Hello to all!

I hope you have all recovered from the onslaught of our first three law sessions together. I am already looking forward to seeing you all next week… another happy time immersed in the law!

Here is the promised re-cap covering what we talked about in our first three sessions.

So… what did we look at over Thursday and Friday? Quite a lot in fact…

_The Vistafjord_…. this case started us off, with a look at the common law and equity, and I have a general handout which I am also attaching, which looks at the role of equity.

- What was the cause of action? This is always one of our first questions…. here, it was the owner’s claim of a debt owed at common law by the broker. The broker had retained what he thought was “his” commission, only to find that the common law did not regard him as privy to the charter party contract under which the hire was paid, in respect of which the broker (likely all parties!) thought he would be paid commission. But – not being privy to the contract meant that he had no claim and no rights under the it.
- He did not have a separate contract of his own with the owner…so, no contract means no claim for breach/non-payment under the non-existent contract! No cause of action, so to speak.
- The owner’s claim was defeated by the broker’s equitable shield of estoppel by convention/trade practice. This does not work as a sword, so if the charterer had paid the hire to the owner, at this point the broker would have had no cause of action against the owner and so would have not been able to recover the money.
- Today, the Contracts (Rights of Third Parties) Act 1999 provides an express statutory right of access to a contract to which the third party is an intended beneficiary. So, today, the broker would be able to recover the expected commission, under the Act – this would be his cause of action, his sword. The Act expressly excludes bills of lading contracts from its ambit, with the exception of third party limitation clauses in such contracts, which are effective under the Act.
- This discussion is all reflected in more depth in the Equity handout on the intranet site.

On Friday we did _The Aliakmon_! This takes us to the handout on the intranet which looks at the matrix of contracts in trade…

- _The Aliakmon_ [1986] AC 785 (which, as I said in class, to my mind was scuppered by _Junior Books v Veitchi_ [1983] AC 520) – what was the cause of action here -? Here, it was the tort of negligence, but our discussion of the case allowed us to llop at contracts for the sale of goods and the Sale of Goods Act 1979 (SGA 79), international sale of goods and shipment terms, bills of lading and rights (or lack thereof!) of suit in carriage, and limitation of liability. So – quite a lot!
We also looked at the way that English law recognises that the (non-shipping) consignee has a contract with the carrier...essential if cif sale contracts are to continue on the risk passes on shipment basis: initially under an implied contract basis, then came the Bills of Lading Act 1855 (which required that the consignee had both the b/la and the property in the goods... not possible in bulk sales, and not in fact in this case), and now the Carriage of Goods by Sea Act 1992. So – we see the contractual role of the bill of lading in this case.

What then are the qs that we should ask in international (any!) sale contracts?
- When does the seller at law deliver the goods to the buyer?
- When does the risk of loss or damage pass to the buyer?
- When does the property in the goods pass to the buyer?

We should keep in mind that the element which makes our international sale contract “international” is the shipment terms aspect: e.g. the c.i.f./f.o.b. terms.

We looked at Incoterms, which are the International Chamber of Commerce’s standard codified shipment terms.

Incoterms are regarded by English law as part of trade practice and will NOT be automatically incorporated into international sale contracts governed by English law. So, if you want Incoterms in your English law international sale contract, you must expressly include them!

We can see from our consideration of The Aliakmon, and cif type contracts, that the cif buyer will take the bill of lading as a contract (COGSA 92) against the carrier, and, since the 92 Act, irrespective of whether he also takes the property in the goods.

I also flagged up that in addition to “divorcing the marriage” between right of suit on the bill as a contract and having the property in the goods, the 92 Act also has extended the range of documents which give right of suit, to: seaway type bills (which includes straight bills), and also ships’ delivery orders (SDOs).

Our discussion about formation of contracts, and the need in cif sales for the buyer to be “given” a carriage contract under (today) COGSA 92 should help us to see that in respect of fob contracts, the buyer is the shipper and so he has a negotiated contract of carriage and, thus, does not require a COGSA 92 one!

