

Antedated Bills of Lading and the Loss of Chance to Reject

A comparison of the liability of a C.I.F. seller under English law and the carrier's liability in accordance with Section 300 of the Norwegian Maritime Code.

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Table of contents

1 INTRODUCTION	1
1.1 The Scope of the Thesis	4
1.2 Purpose and Practical Relevance	5
1.3 Methodology and Structure	6
2 THE LOSS OF CHANCE TO REJECT	7
2.1 Under English law:	8
2.1.1 Right to reject documents and right to reject goods	8
2.1.2 Loss of the rights to reject	10
2.1.3 Damages when the rights to reject has been lost	12
2.2 Under the Norwegian Maritime Code	15
2.2.1 The difference between Section 299 and Section 300	16
2.2.2 Compensation for the loss of chance to reject under Section 300	18
3 THE POSITION IF THE BUYER KNOWINGLY ACCEPTS THE GOODS	23
3.1 Under English law	23
3.1.1 <i>Kwei Tek Chao v British Traders</i>	24
3.1.2 Limits to the principle in <i>Kwei Tek Chao</i>	26
3.2 Under the Norwegian Maritime Code	27
4 THE POSITION IF THE BILL OF LADING IS ANTEDATED BUT THE GOODS WERE SHIPPED WITHIN THE SHIPMENT PERIOD	28
4.1 Under English law:	28
4.1.1 Market loss is not recoverable for breach of contract	29

4.1.2	The effect of fraud	30
4.2	Under Norwegian law	33
4.2.1	In reliance on the accuracy of the B/L or the information contained in it?... 33	
4.2.2	Should the buyer be put in the position as though the B/L did not contain incorrect information or as though the B/L was not relied upon?.....	35
5	THE MEASURE OF DAMAGES	35
5.1	The measure of damages.....	35
5.2	Under English law	36
5.2.1	Compensation for the loss of chance to reject.....	36
5.2.2	Compensation for other types of loss resulting from the breach of the obligation to tender correct documents	40
5.3	Under the Norwegian Maritime Code	43
5.3.1	Compensation for the loss of chance to reject.....	43
5.3.2	Compensation for other types of loss under NMC Section 300	45
5.4	Relationship between the seller's and the carrier's liability	49
6	CONCLUDING REMARKS	50
	TABLE OF REFERENCES	52

1 INTRODUCTION

Distance sales agreements and contracts of carriage are closely connected. Contracts of carriage of general cargo are “*generally entered into so that the sale agreement can be performed*”,¹ and it is not unusual for a charterer to sell or raise credit against goods whilst they are still afloat. Albeit not exclusively, the fulfilment of these purposes is often done through the carrier issuing a bill of lading (“B/L”).

Distance sales inherently involve some practical difficulties in relation to the exchange of payment and goods. In an ordinary sale, the buyer will have a chance to inspect the goods before paying for them. The buyer therefore has the security of being able to withhold (part of) the purchase price if the goods are not in conformity with the contract or are delivered too late. In a distance sale, the seller will ordinarily deliver the goods to a carrier that transports them to the buyer. There is as such a gap in time between the seller’s delivery of the goods and the buyer’s chance to inspect them. It is not a practical solution for the seller to transport the goods without payment, only to risk that the buyer refuses to pay at the destination. If the buyer has to pay for the goods before he has had the chance to inspect them, he is exposed to the risks of non-contractual delivery without the security of being able to withhold the purchase price.²

*“Special rules have evolved which have allowed the bill of lading to bridge the gap between the seller and buyer”.*³ These rules include, *inter alia*, that the B/L “*governs the conditions for carriage and delivery of the goods in relation between the carrier and a holder of the bill of lading other than the sender*”,⁴ the information a B/L should include and the

¹ Falkanger, p. 271

² Falkanger, p. 271-272

³ Falkanger, p. 271

⁴ NMC Section 292, cf. section 251

carriers duty of inspection,⁵ as well as rules about the evidentiary effect of this information and the carrier's liability for misleading information.⁶ The effect of the rules mentioned is that the buyer can “[i]nstead of inspecting the goods to see if they are in conformity with the sales agreement ... reach a decision based on the description in the bill of lading”.⁷

In a sale on CIF terms under English law, when the seller has shipped or bought afloat goods of the contract description⁸, he fulfils “his part of the bargain by tendering to the buyer the proper shipping documents”⁹. This feature of the contract can be restated as the seller having (both) “a duty to ship (or buy afloat) goods in accordance with the contract, and a duty to tender proper shipping documents”.¹⁰ The seller may fail to perform either of these duties¹¹, or both. The seller may have a right to reject in respect of any such failure.¹² The right to reject is a “particular form of the right to rescind, which involves the rejection of a tender of goods or of documents ... and a rightful rejection of either ... brings the contract to an end”.¹³

⁵ NMC Sections 296-298

⁶ NMC Sections 299-300

⁷ Falkanger, p. 272

⁸ Benjamin, 19-001, p. 1548

⁹ Benjamin, 19-001, p. 1548

¹⁰ Benjamin, 19-146, p. 1665

¹¹ Benjamin, 19-146, p. 1665

¹² Benjamin, 19-146, p. 1665

¹³ [1954] 2 Q.B. 459, p. 480. Note however that this account is slightly inaccurate. Even if a tender of documents is rightfully rejected, it may still be open to the seller to make a second correct tender, cf. *Procter & Gamble* p.29.

Where the B/L has been antedated, it will “*more often than not*”¹⁴ be the case that the seller has failed to perform both duties.¹⁵ This is because an antedated B/L is considered to not be “genuine”. Further, the antedating is likely to have been done so as to hide the fact that the goods have been shipped outside the contractual shipment period,¹⁶ which is constructed to form part of the contractual description of the goods.¹⁷

However, the fact that a B/L is antedated is not apparent, and antedating hides the fact that the goods are not of contract description due to being shipped outside the shipping period. The buyer may as such very well be unaware of his rights to reject either the documents or the goods, and therefore pay against the documents and take delivery of the goods. By the time the breach is discovered, the buyer may have sold the goods on or be deemed to have accepted the goods.¹⁸ It is then no longer possible to rescind the contract by rejecting the goods. In such a case, the buyer is not entitled to recover the purchase price, but will still have the option of claiming damages against the seller for any breach of their contractual obligations.¹⁹

If the carrier issued the B/L with the wrong date, the buyer may also have the option of claiming damages against the carrier under the rules in the Norwegian Maritime Code section 300 for the carrier’s responsibility for misleading information in the B/L.

¹⁴ Benjamin, 19-214 (p. 1736)

¹⁵ For examples of when the B/L was antedated, but the buyer did not fail to perform both duties, see chapters 2.1.4.2 and 3.1 below.

¹⁶ Selvig, pp. 105 and 154-155

¹⁷ See e.g. *Bowes v Shand* (1877) 2. App.Cas. 455

¹⁸ SoGA Section 35

¹⁹ SoGA Section 53

1.1 The Scope of the Thesis

The scope for this thesis is to examine and compare the liabilities of a CIF seller under English law and a Carrier under the Norwegian Maritime Code Section 300, towards a buyer who has acquired a misdated B/L.²⁰ Liability is not examined in respect of Bs/L that does not evidence shipment, but merely states that the goods have been “received for shipment”.²¹ The thesis only examines the position in regards to CIF sales, although many of the same issues can arise in relation to certain FOB sales.²²

The buyer can suffer loss because the B/L has been antedated in several respects. In this thesis only the buyer’s “loss of chance to reject” and losses in relation to sub-sales will be addressed.

The right to reject is a valuable remedy if the market prices for the goods have fallen below the contract price, as it allows the buyer to escape a bad bargain. If the buyer has been deprived of this remedy, he can be said to have suffered a market loss that he would otherwise have avoided. Both the carrier and the seller can become liable to compensate the buyer for this loss. An important distinction must be made here between cases where the buyer only had a right to reject the B/L because it was antedated, and cases where the antedating also hid the buyer’s right to reject because of shipment outside of the shipment period. The latter situation is discussed in chapters 2 and 3, the former in chapter 4.

²⁰ A misdated B/L will in most practical circumstances be antedated. Note however that the same questions could arise if the B/L was postdated.

²¹ Cf. NMC Sections 292(1), 294(2) and 296(2). Liability could however be imagined if the correct date would have revealed that the goods could not have been shipped within the shipment period.

²² Depending *inter alia* on whether under the contract the goods are considered received before or after shipment, and whether the contract stipulates payment against the B/L. Cf. Benjamin 20-126, p. 1877; Selvig p. 153; ND 2007.202

How to calculate the market loss will be discussed in chapter 5. This chapter will also explore the liability the carrier and the seller may have for losses a buyer that has acquired an antedated B/L can suffer in relation to sub-sales. Such losses can include both the buyer being unable to fulfil a sub-sale he would have been able to fulfil had the B/L not been antedated, as well as losses the buyer incurs because he has unwittingly tendered an antedated B/L to his sub-buyer and become liable to him.

