped being the contract contained in or evidenced by such Bill of Lading.
- (b) The Bill of Lading does not purport to make the servants agents and independent contractors of the carrier parties to the contract under or evidenced by the Bill of Lading except for the purpose of conferring upon them the various exemptions described in Clause 1 of the Bill.
- (c) Such protection is intended to be conferred on all servants and agents of the carrier without restriction and its operation does not depend upon

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any undertaking or promise implied or otherwise by such persons to perform any duties in respect of the goods.

10 (d) The Stevedore having given no consideration of any kind to unload the goods (or otherwise) in return for any promise on the part of the shipper or consignee contained in the Bill of Lading to exempt it from liability no contract of any kind with the Stevedore was effected.

20 2. Clause 1 of the Bill of Lading is not an offer, or evidence of an offer, by the shipper or the consignee to the world at large or to the servants or agents of the carrier that if they performed their various functions in respect of the goods they would be exempted from all liability in respect of such goods because:

30 (a) Such a construction placed on the clause is inconsistent with its terms which purport to extend a complete absolute and unconditional exemption upon all servants and agents (including independent contractors) of the carrier without reference to any acceptance by conduct or otherwise of such persons.

(b) The clause does not have the essential characteristics of such an offer in that it does not contain by reference or implication any particular mode of acceptance by conduct or otherwise in order to obtain for any of the carriers servants or agents the exemptions set out in the clause.

40 (c) Such a construction is so uncertain and vague as to be quite incapable of proper interpretation.

(d) Such construction is inconsistent with the words of the clause itself which purport to make the carriers servants and agents "parties to the contract in or evidenced by this

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Bill of Lading" (namely the contract of carriage made between the shipper and the carrier) not mere "Offerees" or parties to some other separate and different contract.

- (e) The agency in favour of the carrier is solely for the purpose of making its servants and agents party (to the limited extent of the exemption clause only) to the contract contained in or evidenced by the Bill of Lading. 10
3. No consideration is given by the Stevedore to the shipper or the consignee in the performance by the Stevedore of its existing contractual obligations with the carrier to unload because:
- (a) Nowhere does the Stevedore expressly or by implication promise to unload the ship the exemption clause totally negating any duty or obligation of any kind on the part of the carriers servants and agents. 20
 - (b) The Stevedore incurred no additional liability and the consignee obtained no additional advantage by the Stevedore proceeding to unload the goods.
 - (c) It is not possible to imply that the Stevedore's performance of its contract with the carrier is acceptance by performance of an implied offer by the shipper or consignee, the existing contract between the Stevedore and the carrier being itself sufficient explanation of the carrier's actions in unloading the ship and there was no evidence to suggest otherwise. 30
4. Clause 1 of the Bill of Lading was drafted as an attempt to take advantage of the "vicarious immunity" theory propounded by Lord Denning in Adler v. Dickson as being available to all persons participating in the contract of carriage and was not designed either to overcome "any difficulties as to consideration on the part of
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the Stevedore" or as "an offer to the world at large" because:

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- (a) It is known in the trade as a "Himalaya clause" or "Adler v. Dickson clause".
 - (b) It purports to totally exempt the carriers servants and agents from all liability notwithstanding the statutory restriction on the carrier against total exemption from liability.
 - (c) Any other interpretation must be based on inference or implied intent which is not manifest in the clause.
5. Neither the vicarious immunity theory nor the participation in the contract theory of extended exemption can now be successfully pleaded in our courts because of the decision of the House of Lords in Scrutton Ltd. v. Midland Silicones Ltd.
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6. The provisions of Section 1 of the Bills of Lading Act 1855 (U.K.) or Section 13 of the Mercantile Law Act 1908 (N.Z.) cannot have effect so as to impose on the consignee any obligation to exempt the Stevedore in the terms of Clause 1 of the Bill of Lading because:
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- (a) The Act transfers to the consignee only those rights and obligations of the shipper in respect of the goods created by the contract contained in the Bill of Lading.
 - (b) No other or collateral contracts are affected by operation of the Statute.
 - (c) The alleged "offer" of exemption is not a right or obligation which can be transferred by the Statute to the consignee so as to make it a notional offeror by succession to the shipper.
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7. The decision of the Court of Appeal is consistent with the decision of the courts of other Nations on the question in issue.
8. The decision of the Court of Appeal was correct.


Counsel

IN THE PRIVY COUNCIL

No. 3 of 1973

ON APPEAL FROM
THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

THE NEW ZEALAND SHIPPING COMPANY LIMITED

Appellant

AND

A.M. SATTERTHWAITE & COMPANY LIMITED

Respondent

CASE FOR RESPONDENT

WRAY SMITH & CO.,
1 King's Bench Walk,
London E.C. 4

as agents for

BUDDLE, ANDERSON, KENT & CO.,
Wellington,
New Zealand.

Solicitors for the Respondent