As I said in class, this came to the Commercial Court in July 1992, which in fact was the same month that the decision came out in Junior Books! It was in the Court of Appeal in 1994 – where their Lordships, by careful and subtle argument, made it clear, albeit by subtle and low-key analysis, that they were not going to take Junior Books as having opened the door in general terms to pure economic loss, and certainly not in this case! The HL agreed... as I said, almost a case of wrong judge wrong time for our cargo interest... Lord Brandon had given a strong dissenting speech in Junior Books, and The Aliakmon was his golden opportunity to restate his approach and bring negligence nicely back into its previous boundaries! His Lordship also said that to allow the carrier to be sued outside of contract would be to deprive him of the “intricate blend” of liabilities and limitations provided by the H/HV Rules. The high-water mark case was the Gafta one to which I referred... this, being an arbitration case, is unreported: The Gosforth, in which several holders of bills in respect of grain/feed could not sue the carrier as they were the buyers of unascertained goods), after which the Law Commission recommended changes to the law, and the Carriage of Goods by Sea Act 1992 came into force, which did change the law!
And then on Saturday, we did *The Nicholas H*

- What was the cause of action here? Always the same question!
- The elements of the tort of negligence: duty, breach and resulting damage.
- The difficulties with the courts’ use of policy considerations in English law. So, here, we saw that (the majority) of the HL did not recognise that a duty was owed by the class society to the charterers because, per Lord Steyn’s concerns, the class society’s inability to limit its liability under English law could well open the floodgates of litigation.
- Limitation of liability… the Merchant Shipping Act (today… at the time of this case it was the previous Act) 1995 incorporates the London Limitation Convention 1976 (this is the Convention to which I referred…), which allows owners, charterers and salvors to limit (on a tonnage basis). This, then, obviously does not include class societies. We discussed the policy of limitation and that it is generally regarded that limitation “keeps shipping going”.
- There are two limitation regimes around: the 1957 Limitation Convention; the 1976 London Limitation Convention,¹ and now, today, the UN Protocol 1999 (which the UK has also adopted, to raise the limitation level available… remember, there is no “international law” to govern our private relationships, so if the Convention/Protocol are to apply as a matter of law, they must be incorporated into the jurisdiction’s national law). So – this is a good reason for forum shopping, for the claimant to get his claim under a 1976 or 1999 limitation amount. As I said, this is a game²
- We will see this game played in respect of the H/H V Rules… we will see the staggering difference between the H/H V amounts when we look at *The Rafaela S* : under the H Rules the claim would have been $2,000, whilst under the HV Rules it was $150,000!! Quite a difference!!!
- The overall “shipping picture”, in which we looked at charter contracts (where the contract is in the document/charter and thus no other document can be relied on as “evidence of the contract”; so, b/l are not evidence of a charter and thus have no contractual role at all between charterer and owner/disponent owner.
- In discussing this issue, we should understand when the b/l might be regarded as admissible evidence of the carriage contract, i.e. between the non-chartering shipper – who may or may not also be the receiver/consignee of the goods – and the carrier:
- Where the b/l is on-sold, it becomes the contract in the hands of the consignee, (e.g. where the bill is sold under a cif type contract). We can see, then, that there are two situations in which a “bill of lading contract” can arise: as between a (non-chartering) shipper and his carrier (where the b/l is evidence of the contract), and in the hands of the subsequent (cif type buyer) consignee where the b/l is the contract.
- No “b/l contract” exists between a charter and his carrier. This is crucial, as the

¹ The Convention defines “owners” as owners, charterers, operators and managers. The Convention also provides limitation to insurers of certain liabilities. So – quite wide-ranging, and certainly anyone who might have a reasonable expectation of being sued—and, thus, of being able to take out insurance against liability. But not class societies… and, as Steyn points out in *The Nicholas H*, the Class Society did not expect to be sued, and would likely not have been had the properly anticipated defendant not disappeared.
² And different jurisdictions play the game differently. Germany is a signatory to the London Limitation Convention 1976, and extends limitation to port pilots.
Hague and HV Rules only apply on a mandatory basis to bills of lading contracts. This we did discuss, but we are going to look at again in our consideration of *The Aliakmon*.

- When we look at *The Rafaela S*, we will remind ourselves of who is the consignee’s carrier under a bill of lading contract: to which the answer since the HL decision in *The Starsin* [2003] 1 Lloyd’s Rep 571, is the person named in the carrier box on the front of the b/l. So – to traders who are time charterers, who agree as carrier to carry goods for a shipper, the message is “beware”… if your name goes in the carrier box because of “trade reality”, be on notice now that since *The Starsin*, the English courts will hold you as carrier notwithstanding a demise clause saying that the owner is carrier for b/l contract purposes. We did touch on this on Saturday, I think.

- We also looked at the overall roles of the bill of lading, looking at the question of why would a shipper demand a b/l? Likely for security… the bill must be presented in order for collection of the goods, which is the b/l’s role as document of title. We have discussed what we mean when we use this phrase… lawyers might regard such a document as actually containing the legal title to the goods… which is what the b/l will not do under English law when it represents part of a bulk: the property in unascertained goods cannot pass from the seller to the buyer: section 16 Sale of Goods Act 1979 (as amended). So, to use a phrase that I like for our purposes, it might be well to think of the b/l’s role as a document of title as meaning representing the goods/ “standing in the shoes of the goods”. This is something we revisited, when we looked at *The Aliakmon* – which allowed us to consider international sale contracts, the relationship with such contracts and carriage contracts, and, again, policy considerations in English law.