1.2 Purpose and Practical Relevance

The purpose for the comparison of a carrier's liability under Norwegian law and a seller's liability under English law is primarily that it is a relevant comparison from a practical point of view. Comparing liability for market loss and issues with sub-sales is particularly interesting because the losses in question arise because of the terms of the sales contract(s). Accordingly, it is not unreasonable to describe the carrier's liability in these circumstances as dependent on the terms of the sales contract. Furthermore, both the seller's liability for the breach of the obligation to tender proper documents and liability under Section 300 of the NMC aim in these circumstances to compensate for the same losses.

It is not an unlikely scenario a buyer who has acquired an antedated B/L can pursue a claim against the seller under English law and against the carrier under Norwegian law. Parties to an international sales agreement in general have a right to choose the law to govern their contract,²³ and English law is common choice. Similarly, the B/L might state that Norwegian law governs the carriage. Further, the application of chapter 13 of the NMC is mandatory if the agreed place of loading, or the agreed or actual place of delivery, is in Norway, Denmark, Sweden or Finland.²⁴ Furthermore, if Norwegian law applies to the carriage,

²³ Cordero-Moss, Giuditta, *International Commercial Contracts*, p. 134-136

²⁴ NMC Section 252

NMC Section 300 may not be departed from by agreement²⁵, and even if the disputes are to be settled by arbitration, the provisions of chapter 13 shall apply.²⁶

A comparison of the seller and carrier's respective liabilities could help a buyer to determine whether either claim is worth pursuing. An understanding of how liability may differ could be also be instrumental in determining whether it is deemed worth the risk to issue an antedated Bs/L. This is especially relevant for the carrier who unlike the seller has little to gain by antedating the B/L.

1.3 Methodology and Structure

This thesis is structured primarily around a descriptive account of the liability of the seller under English law, with subsequent comparison to the liability of the carrier under the NMC. This is done for two reasons. Firstly, it is a logical order, because of the nature of liability under NMC Section 300, which depends to a large extent on the provisions of the sales agreement. Secondly, the source materials for the questions under English law are richer, and the position under English law is therefore better suited as a base for comparison.

For the account of English law, I am indebted to the terminology and excellent treatment of the material in the treatise Benjamin's Sale of Goods. General issues of contract law and sale of goods law that are not specific to antedated Bs/L are mostly dealt with by reference to this and other textbooks. Questions that are to be more directly compared to Norwegian law are primarily dealt with through references to case law, but textbook discussions, and academic criticism of the case law is also frequently referred to. The account of English law aims primarily to be descriptive. However, the discussion of the position when the B/L is misdated, but shipment was performed within the shipment period (chapter 5.1) and the

²⁵ NMC Section 254

²⁶ NMC Section 311

measure of damages (chapter 5) I adopt a more critical and original treatment towards the sources.

The account of Norwegian law is based on scarcer source material than the English law. The primary sources are the Norwegian Maritime Code, along with the preparatory works of both Norway and the other Nordic countries who cooperated in drafting the code. However, these sources give little guidance on some of the particular questions raised by the comparison with English law, and there is to my knowledge no directly relevant case law on this topic for the most recent iteration of the NMC. This necessitated a greater reliance on sources that might be considered less authoritative, including case law from, and academic commentary on well as older versions of the code where the carrier's responsibility for inaccurate statements in the B/L was conceived of differently. These sources primarily have value in demonstrating general principles, which then has to be applied to the particular questions. As such, the account of Norwegian law is on less solid foundations than the account of English law.

2 THE LOSS OF CHANCE TO REJECT

This chapter examines the scenario where shipment outside of the shipment period has been hidden because the B/L is antedated, and as a result, the buyer has been deprived of the chance or opportunity to exercise his rights to reject the documents and the goods.

If the market value of the goods has fallen below the contract price, a buyer will in ordinary circumstances wish to exercise any right he has to reject, and thereby avoid the "market loss" that has occurred. Price fluctuations are likely to equally affect goods shipped on e.g. the 31st of March and on the 1st of April. Goods shipped outside the shipment period are therefore not necessarily, or even ordinarily, worth any less than goods shipped within it. If the buyer has been deprived of the chance to reject he will wish to receive compensation for the market loss thereby suffered, and not just the difference in value between what he

got (e.g. goods shipped on the 1st of April) and what he should have gotten (e.g. goods shipped in March).

2.1 Under English law:

The sub-chapter on English law sets out the circumstances under which the rights to reject documents and goods arise and are lost. It further explains the difference between a claim against the seller for a breach of the obligation to tender proper shipping documents, and a claim against the seller for the goods not being of contract description because they are shipped outside the shipment period. This distinction is important because damages for the former breach can include compensation for the market loss, whereas damages for the latter breach cannot.

2.1.1 Right to reject documents and right to reject goods

Under English law, a buyer's right to reject documents and a buyer's right to reject the goods are considered to be two separate rights. However, the relationship between them is not entirely clear cut, and the rights have "*variously [been] described as 'quite distinct', 'separate and successive' and 'not entirely separate'.*"²⁷ If the B/L is antedated, and this hides the fact that the goods were shipped outside of the shipment period, the buyer will in the ordinary course of events have both a right to reject the documents, and subsequently, a right to reject the goods.

2.1.1.1 Right to reject documents

The buyer has, in principle, the right to reject documents that "*do not conform with the terms of the contract*".²⁸ Obvious examples of this include where the B/L is not clean, i.e.

²⁷ McKendrick, 13-059 (p. 684)

²⁸ McKendrick, 13-061 (p. 685)

that the B/L contains reservations about the good order and condition of the goods,²⁹ or where the documents are of a different kind than specified.³⁰ The buyer also has a right to reject a B/L that otherwise shows that the goods are not of contractual description. The circumstances described here are not hidden however, and so the buyer would be aware of his right to reject. These circumstances are therefore not directly relevant for the question of compensation for the loss of the chance to reject.

A hidden defect is where the B/L on the face of it complies with the terms of the contract. In respect of hidden defects, the general rule, as established in *Gill & Duffus v Berger & Co*,³¹ is that a buyer must accept and pay against conforming documents, even if the actual goods are not of contract description.³² The general rule established in *Gill & Duffus*³³ does not appear to be applicable in cases concerning antedated Bs/L however. There is a long-established line of authority that documents can be rejected if they are not “genuine”,³⁴ and that a B/L is not genuine if it does not show “*the right date shipment*”.³⁵ There is no suggestion in the judgment of *Gill & Duffus* that it intended to depart from this line of authority, and that the buyer has a right to reject antedated Bs/L has also been confirmed in a later judgment of the Court of Appeal.³⁶

²⁹ Benjamin, 19-038

³⁰ McKendrick, 13-061 (p. 685)

³¹ [1984] A.C. 382

³² *Idem*, per Lord Diplock

³³ [1984] A.C. 382

³⁴ See, for example, *Hindley & Co Ltd v West Indian Produce Ltd* [1973] 2 Lloyd’s Rep 515; applying *James Finlay & Co Ltd v East Indian Produce Co Ltd* [1929] 1 K.B. 400

³⁵ [1929] 1 K.B. 400, p. 409.

³⁶ [1988] 2 Lloyd’s Rep. 21, p. 31

2.1.1.2 Right to reject goods

The buyer has the right to reject the goods if they do not correspond to the contract description, and this is a breach of either “*a condition or an intermediate term and the consequences of the breach has been sufficiently serious*”.³⁷ In the context of an antedated B/L, it is important to note that as per *Bowes v Shand*,³⁸ the shipment period is considered to form part of the description of the goods. “*It follows that late shipment involves a breach of condition which gives rise to a right of rejection.*”³⁹

2.1.2 Loss of the rights to reject

The buyer may lose his “right to reject ... for the usual reasons”,⁴⁰ i.e. acceptance, waiver or estoppel.⁴¹ Loss of the right to reject documents follows the same principles as those for goods, however the practical scope for when a buyer will lose just the right to the reject documents by reason of waiver or estoppel appears narrow. There also seems to be little discussion on the very common scenario of losing the right to reject the documents by acceptance, presumably because this can usually be evidenced by payment.

To lose the right to reject by estoppel, the buyer must have given an unequivocal representation to that effect, which “*the seller has acted in reliance upon [,] so as [...] to make it*

³⁷ McKendrick, 13-065, p. 688

³⁸ (1877) 2. App.Cas. 455

³⁹ *Procter & Gamble Philippine Manufacturing Corp v Kurt A Becher* [1988] 2 Lloyd’s Rep. 21 at p.22; see also McKendrick, 13-065, p. 688 and Benjamin 19-147, p. 1667-1668

⁴⁰ McKendrick, 13-064 and 13-066, p. 688

⁴¹ *Ibid*; Cf. Benjamin 19-152 (p. 1672) et seq. for a more comprehensive account, including waiver (or estoppel) of not just the remedial right to reject, but also of damages for the breach or the right to future performance.

inequitable for the buyer to go back on the representation”⁴². The right to reject is lost by waiver if the buyer elects not to exercise it. This requires knowledge “*not only of the facts which have given rise to the right to reject, but of the existence of the right itself*”.⁴³

Acceptance is distinct from waiver in that it does not require knowledge of the facts giving rise to the right to reject. Thus, the buyer may lose his right to reject even if he is unaware of the circumstances giving rise to that right. Acceptance is a difficult concept to apply to CIF sales, where the right to reject might arise both in connection with the documents and with the goods.⁴⁴ Section 35 of the Sale of Goods Act 2000 (“SOGA”) governs acceptance. However, this section assumes “*that it is the goods themselves which may be examined and accepted*”,⁴⁵ though “*acceptance of the documents and acceptance of the goods appear to be separate acts*”.⁴⁶ This causes certain anomalies, whereby the right to reject the goods might be lost because the buyer has accepted non-conforming documents.⁴⁷

SOGA 35 establishes that the buyer is deemed to have accepted the goods when “*he intimates to the seller that he has accepted them*”⁴⁸ or “*the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller*”⁴⁹. In both cases, if the buyer has not previously examined the goods, he is not

⁴² Benjamin 19-152, p. 1673

⁴³ Benjamin 19-152, p. 1672

⁴⁴ Benjamin, 19-157 p. 1679

⁴⁵ Benjamin, 19-157 p. 1679

⁴⁶ Benjamin 19-157, p. 1679; cf. *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 Q.B. 459 p. 480 et seq.

⁴⁷ Even if the buyer was not aware of the facts giving rise to the right to reject; see Benjamin 19-157 p.1675-1676, cf. below 4.1.

⁴⁸ SOGA 35 (1) (a)

⁴⁹ SOGA 35 (1) (b)

deemed to have accepted them before “*he has had a reasonable opportunity of examining them for the purpose ... of ascertaining whether they are in conformity with the contract, and ... in the case of a contract for sale by sample, of comparing the bulk with the sample.*”⁵⁰ “*The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them*”.⁵¹ In determining whether a reasonable time has lapsed, it is a material question whether the buyer has had reasonable opportunity of examining the goods for the aforementioned purposes.⁵² When it comes to the right to reject the goods because of late shipment, if this is not apparent from the documents “*the provisions of the Act as to opportunity of examination are scarcely appropriate*”,⁵³ and accordingly there is little guidance on the question of precisely when the buyer is deemed to have accepted the goods.

2.1.3 Damages when the rights to reject has been lost

Even if the buyer has lost his rights to reject, he may still retain the right to damages for a breach, and if the right “*is lost by waiver or acceptance, the right to damages normally survives.*”⁵⁴

SOGA section 53 governs damages “[w]here there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty”. In such cases, the buyer may set the breach of warranty up in diminution or extinction of the purchase price, i.e. withhold all or parts of the purchase price, and/or maintain an action in damages for the breach of warranty. The amount the buyer is entitled to withhold or claim in damages is “*is the estimated loss di-*

⁵⁰ SOGA 35(2)

⁵¹ SOGA 35(4)

⁵² SOGA 35(5)

⁵³ Benjamin 19-158, p. 1680

⁵⁴ Benjamin 19-152, p. 1672

*rectly and naturally resulting, in the ordinary course of events, from the breach of warranty.*⁵⁵

If the seller has tendered an antedated B/L that hides shipment outside the shipment period has been tendered, it is important to keep in mind that there are two distinct breaches of contract. In addition to the breach of the goods not being of contract description, there is also a breach of the “*implied condition of the contract that the bill of lading so to be tendered shall be a true and accurate document and correctly state the date of shipment.*”⁵⁶

The distinction between the breach of the goods not being of contract description, and the breach of tendering misdated Bs/L is important in determining “*the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach*”.

2.1.3.1 Damages for the breach of the obligation to tender correctly dated Bs/L

Following *James Finlay and Company, Limited v N. V. Kwik Hoo Tong Handel Maatschappij*⁵⁷, it is clear that if the seller has tendered a B/L with the wrong date that hides shipment outside of the shipment period, the buyer may recover substantial damages for the lost chance to reject.

In *James Finlay*, this conclusion was premised on the finding that due to the fall in market prices, had the B/L accurately stated the date of shipment, the buyer would have rejected the tender of documents. Further, “[t]he effect of misdating the bill of lading is to deprive him of that right by rendering its exercise impossible, if he relies, as in practice he generally must rely, and in law is entitled to rely, on the accuracy of the bill of lading date.”⁵⁸ That the buyer had paid “*the higher contract price instead of the lower market price, and*

⁵⁵ SOGA section 53(2)

⁵⁶ *James Finlay and Company, Limited v N. V. Kwik Hoo Tong Handel Maatschappij* [1928] 2 K.B. 604, p. 611

⁵⁷ [1929] 1 K.B. 400, affirming the lower court decision [1928] 2 K.B. 604

⁵⁸ [1928] 2 K.B. 604, p. 612

*[lost] their right to reject*⁵⁹ was therefore a loss directly and naturally resulting from the breach.

The buyer was therefore able to recover their market loss, or the difference between the contract price and their market price, a measure that has been described as “*putting him in the same financial position as that in which he would have been, if he had indeed rejected.*”⁶⁰

2.1.3.2 Damages where there is a defect in the goods alone

*Taylor and sons Ltd v. Bank of Athens*⁶¹ illustrates the importance of whether, in addition to goods being shipped outside the shipment period, there has been breach of the obligation to tender correct documents.

In *Taylor v Bank of Athens*, the relevant contract was entered in July 1919, for 500 tons of beans c.i.f. London, shipment in July and August, Bs/L dated for those months. Payment was to be made against documents, but the sellers also “*had the option to claim payment against delivery order, freight release and letter of insurance on arrival of steamer*”⁶² at the port of discharge. The sellers exercised this option, but the buyers sought assurance from the seller that the Bs/L were correctly dated before they would pay. In response the sellers stated “*that they had seen the captain's bills of lading, and that those were dated Aug. 31, 1919.*”⁶³ This was accepted by the buyers, which then duly paid and received the goods, but with the caveat that they would claim the money back if the assertion was not true. Two months later, when the beans had already been sold on, the buyers discovered

⁵⁹ [1928] 2 K.B. 604, p. 613

⁶⁰ Benjamin, 19-212

⁶¹ (1922) 27 Comm. Cas. 142

⁶² (1922) 27 Comm. Cas. 142

⁶³ (1922) 27 Comm. Cas. 142

that the Bs/L had been antedated, and that the true shipping date could not have been before 6th of September.

The issue before the court was the correct measure of damages for the breach in shipping goods outside of the shipment period. It was established in arbitration that “[n]o substantial difference in value existed between beans shipped in August and beans shipped in September, 1919.”⁶⁴ The buyer submitted that the correct measure of damages was the difference between the contract price and the market price when the goods arrived (or should have arrived), the market price having fallen substantially between July and October.

The judge, applying SOGA section 53(2), decided that the correct decision was to award merely nominal damages. In particular, he observed that

... the damage must result from the breach of warranty, as distinguished from a loss through having entered into the contract. It does not extend, I think, to a case where the loss results not from the breach of warranty but from an unfortunate or improvident bargain which the buyer may have made.

Accordingly, the buyer was not entitled to damages reflecting the market loss he suffered by not rejecting the goods. This decision appears right in principle, given that the decision was strictly confined to the question contained in the special award by the arbitrators, i.e. the correct measure of damages for the seller’s breach in shipping goods outside of the shipment period.

2.2 Under the Norwegian Maritime Code

The sub-chapter on Norwegian law sets out how the Norwegian Maritime Code imposes liability on the carrier for incorrect statements in a B/L acquired by a third party in two different ways and explains the difference between them. It then explores more in detail

⁶⁴ (1922) 27 Comm. Cas. 142

how the carrier can become liable to a buyer for the market loss suffered the buyer because an antedated B/L has hidden the buyer's right to reject.