- We also noted that the b/l always acts as a receipt for the goods in the hands of whoever is holding it lawfully – so a shipper be he charterer or not, and also a consignee to whom the bill is transferred.

- We have also seen how it can become the contract of carriage between the “lawful holder” (to use the modern wording of the Carriage of Goods by Sea Act 1992: COGSA 92) and the carrier (the person for whom the bill is signed on the front: *The Starsin*) … this initially was dint of the common law approach of an implied contract, codified by Parliament under the Bills of Lading Act 1855 and then re-codified under COGSA 92.

- We looked at the disponent owner’s (TC in our Nicholas H story) liability to the claimant cargo interest (had he not done a “runner”! )… TC was in breach of the voyage charter with VC. The obligation breached was either at common law to provide a seaworthy vessel or, more likely, under an express incorporation of the H/HV Rules, to exercise due diligence to provide a seaworthy ship.

- We also looked at how the charterer claimed for loss and damage from the owner. Such liability could arise in negligence (where the claimant must show carelessness) or, in fact, under the area of law known as bailment (where the defendant bailee must show lack of carelessness). We more or less agreed (bailment is not cast either in stone or statute!) that the owner would be the bailee of the goods… the bailee is the person who has possession of the goods in circumstances where he is under a duty to act with due diligence to deliver those goods to a named receiver (the bailor) in the same condition as he, the bailee, received them. Where a TC’s bill is issued though, *The Starsin* is authority that the owner is likely not to be the bailee of the goods.

- Although negligence and bailment are both about liability for causing harm though
lack of due care, there is one important difference between them: on the basis that “he who asserts must plead and prove all the elements of the wrong”, bailment might be the better action because whereas in negligence the claimant must show that the defendant was careless/lacked due care, in bailment the burden of proof is on the bailee to show lack of carelessness/that he did act with due care. As we will see when we look at liability under the H/HV Rules, the Rules mirror this approach to the burden of proof.

- We looked at how the bailee owner in this case would have limited his liability: the “easiest” route would be to say under the MSA, on the basis of his tonnage. Indeed, that is the approach which seems to be presumed by Lord Lloyd in his dissenting speech.

- But… we should keep that the tonnage basis is not really appropriate for cargo damage limitation. So… how else the bailee owner might limit… hmm… well, the b/l had a Hague clause in it. The black letter law difficulty with accepting that the owner could limit his liability under the Rules is that both the H and HV Rules apply to contracts… either on a mandatory basis (b/l contracts) or where expressly incorporated (charters)... and the owner cannot really have a contract with the chartering cargo interest, as that cargo interest does not take the b/l as a contract, and has his contract of carriage with TC. But… as we have seen, we are in a more purposive judicial climate, and are not overly worried about such niceties!! So… it seems to me that there is no problem in going down what appears to be Lord Steyn’s way of thinking that the owner limited under the H clause in the bill, on the basis that this was bailment on terms of the bill – bailment on terms is possible notwithstanding that those terms are not in a commercial quid pro quo mutual exchange of promise (i.e. contract). As I said on Saturday, bailment arises irrespective of whether there is a contract between the bailee (the person with possession/the carrier) and the bailor (person to whom the property must be given)... and so it is not difficult to see that in a culture where the courts are inclined to adopt a commercially sensible and viable approach, Lord Styen would happily find that the owner in The Nicholas H could limit under the H terms in the bill!

- Right at the end of our discussion on The Nicholas H, we compared this decision with the later Court of Appeal case of Perrett v Collins (The Popular Flying Association) [1998] 2 Lloyd’s Rep 255, where the CA allowed the claimant to sue the defendant class society, and the US case of The Sundancer 7 F 3d 1077 (1994 AMC 1), in which the Court of Appeals (for the 2nd Circuit Court) held that the disparity between the class society ABS’s fees (US $85,000) and the owners’ claim (US $200 million in punitive damages) demonstrated that ABS had not assumed the risk of loss of the vessel. Whilst this is a slightly different case, it being between the class society and owner and not, as in The Nicholas H, between the class society and a third party, the Court’s concerns here were in the same vein, that the class society should not face what might be a crushing or trade-changing liability. There have, however, been cases in the US where such concerns did not take precedence and class liability has been allowed, e.g. Somarelli v ABS 720 f. Supp 441 (DNJ 1989). The issue of class societies’ liabilities is not, however, without tension within the trade, and, as I said, the predominant approach towards these claims is not to recognise liability.