2.2.1 The difference between Section 299 and Section 300

If the buyer has acquired an antedated B/L, the buyer will typically want is compensation for having lost the chance to reject, or alternatively having paid more than what was due under the sales contract, if this could have been avoided had the carrier not issued a B/L with the wrong shipment date.⁶⁵ The carrier is not liable for such losses under NMC Section 299, but can be so under NMC Section 300.⁶⁶

Under NMC Section 299, the carrier may become liable for the discrepancies between the descriptions in the B/L and the actual condition of the goods, under a doctrine known as “fictitious cargo liability”⁶⁷ or “implied transport liability”.⁶⁸ As per NMC Section 299, the B/L is *prima facie* evidence that goods were received or loaded as stated in the B/L, “*in so far as no reservation has been made as mentioned in Section 298*”.⁶⁹ The section further states that “[i]f a third party in good faith has acquired a bill of lading in reliance on the accuracy of the statements in it, evidence to the contrary .. is not admissible”⁷⁰. If the goods do not correspond to the description in the B/L, the carrier may therefore become

⁶⁵Selvig, p. 154. Note that both these losses may in Norwegian terminology be termed ”disposisjonstap”. Compensation for having paid more than is due under the contract will not be discussed however.

⁶⁶ Falkanger et al, p. 339-340

⁶⁷ Solvang p. 31-32

⁶⁸ Falkanger et al, p. 336-339

⁶⁹ NMC § 299 (1)

⁷⁰ NMC § 299 (3)

liable as though the goods were damaged or lost in the carrier's custody, because he is barred from proving otherwise.⁷¹

In cases where the B/L is antedated, and thus the incorrect statement is the shipping date, fictitious cargo liability under Section 299 is largely meaningless. The buyer will ordinarily not have a claim dependent on, or otherwise a legal interest in, proving vis-à-vis the carrier that the goods were shipped on the date stated in the B/L.⁷²

The scope of the carrier's liability under NMC Section 300 is based on the so-called "reliance losses".⁷³ NMC Section 300 states (in translation) that "[i]f a third party incurs a loss by acquiring a bill of lading in reliance on the accuracy of the information it contains, the carrier is liable if the carrier understood or ought to have understood that the bill of lading was misleading for a third party. [...]"⁷⁴ In Falkanger, this is stated to mean that the losses suffered due to reliance on the bill of lading should be compensated by placing the third party acquirer in "in the position he would have been in if the information had been correct".⁷⁵ It is trite law that loss for this purpose includes paying against documents in circumstances when "[h]ad the correct information been known, the [buyer], or the bank on

⁷¹ NMC Section 275

⁷² Except potentially if the actual date is important for the carrier to prove that a damage or loss that has occurred was due to circumstances the carrier is not responsible for, or if the claim is not for damage to or loss of the goods but for "fictitious delay", or, cf. Solvang pp. 38-39 and 32

⁷³ In Norwegian and Danish, the terminology used is "den negative kontraktsinteresse", i.e. "the negative contractual interest", c.f. Selvig p. 158 and the discussion of Section 300 in the 1994 preparatory works for the Danish Maritime Code.

⁷⁴ Marius nr 435, p. 132

⁷⁵ Falkanger et al, p. 339

his behalf, would not have taken up the document".⁷⁶ A buyer may accordingly recover damages against the carrier for his loss of right to reject under the sales contract.

2.2.2 Compensation for the loss of chance to reject under Section 300

Although it is clear that the carrier may become liable for the buyer's loss of chance to avoid taking up an antedated B/L by rejecting the buyer's tender, more should be said about the particular elements of a claim under Section 300. The next sub-chapters explores the requirement that the buyer must have incurred a loss by acquiring the document, whether it is a requirement to be the holder or the receiver of the B/L and the practical effect of the qualification to the carrier's liability.

2.2.2.1 Causation

When payment is due under the sales contract appears to be a key element in establishing whether the buyer has, for the purpose of NMC Section 300, incurred a loss "*by acquiring a bill of lading in reliance on the accuracy of the information contained in it*".⁷⁷ According to Selvig⁷⁸, loss under the NMC Section 300 must primarily be seen as occurring because the buyer loses the security of being able to withhold the purchase price. The issue is as such not whether the buyer has lost a legal right to reject, but whether the buyer is factually worse off because he has relied on the incorrect date in the B/L. The difference this makes is best explained by illustration.

If payment was due on or after the B/L was tendered, the analysis under NMC Section 300 of the loss the buyer has incurred by acquiring the B/L appears to be substantially similar to the analysis in *James Finlay* of the loss caused by the seller's breach in tendering incorrect documents. The buyer has, by relying on the antedated B/L, not exercised his right to re-

⁷⁶ Falkanger et al, p. 339-340

⁷⁷ NMC Section 300, Marius nr 435, p. 132

⁷⁸ Selvig, p. 158, cf. 151, discussing the predecessors to NMC §§ 299-300.

ject. Accordingly, because the B/L was antedated, the buyer has paid a purchase price that was higher than the value of the goods he received. The buyer's loss is the difference between the purchase price and the market price.

If the buyer had already paid the purchase price when the B/L was tendered, the situation is different. Had the B/L been correctly dated, the buyer would have been able to reject. The analysis of the loss caused by the seller's breach in tendering incorrect documents is therefore unchanged in principle.⁷⁹ Under the NMC Section 300 however, the buyer would not be seen as having incurred a loss by relying on the B/L. Even if he had exercised the right to reject, he would not have kept the purchase price, and would have had to claim this back from the seller. He did therefore not suffer a market loss by acquiring the B/L.

2.2.2.2 Who are protected?

NMC Section 300 protects a third party who has acquired the B/L in reliance on the accuracy of the information it contains. A CIF buyer is clearly a third party, as he is not an original party to the contract of carriage.⁸⁰ The wording of the section does not require that a claimant is the receiver of the goods. This represents a change from the state of the law in the pre-1973 maritime code, which referred exclusively to the carrier's responsibility to the receiver, and where accordingly a party who had acquired a B/L did not have a claim against the carrier until he had received the goods in exchange for the B/L.⁸¹ Whether a third party that does not receive the goods has a claim under NMC Section 300 is important because the buyer might transfer the B/L to a sub-buyer. If only a receiver has a claim, the

⁷⁹ In practice it might be quite different. If the buyer has already paid, it cannot be assumed that he would have exercised his right to reject. That he actually would have rejected is an important part of the analysis that the seller's breach in tendering incorrect documents caused the buyer's market loss by depriving him of the right to reject.

⁸⁰ In respect of FOB contracts, see Selvig p. 152-153

⁸¹ Jantzen, p. 534

buyer might therefore lose his claim. If any third party that has acquired the B/L in reliance on the accuracy of the B/L has a claim, there might be more than one claimant.

The change in wording from receiver to third party was done in relation to the conclusive evidence rule (now) contained in NMC Section 299.⁸² The purpose of the conclusive evidence rule is to protect a receiver from misleading statements by making the carrier liable for (fictitious) damage or loss to the cargo. It is therefore not clear whether a change was intended in relation to the responsibility for misleading statements.

Regardless of whether a change was intended, it is submitted that it should not be read into Section 300 NMC a requirement that a claimant must be the person who currently holds the B/L or took delivery of the goods. When the change was made, the liability for misleading information (now) contained in NMC Section 300 was seen as being justified as a codification of general rules of liability for misleading information.⁸³ If the responsibility is limited to receivers, it is foreseeable that a carrier will not be liable under NMC Section 300 for a loss a third party has incurred in reliance on a B/L the carrier knew or should have known was misleading, e.g. because the third party who has relied on the accuracy of the B/L transfers the bill to a third party that does not.⁸⁴ Restricting the carrier's responsibility to just receivers might have been justifiable for a provision based on the responsibility as a carrier for the accuracy of the information in a B/L,⁸⁵ but it is clearly inappropriate for a provision based on the general rules of liability for misleading information where no such restriction applies.

⁸² See preparatory works NOU 1972:11 p. 22-23.

⁸³ NOU 1972:11 p. 23

⁸⁴ Jantzen, p. 534-535

⁸⁵ Jantzen (at p. 534) calls it "well considered and quite proper" [author's translation].

2.2.2.3 The qualification to the carrier's liability

The carrier is only liable for the buyer's loss of chance to reject if the "*carrier understood or ought to have understood that the bill of lading was misleading for a third party.*"⁸⁶ This has been stated as being a two-pronged test whereby "*the carrier will be liable if he or she has or should have understood: (1) that the statement was objectively incorrect; and (2) that the information was likely to mislead a third party considering whether to take up the bill of lading*".⁸⁷ The second leg of the test is consistent with two interpretations. The broad interpretation is that the carrier is only liable if he has or should have realised that the incorrect statement was of importance to a third party, and therefore misleading to him.⁸⁸ The narrow interpretation is that the carrier is not liable, unless he has or should have realised that the bill of lading could be presented to a third party without knowledge of the actual condition and circumstances of the shipment.⁸⁹

The second leg of the test does not directly follow from the wording of NMC Section 300. In ND 2007.202 the condition in NMC Section 300 was considered met simply because the carrier (by the master) ought to have realised that the B/L "*gave an objectively incorrect statement about the goods and the bill of lading was therefore misleading for a third person*".⁹⁰ However, in the preceding discussion, it had been established that the master ought to have understood both that the information given in B/L was incorrect and that correct information was important for both seller and buyer. The case is therefore not a direct precedent for a proposition that the condition in NMC Section 300 relates only to whether

⁸⁶ NMC Section 300

⁸⁷ Falkanger et al, p. 339; NOU 2012:10 p. 95. Cf. Selvig p. 156-158 for an interpretation in relation to the predecessor of NMC Section 300, whereby the carrier's liability is more restricted.

⁸⁸ Selvig, p. 156-158

⁸⁹ NOU 2012:10, p. 95-96

⁹⁰ ND 2007.202

the carrier knew or ought to have known that the B/L was misleading, not whether it could or was likely to mislead.

In relation to an antedated B/L, it is in any event submitted that the condition in NMC Section 300 will be met in all but exceptional cases. The carrier clearly has or ought to have knowledge of the time when the goods were loaded onboard, and the importance of the shipping date in relation to international sales and payment by letter of credit is well understood.⁹¹ However, exceptional circumstances were apparently present in ND 1907.220. In this case the master had a shipped B/L before the loading was completed. The goods were expected to be loaded on that day, but due to accident loading was not completed until two days after and the B/L was therefore antedated. The buyer unsuccessfully claimed damages against the carrier on the basis that had the B/L not been antedated, he would have rejected it. The court found that the carrier was not liable, because the B/L had been dated in accordance with the custom at the loading port, and the master had not had knowledge of the contractual terms giving rise to the buyer's right to reject. Solvang notes that this result "*does not seem sustainable today*".⁹² This implies that a carrier ought to understand that an antedated B/L is misleading, even if it is dated in accordance with custom and without the carrier having knowledge of the provisions in the contract.

It is accordingly difficult to see under what practical circumstances, if any, the qualification to the carrier's liability will apply in relation to antedated Bs/L. However, it is theoretically possible to imagine circumstances where it might apply, i.e. where he has reasonably be-

⁹¹ Cf. ND 1908.305, p. 309: "*Correct dating of the bill of lading is so important [...] that deliberate misdating or negligence in relation to the dating must in general be considered a gross error on the part of the issuer [...]*" (Author's translation)

⁹² Solvang, p. 40

lieved that the B/L would not be presented to a third party without knowledge of the actual condition and circumstances of the shipment.⁹³

3 THE POSITION IF THE BUYER KNOWINGLY ACCEPTS THE GOODS

In the previous chapter, the scenario was that a buyer, because the B/L was antedated, had been deprived of both the right to reject the shipping documents and the right to reject the goods. This chapter examines the slightly different set of facts where the buyer becomes aware of the actual shipment date after he has accepted the documents, but before he has (been deemed to have) accepted the goods. In such circumstances, the buyer has not lost the legal right to reject the goods because they were shipped outside of the shipment period, but he may be unwilling to exercise it if e.g. he has already paid the purchase price against the documents. Can the buyer knowingly accept goods shipped outside the shipment period, and still claim damages for the market loss suffered because of the lost chance to reject when the documents were presented?

3.1 Under English law

The position under English law is examined largely by a case study of *Kwei Tek Chao*. This case established that a buyer that has accepted antedated Bs/L and discovers this before he has accepted the goods may choose between rejecting the goods or accepting them and claiming damages for the seller's breach of the obligation to deliver correct documents. If he chooses the former, he will be entitled to recover the purchase price. If he chooses the latter, the damages he can recover includes the market loss suffered by not rejecting the tender of the document.

⁹³ NOU 2012:10, p. 95-96

In addition to examining the facts and reasoning of this case, subsequent judicial and academic treatment is referred to in order to establish the significance of whether the purchase price has been paid.

3.1.1 Kwei Tek Chao v British Traders

3.1.1.1 Facts of the case

The relevant contract was for Rongalite C at £590 sterling per ton, C.I.F. Hong Kong, shipped by October 31 1951. The goods were not in fact shipped until November 3, but the Bs/L were antedated to show that shipping was done on October 31. Payment was to be by letter of credit against documents. The documents were presented to the buyer's bank on November 10, who paid the purchase price against them on November 12. The documents arrived in Hong Kong on November 19, and on November 21 the Bs/L were presented to the buyers by their bank and accepted by them.

The buyers had in August entered into a contract to sell the goods on to a sub-buyer. Towards the end of November, the sub-buyers discovered that the ship had not called at the loading port until November 1, and wrote to the buyers on December 1 informing them of this and requesting the cancellation of the sub-sale, as the goods could clearly not have been shipped in October. The buyers confirmed with a shipping agent that the ship had not arrived at the loading port until November 1. The goods arrived in Hong Kong on December 17, and the buyers took delivery on behalf of their bank, which they had pledged the goods to. The buyers then attempted, unsuccessfully, to get their sub-buyers to accept the goods until January 25. The buyers instructed solicitors to write to the sellers in February 1952, alleging forgery and breach of contract and began proceedings against the sellers in March 1953. At this point the buyers still had the goods in their possession.

The judge held that the buyers had lost their right to reject the goods by not making any act to reject them until March 1953, despite having known the facts that would justify rejection since December 1951.⁹⁴

3.1.1.2 Basis for the decision

The buyers were unable to reject the goods because of their own actions, but they were nonetheless able to recover their market loss as damages for the seller's breach of contract in tendering antedated Bs/L. This outcome was primarily reasoned on the basis of applying the precedent of *James Finlay* that two distinct breaches of contract had been committed, as follows:

*If I might call the breach of the term to deliver correct documents breach A, and the failure to ship goods on the contract date as breach B, it seems to me that the right to damages for breach A vests when the breach is committed, that the measure is then determined as being the proper measure required to put the buyer in as good a position as he would have been in if the breach had not been committed; and that when a separate breach, breach B, is committed the buyer has a separate and independent right to elect upon that breach as to the way in which he is going to deal with it, whether he treats it as a condition or as a warranty, and that he cannot be fettered in the exercise of that right as he would be if by his election he altered the measure of damage for breach A. That measure of damage must remain the same however the buyer elects to deal with breach B.*⁹⁵

⁹⁴ Under the predecessor of today's SoGA section 35, the right to reject the goods was seemingly lost when the buyer did not clearly indicate rejection in the letter of February 1952, although the buyer had been entitled to take time to consult with solicitors and attempt to persuade his sub-buyers to accept the goods. ([1954] 2 Q.B. 459, p. 472 et seq.)

⁹⁵ [1954] 2 Q.B. 459, p. 483

Underlying this formal distinction between the two breaches, was the commercial reality that “[h]aving a right to reject the documents separately from a right to reject the goods, it is obvious that as a matter of business very different considerations will govern the buyer's mind as he applies himself to one or other of those questions.”⁹⁶ In particular, in the ordinary course of events, the buyer will not have paid the purchase price before accepting the documents. After having paid, however, by rejecting the goods the buyer would “be faced merely with an unsecured claim for the recovery back from the seller of the price which he originally paid.”⁹⁷ Accordingly, as a matter of business, it was not correct to say that the buyer could, by rejecting the goods, have placed himself in the same position as if the seller had not committed a breach by tendering antedated Bs/L.

3.1.2 Limits to the principle in *Kwei Tek Chao*

In *Procter & Gamble*,⁹⁸ the decision in *Kwei Tek Chao* is referred to as taking

[...] the decision in *James Finlay* a stage further by holding that the buyers' entitlement to substantial damages remained intact even though they had discovered the true facts - the misdating of the bill of lading and the late shipment - before the goods had arrived, because, having paid the price, they had no viable alternative but to deal with the goods in the best way possible in the circumstances.

This suggests that *Kwei Tek Chao* should best be understood by reference to the underlying business rationale in not rejecting, and accordingly, that there might be limits the principle that the buyer's decision to not reject the goods should not affect the measure of damages for the breach of the obligation to tender correct documents.

If for instance, the contract stipulates later payment so that the buyer has not already parted with the purchase price, it would then *prima facie* seem as though the buyer could not set

⁹⁶ [1954] 2 Q.B. 459, p. 482

⁹⁷ [1954] 2 Q.B. 459, p. 482

⁹⁸ [1988] 2 Lloyd's Rep. 21 Discussed below in chapter 4.1.

the market loss of against the purchase price, as the market loss would not be caused by the breach of the obligation to tender correct documents, but by the buyer's decision to accept the goods. This *prima facie* position must however be tempered by the fact that other considerations than whether the price has been paid could make it unviable to reject the goods. For instance, the buyer might suffer higher losses by rejecting the goods because of a lack of time to purchase substitute goods. Therefore, the *ratio* of *Kwei Tek Chao* might best be stated as it is in Benjamin, i.e. that a buyer may recover substantial damages for having been deprived of the chance to reject the goods, "*whether as a matter of law or business*".⁹⁹

3.2 Under the Norwegian Maritime Code

Under the NMC Section 300, it is submitted that a buyer who discovers his right to reject the goods and rescind the contract before the goods arrive, should be entitled to elect to receive the goods, and still maintain a claim against for the market loss suffered by not having had the chance to reject the documents. This result also follows from an analysis of when a loss under NMC 300 is seen as arising, as well as policy arguments for limiting the total amount of the claim against the carrier.