Odd bits
• I also touched on the arrest of the vessel procedure for bringing a claim, which is known as the in rem action... at some point, likely when we look at The Rafaela S, we will talk about the two types of in rem action: (a) for a maritime lien, which travels with the res (maritime property, which is the vessel, her cargo and bunkers) and is not defeated by the sale of the vessel to a bona fide purchaser, and (b) a statutory in rem action, created by the Arrest Convention 1952 (and incorporated into the UK), which is defeated by sale of the vessel. For a statutory lien, the claimant can arrest any vessel (so not just the wrongdoing vessel) which is owned at the time the claim is brought by the person who would be liable in personam.

• I touched on Chester v Afshar [2004] UKHL 41. This is the hospital negligence case in which the HL on a majority allowed the claim, notwithstanding that the claimant admitted that there was a lack of causation between the negligence and actual damage. Lord Steyn, in leading the majority, said that to allow the claim would be to satisfy the reasonable expectations of people. This in fact became his mantra – I will send round the article written by Steyn in which he focuses on this - the mantra did initially come from a commercial case, on agency: First Energy v HIB [1993] 2 Lloyd’s Rep 194, when Steyn was still in the CA!

• We talked about the applicable law of the contract, by which we mean the law which regulates the parties’ relationship. As I said, when we talk about other legal relationships, e.g. in torts, we talk about the governing law of the tort/other wrong.

• We also touched on procedure, and jurisdiction/forum – what court has jurisdiction is determined in EU defendant cases by the Brussels Amended Regulation, and in non-EU defendant cases by the courts’ own “rules”/policy approaches to conflicts of law, otherwise known as private international law. The rule is that you always have the procedure of the forum, which is why litigants may forum shop, so as to get procedural rules which may be more favourable to their claim!

• On our course, the applicable or governing law is always English law, and any claim is always within the jurisdiction of the English courts!

• The other case to which I referred over the weekend was the OW Bunkers case: Res Cogitans (SC May, 2016). This was the case which involved a chain of bunker supplies: RNB to RMUK, to OWSAS which was the parent company of and supplied the bunkers to OWBM... who then sold them to the vessel owners. The OB group went insolvent, and as a consequence, OWAS did not pay RMUK for the bunkers. OWBM claimed for the price of the bunkers from the vessel owners, who were concerned about paying in case they also were sued by RMUK. Long story short on this one, the SC agreed that as the contracts in the chain did not envisage the property in the goods passing to the next buyer, they were not sale of goods contracts, and as such there could be no action against the vessel owners for the price of the goods under the Sale of Goods Act 1979 (SGA 79). Hmm- the SC held that the vessel owners were, however, “simply liable for the price of the bunkers ”... in fact, RMUK did not formally pursue any claim against the vessel owners, and the SC said that the issues before them did not involve any claim that the vessel owners might be exposed to any risk of having to make a double payment. Lord Mance, with whom the other four Law Lords agreed, said that on facts, the Owners were “simply liable for the price” ... What does this mean??!! That the only debt to which the
owners could be exposed was “simply” one for the unpaid goods in their relationship with OWBM, or that this was the only claim being dealt with???! There is nothing in fact in this speech which definitively clarifies that the vessel owners could not be liable also to RMUK! A salutary warning this case as to how things can go wrong with what one thinks is one’s contract – think *The Aliakmon*… careful drafting with a legal eye to what the law may say when things do go wrong is often the moral of the story. Certainly a legal eye being cast on the seller thinking to reserve the property in the goods (under s 19 SGA 79) would very likely have saved the buyer!

- And lastly… do you remember way back when we had the welcome week… when I told you about the “girl with the boyfriend” case, *Khorasandjian v Bush* [1993] QB 727, where Dillon LJ said “To my mind, it is ridiculous if in this present age the law is that the making of deliberately harassing and pesteresting telephone calls to a person is only actionable in the civil courts if the recipient of the calls happens not to have the freehold or a leasehold proprietary interest in the premises in which he or she has received the calls.” That is a clear indication that he is going to argue that black is white in order to find that the defendant has committed some wrong – and here, nuisance. This allows the injunction to be ordered. This is real “purposive law making”. As I said, this case was overruled by the HL, in another case, but by that time the Harassment Act 1997 was in force. This purposive approach is often taken in the trade/shipping cases – it is relatively easy for the courts to do that where there is little statutory regulation to constrain them! All good stuff, eh?!

I think this covers our three sessions – blimey… what a lot!

Happy reading… and do come back to me if you have any qs.

Warm regards to all and see you next week!

Susan.