As examined in chapter 2.2.2 above, the carrier becomes liable because the buyer has paid against documents in reliance on the information in the B/L. The loss has as such accrued before the buyer has the chance to reject the goods. Further, on the same reasoning as in *Kwei Tek Chao*, it is not correct to say that the buyer could have placed himself in the same situation as though the B/L had not been antedated by rejecting the goods. By doing so the buyer merely becomes an unsecured creditor for the purchase price he has already paid.

There are also good policy reasons for why the buyer should be entitled to accept the goods. Jacobi points out that it is ordinarily also in the interest of the seller and the carrier

⁹⁹ Benjamin, 19-208, p. 1732

the buyer accepts the goods and claims for his market loss.¹⁰⁰ The alternative is that the buyer rejects the goods. His claim against the carrier would then be for the full contract price paid. This claim will normally be substantially higher than a claim for the difference between the contract price and market price.¹⁰¹

4 THE POSITION IF THE BILL OF LADING IS ANTEDATED BUT THE GOODS WERE SHIPPED WITHIN THE SHIPMENT PERIOD

The discussion in the chapters above has dealt with cases where there has simultaneously been shipment outside of the shipment period and an antedated B/L. However, it is perfectly possible for the B/L to be antedated, without the goods being shipped outside the shipment period. The reason for this could e.g. be due to a clerical error. Another possible scenario is that the B/L was originally antedated to hide delayed shipment in respect of one sale, but that the goods were subsequently sold on under a contract which requires a different shipment period, such that they are shipped within the shipment period in respect of that sale.

4.1 Under English law:

The sub-chapter on English law examines two different, but related questions. It first explains why a buyer cannot claim damages in contract for his loss of chance to reject, if the only breach the seller has committed is tendering an antedated B/L. It then explores whether the buyer may nonetheless be able to claim market loss damages against the seller in an action for deceit.

¹⁰⁰ Jacobi, Adam, p. 48

¹⁰¹ Jacobi, Adam, p. 48

4.1.1 Market loss is not recoverable for breach of contract

In *Procter & Gamble v Kurt A Becher*¹⁰² it was determined that the buyer could not recover back the difference between the contract price and the market price simply because the B/L tendered by the seller was misdated. The ratio behind this decision was that the sellers' breach of the obligation to tender proper documents did not cause the buyer to suffer the market loss.

In *Procter & Gamble*, the parties had entered into two contracts on the 10th of October for copra expeller cakes, C.I.F. Rotterdam/Hamburg, cash against documents. The shipment period under both contracts was extended to include January, and for one of the contracts the shipment period was further extended to include February. The seller presented Bs/L that were dated January 31. In fact, loading of the goods covered by the Bs/L had commenced on January 30, and had been completed on February 6 and 10. The buyers discovered this upon arrival of the vessel in Rotterdam, before the goods were discharged. At this point the buyers demanded repayment and stated their intention to reject the goods. As it turned out, rather than rejecting the goods, the buyers took delivery and sold them on, "*realizing only about 57 per cent. of the contract price.*"¹⁰³

The buyers then claimed damages on the basis of the difference between the contract price and the market price, and were awarded this in arbitration proceedings. In respect of the contract where the shipment period had been extended to February, this award was overturned in the commercial court and this decision was upheld in the Court of Appeal. *[I]t was common ground that the buyers [...] were entitled to reject the bill of lading when it was tendered. They were entitled to reject the bill of lading because it misstated the date of shipment.*"¹⁰⁴ However, the existence at one point of a right to reject, did not affect the

¹⁰² [1988] 2 Lloyd's Rep. 21

¹⁰³ [1988] 2 Lloyd's Rep. 21, p. 24

¹⁰⁴ [1988] 2 Lloyd's Rep. 21, p. 31

measure of damages for the seller's breach in tendering misdated documents. The Court of Appeal did not see it as relevant that the buyer's would have been able to reject the Bs/L tendered under the February contract. As these Bs/L did not hide shipment outside the shipment period, "[h]ad there been no breach [...] the buyers would have had no right to reject the bill of lading or the goods." Accordingly, the buyers did not lose the chance to reject "because of the breach [...], but because they did not know of the existence of the breach at the time."¹⁰⁵

4.1.2 The effect of fraud

In *Procter & Gamble* it was noted *obiter dictum* that the outcome would have been different if the buyers could have had claimed in tort rather than in contract. This is because "[i]n cases of fraudulent misrepresentation the innocent party is entitled to be put in the same position as if the representation had not been made, not as if it had been true".¹⁰⁶ This would presumably be equally true of claims for negligent misrepresentation or under the Misrepresentation Act 1967.¹⁰⁷

4.1.2.1 The orthodox position

The position that the measure of damages would have been different in action based on fraudulent misrepresentation is based on Lord Justice Kerr's comment in *Procter & Gamble*, that if the "*sellers had themselves been involved in the false dating of the bill of lading and could therefore have been sued in fraud*" the measure of damages "*would have as-*

¹⁰⁵ [1988] 2 Lloyd's Rep. 21, p. 32

¹⁰⁶ [1988] 2 Lloyd's Rep. 21, p. 28

¹⁰⁷ To the extent that they can be made out. The Misrepresentation Act applies only to representations made before the contract is entered into. Negligent misrepresentation would require the parties' relationship to give rise to a duty beyond the contractual duties under the contract of sale. See Benjamin, 19-217.

sumed that no bill of lading had been presented at all and placed the buyers in the same position as if they had kept the price of the goods in their pocket.”¹⁰⁸

In *Benjamin*, this position is expanded. It is assumed that in *Procter & Gamble*, “if the seller had known that the bill of lading which he had obtained was misdated” the buyer would have succeeded in an action for deceit.¹⁰⁹ In other words, mere knowledge that the B/L is misdated would be enough for the seller to make a fraudulent misrepresentation if he presents them as genuine, and the buyer could in such circumstances “recover back the price less the proceeds of any (reasonably concluded) resale”.¹¹⁰

4.1.2.2 Criticism

Even though it is clearly a correct statement of law that in cases of fraudulent misrepresentation the innocent party is entitled to be put in the position as though the representation has not been made, it does not necessarily follow that the innocent party is entitled to be put in the same position as though the Bs/L were never tendered. As noted by Edwin Peel¹¹¹, in all cases of fraudulent misrepresentation, there is a question of which counter-factual set of facts to apply. In a case such as *Procter & Gamble*, the most likely counter-factual to a false representation of the shipment date is not that the B/L was never tendered, but that the B/L was tendered with the correct date. If the counter-factual scenario is that the B/L was tendered with the correct date, it follows that an action in deceit would not allow a buyer to recover back the price paid less the proceeds of a resale.

¹⁰⁸ [1988] 2 Lloyd’s Rep. 21, p. 28

¹⁰⁹ Benjamin, 19-217, p. 1739

¹¹⁰ Benjamin, 19-217, p. 1739

¹¹¹ During the course of teaching a class in 2014.

4.1.2.3 Restatement of the orthodox position

The position stated by Lord Justice Kerr and in Benjamin would appear to avoid Edwin Peel's criticism if the fraudulent misrepresentation is understood not as the explicit representation about the shipment date, but an implied representation about the B/L being genuine.

The claim for fraud put forward by the buyers in *Kwei Tek Chao* was that the sellers "*fraudulently presented the bills of lading, and thereby made a fraudulent representation that the bills of lading were genuine, and a representation about the shipping date.*"¹¹² Although the sellers in *Kwei Tek Chao* were not found to have known about the misdating, it seemed to be accepted in principle that a seller can by tendering a B/L make an implied misrepresentation that it is genuine. That the seller can be said to impliedly represent that the B/L is genuine also follows from Lord Justice Kerr's analysis of the current state of the law on misdated Bs/l, where he stated that "*[t]he presentation of the documents by sellers under a c.i.f. contract implies a guarantee or warranty - or whatever term one chooses to use - in the nature of a condition that the contents of the documents are true in all material respect*"¹¹³.

If the action in deceit is based on the seller having made a fraudulent representation that the B/L was genuine, the buyer would be entitled to be put in the position as though this representation was not made. In terms of the counter-factual, is not necessary to state it in as absolutely terms as assuming that the B/L had not been tendered. It is sufficient to say that the buyer should be put in the position he would have been in had the seller not impliedly represented that the B/L was genuine, by e.g. informing the buyer about the fact that B/L did not contain the actual shipment date. Had the buyer thus been aware that the documents were not genuine, they would have exercised their right to reject the tender. The buyer can

¹¹² [1954] 2 Q.B. 459, p. 470-471

¹¹³ [1988] 2 Lloyd's Rep. 21, p. 29

therefore have recovered his market loss in an action in deceit if the seller knew that B/L was misdated when it was tendered, even if the goods were actually shipped within the shipment period.

4.2 Under Norwegian law

If the buyer has acquired an antedated B/L but the B/L did not hide shipment outside of the shipment period, the question of whether the carrier can be liable for the difference between the contract price and the market price brings up two interesting questions of how to interpret NMC Section 300 that does not otherwise arise. The first is whether liability under NMC Section 300 requires that the buyer has relied on the accuracy on the information in the B/L as opposed to reliance on the B/L being accurate. The second is whether the carrier is liable to put the buyer in the same position as if the B/L had not contained incorrect information or as though the B/L was not relied upon.

4.2.1 In reliance on the accuracy of the B/L or the information contained in it?

If an antedated B/L does not conceal shipment outside of the shipment period, the buyer has by relying on the bill of lading being accurate, not exercised the right to reject and can therefore be said to have suffered a market loss. However, he has not incurred this loss by relying on the shipment date stated in the B/L, as he would have suffered incurred the market loss if the B/L had accurately stated the shipment date. It is therefore important to examine whether reliance not just on the information in the B/L, but also on the accuracy of the B/L itself, is protected under NMC Section 300.

The translated version of NMC Section 300 states that the carrier is liable “[i]f a third party incurs a loss by acquiring a bill of lading in reliance on the accuracy of the information it contains”. The translation as such makes it clear that what is protected is reliance on the accuracy of the information, i.e. the shipping date. However, in the current context this is a misleading translation. A more direct translation of the original is “if a third party incurs a loss by taking up a bill of lading in reliance on the information in it being correct”. This is far more ambiguous, but suggests that reliance on the bill of lading being correct, or genuine, is protected.

The formulation in NMC Section 300 is different from its predecessor, which (in the author's translation) stated that the carrier was liable “[i]f a third person suffers loss by acquiring a bill of lading in reliance on the accuracy of a statement contained in it [...]”.¹¹⁴ There is no explanation of this change in the Norwegian preparatory works.¹¹⁵ In the Danish preparatory works, there is some indication that the change may have been deliberate, in that it refers to liability for a loss incurred by acquiring a B/L “in reliance on its accuracy”.¹¹⁶

A Norwegian case from 1971¹¹⁷ can be seen as having protected the buyers' reliance on the B/L being correct, even if the actual information was not relied upon. In this case, the carrier had issued clean Bs/L for a shipment of lumber, despite the master noting that it had cracked pieces and mould. The carrier denied responsibility, *inter alia* on the ground that under the contract the payment was due regardless of the condition of the goods and the buyer could therefore not be said to have suffered a loss by paying the purchase price in reliance on the goods being of good order and condition. The court rejected this argument, because they found that if the Bs/L had been correctly marked, the shipment would have been investigated before the buyer's paid for against the Bs/L, which would have revealed the buyers' right to reject on account of a different breach by the seller. The carrier was held responsible on general principles of responsibility for misleading statements but it was left open whether the carriers would also have been liable under the maritime code.

¹¹⁴ NMC 1893 Section 162 (Author's translation). Curiously, a very similar formulation has been adopted in NMC Section 299. The same discrepancy between the provisions is not present in the maritime codes of the other Nordic countries, cf. the Danish Søloven Sections 299-300 and the Swedish Sjölagen Section 13.49-13.50.

¹¹⁵ NOU 1993:36 Til § 300

¹¹⁶ Forarb. til søloven (1994), Til § 300

¹¹⁷ ND 1971.165

In the absence of any persuasive evidence to the contrary, it is submitted that the best interpretation of NMC Section 300 is that it protect reliance on B/L being correct *per se*, and not just reliance on the statements contained in it. This interpretation would explain the outcome in the case discussed above. It would also seem to be a more natural explanation of the decision-making process when a buyer accepts a tender of documents; he does not necessarily rely upon the specific information in the B/L, but on the fact that the B/L on the face of it appears to comply with the conditions of the contract.

4.2.2 Should the buyer be put in the position as though the B/L did not contain incorrect information or as though the B/L was not relied upon?

Even if a buyer's reliance on the B/L being correct is protected, the question remains of whether under NMC Section 300 the buyer should be put in the position as if he had not relied upon the information, i.e. rejected the seller's tender of the B/L, or as if the B/L had contained the correct shipment date. It is put both ways in academic literature,¹¹⁸ but the significance of the way it is put does not seem to have been considered. If the seller is to be put in the same position as if he had rejected the B/L, he should be able to recover his market loss. If he is to be put in the same position as if the B/L had not been antedated, he would not be able to recover the market loss, as his only ground for rejecting the tender in this scenario is that the B/L was antedated.

5 THE MEASURE OF DAMAGES

5.1 The measure of damages

In the previous chapters, the circumstances in which either the seller or the carrier becomes liable for the buyer's loss of chance to reject. This chapter examines how to calculate the

¹¹⁸ Selvig 158; Falkanger, p. 339; NOU 2012:10

measure of damages for this loss. It will further be explained how to calculate other losses that might arise if the B/L is antedated in relation to the buyer's sub-sales. The final part of the chapter deals with how the seller's and the carrier's liability relate to each other.

5.2 Under English law

As explained in the previous chapters, the seller is responsible for the buyer's loss of chance to reject if the seller has tendered incorrect documents that hid the buyer's right to reject on the basis that the goods were shipped outside of the shipment period. The seller can also become liable for the buyer's loss of chance to reject if he has knowingly tendered misdated Bs/L.

The buyer's right to compensation from the seller for other types of loss that might result from the seller's breach of the obligation to tender a correctly dated B/L, such as loss of the benefit of a sub-sale, does not depend on whether or not the goods were shipped within the shipment period of the original sale.¹¹⁹

5.2.1 Compensation for the loss of chance to reject

The measure of damages for the loss of chance to reject, or "*breach by the seller of his obligation to deliver a correct bill of lading*"¹²⁰ was stated in *James Finlay* to be "*the difference between the market price and the contract price, the latter being higher than the former.*"¹²¹ This formulation has since been applied in several cases, but precisely how to calculate the market price has remained somewhat uncertain. The time when the market price should be determined has been subject to various suggestions.

¹¹⁹ [1988] 2 Lloyd's Rep. 21, p. 30 and 32

¹²⁰ *James Finlay and Company, Limited v N. V. Kwik Hoo Tong Handel Maatschappij* [1928] 2 K.B. 604, p. 612-613

¹²¹ [1928] 2 K.B. 604, p. 612

5.2.1.1 Market price at time of breach, at arrival or by resale?

In *James Finlay* itself, the documents were accepted on November 12, whereas the ship arrived in Bombay at November 9 and finished discharging on November 15.¹²² The market price was determined as the “*the value of the sugar at the time of the delivery in Bombay*”,¹²³ although it appears that the value at the time of delivery was taken to be the price achieved at an auction held by the buyers a month after delivery.¹²⁴ In *the Kastellon*,¹²⁵ the judge upheld “*damages [...] based upon the difference between the contract price and the market price on Feb. 26, 1975, when the documents were presented*”¹²⁶. It should however be noted that the goods themselves arrived “*towards the end of February*”,¹²⁷ and that the measure was set by the arbitrators and was not in dispute at trial.¹²⁸

5.2.1.2 The approach in *Kwei Tek Chao*

In *Kwei Tek Chao*, the question of how to calculate the market loss was addressed thoroughly by Mr Justice Devlin, as on the fact of the case the time when the market price was calculated was crucial. The contract price was £590 sterling per ton. The Bs/L were presented on November 10, by which time the (nominal) market price for Rongalite C had fallen to £504 sterling per ton. By the time of delivery, on December 17, the (nominal) market price had fallen further to £330 sterling per ton.

Mr Justice Devlin’s analysis of what it would take to apply the principle in *James Finlay*, and put the buyers in the same position as if the breach in tendering antedated Bs/L had not

¹²² [1928] 2 K.B. 604, p. 605-606

¹²³ [1929] 1 K.B. 400, p. 409

¹²⁴ Benjamin 19-218; [1954] 2 Q.B. 459 p. 492

¹²⁵ *Huilerie L’Abeille v Société des Huileries du Niger (The Kastellon)* [1978] 2 Lloyd’s Rep. 203

¹²⁶ [1978] 2 Lloyd’s Rep. 203, p. 204

¹²⁷ [1978] 2 Lloyd’s Rep. 203, p. 204

¹²⁸ [1978] 2 Lloyd’s Rep. 203, p. 204,

deprived the buyer of the right to reject was based on the following: “[the buyer] has the goods, he has parted with his money, and therefore he wants to relieve himself of the goods and recover his money. If that is done he will be in the same position as he would have been in if he had never parted with his money and had never received the goods.”¹²⁹ Accordingly, Mr Justice Devlin judged the correct measure to be “the difference between the contract price and the price at which the buyer has sold the goods.”¹³⁰ This was however modified by the principle that a party must mitigate his losses, so that “as soon as [the buyer] knows of his rights he must sell the goods. ... If he chooses not to sell the goods he is not to be put in any better or worse position by delaying for his own purposes, so that, in substance, it is the price which he actually gets on selling them, or the price which he actually could get if he did sell them.”¹³¹ In other words, the market loss was taken to be the difference between the contract price and the market price the when the buyer discovered the breach.

5.2.1.3 Critique of the approach in *Kwei Tek Chao*

Breach of the obligation to tender correct documents hides from the buyer both his right to reject the documents and his right to reject the goods. However, in these cases, if the seller had not committed the breach, the buyer would have rejected the tender and there would have been no question of rejecting the goods. What is being compensated must therefore be the loss suffered because the buyer did not reject the documents. The different dates for calculating the market price presumably stems from the fact that the loss is first realised when the buyer loses the right to reject the goods or sells the goods on. The fluctuations in the market price between the time when the documents are tendered, and the time when the goods are delivered and/or sold on, are not caused by the seller’s breach. The buyer should in principle not be better or worse of for having made the decision to sell or retain the

¹²⁹ [1954] 2 Q.B. 459, p. 500-501

¹³⁰ [1954] 2 Q.B. 459, p. 501

¹³¹ [1954] 2 Q.B. 459, p. 501

goods. It would therefore seem that the relevant date for calculating the market loss should, as a starting point, be the date when the documents are tendered.

The suggestion that the relevant date is when the document was tendered was however expressly rejected in *Kwei Tek Chao*. It is submitted that this should not be seen as laying down a general rule that damages for market loss are assessed by reference to the market value of the goods when they were sold or the buyer discovers the breach. Benjamin appears to apply the principle in *Kwei Tek Chao* only “*if the market declines between the tender of the false documents and the buyer’s discovery of his right to reject*”¹³², because the buyer will then “*in fact continue to suffer loss as a result of the falsity of the documents*”.¹³³ The true *ratio* of the measure arrived at in *Kwei Tek Chao* appears to be that it would be “*illogical to say that [the buyer] must be expected as reasonable men to act in the same way as if they had not been deceived.*” In *Kwei Tek Chao*, the buyer had retained the documents because he had an agreement with a sub-buyer. That the market loss in *Kwei Tek Chao* was by reference to the date the buyer became aware of the breach should perhaps therefore be best understood by analogy to fraudulent misrepresentation cases. If a buyer has bought e.g. stock at a higher price than the market value because of a fraudulent misrepresentation, the starting point is that the defendant is liable only for the difference between the market value of the stocks and the price the buyer paid at the date the buyer acquires them. A buyer can however also recover market losses suffered after the acquisition, if the misrepresentation has induced him to retain the stock.¹³⁴

¹³² Benjamin 19-218, p. 1740

¹³³ Treitel, p. 395-396

¹³⁴ Treitel, p. 395-396

5.2.2 Compensation for other types of loss resulting from the breach of the obligation to tender correct documents

5.2.2.1 Loss of the benefit of a sub-sale

The buyer may lose the benefit of a sub-sale, i.e. the profit he would have made on it, because the B/L he has acquired is antedated. This might happen in two slightly different circumstances. The sub-buyer may on his own accord discover his right to reject the documents and/or the goods, and exercise it. Alternatively, the buyer may discover that the B/L is antedated before tendering the documents to the sub-buyer. It would then be fraud to present them to the sub-buyer without informing him that they are misdated,¹³⁵ and the sub-buyer may learn of his right to reject in this way.

If the buyer has lost the benefit of the sub-sale because of the seller's breach in tendering incorrect documents, he can recover this loss against the seller.¹³⁶ The measure of damages would presumably be the measure that was discussed *obiter dictum* in *James Finlay* of "the difference between the market value of the goods delivered and the price [the buyer] would have got under the sub-contracts".¹³⁷ This claim would as such subsume a claim for market loss damages. Any claim for the loss of a sub-sale must be subject to the rules of remoteness. Accordingly, the seller is liable "only if he knew or could have contemplated that the goods were required for resale"¹³⁸. Even if this is known, the seller is not ordinarily liable for the loss of an extraordinarily high profit.¹³⁹

Whether the benefit of the sub-sale has been lost because of the seller's breach is dependent on some intricate questions of causation. The buyer can only be said to have lost the benefit

¹³⁵ See 4.1 above.

¹³⁶ Procter & Gamble, p. 30

¹³⁷ [1929] 1 K.B. 400, p. 409

¹³⁸ Treitel p. 1022

¹³⁹ Treitel, p. 1022

of his sub-sale as a result of the seller's breach in tendering falsely dated Bs/L, if it is not open to the buyer to fulfil it by acquiring substitute goods and the buyer would have had the benefit of it had the B/L been correct. It will not be open to the buyer to acquire substitute goods to fulfil his sub-sale by acquiring substitute goods in certain circumstances. Firstly, if the sub-sale was for the specific goods he was to acquire from the buyer. Secondly, if the specific goods carried under the antedated B/L have been irrevocably appropriated to the sub-sale contract by notice or tender.¹⁴⁰

Even if it is impossible for the buyer to fulfil his sub-sale, this will not necessarily have been occasioned by the seller's breach in tendering incorrect documents. If the sub-sale was for specific goods, or the goods had been appropriated to the contract before the buyer accepted the seller's tender, the buyer would not have been able to fulfil his sub-sale even if the B/L had been correctly dated.¹⁴¹ The same would be true if it would simply not have been possible for the buyer to go into the market to acquire substitute goods to fulfil the sub-sale.

¹⁴⁰ Appropriation is here meant in the sense that *"a seller of unascertained goods binds himself contractually to deliver particular goods ... or the documents representing them"*. See Benjamin 19-014 et seq.

¹⁴¹ Different if the B/L would still be of contractual description for the purpose of the sub-sale if the shipping date were accurately stated, see 4.1 above. Note also that a claim for the loss of benefit of the sub-sale could in these circumstances potentially still have been made in addition to a claim for the market loss, on the basis of the seller's breach of the obligation to ship the goods within the shipment period, as was claimed in *Kwei Tek Chao*. However, in respect of this claim, it was stated (at p.489-490) that the loss of profit would only be an appropriate measure of damages if the seller had known that the buyer required those specific goods to fulfil a specific sub-sale.

5.2.2.2 Damages for becoming liable in relation to sub-sales

If the antedated B/L has been sold afloat to several sub-buyers, their claims might compound in an interesting manner. This point is best explained by illustration.

For instance, we might imagine that in August, A agrees to sell B 100 tons of corns for 100\$, C.I.F. Hamburg, shipment in September, payment against B/L. In the same month, B enters into an identical agreement with C, except the price is 110\$, and C enters into an identical agreement with D, except the price is 120\$. During the course of September, the market price for corn sinks to 90\$. Shipment is not completed until 1 October. A had previously made it clear that the need for shipment to be by September, and the master therefore decides to issue a B/L stating that the corn was “shipped onboard” September 30. A presents the B/L to B who accepts it and pays, and presents it to C and so forth. The ship arrives in Hamburg on October 15 and discharge is completed the same day.

Whilst the ship was discharging, D consulted the ship’s log and discovers that loading of the goods was not completed until October 1. D rejects the goods for not being a September shipment, and claims back the 120\$ already paid to C. C refunds D, takes delivery of the goods and sells them at auction for the market price of 90\$.

C claims damages from B for B’s breach of the obligation to deliver a correct B/L. C primarily claims damages for the loss of the benefit of the sub-sale, i.e. the difference between the sub-sale price and the market price, or $120\$ - 90\$ = 30\$$. In the alternative, C claims their market loss of $110\$ - 90\$ = 20\$$. Depending on the amount B has become liable for, B then claims 40\$ or 30\$ in damages from A, representing the market loss suffered by B, i.e. \$10, as well as the amount he has become liable to C for.

If B’s claim succeeds, A will have become liable for the same market loss twice, in respect

of the market loss suffered by both B and C.¹⁴² The way in which it suggested here that the claim can increase between each link in this “*chain of liability*”¹⁴³ appears to be a natural extension of the principle formulated in *James Finlay* that a buyer is “*in law ... entitled to rely, on the accuracy of the bill of lading date*”¹⁴⁴. If the seller is liable for market loss because “*the parties must have contemplated that the buyers would, by taking up the documents and accepting the goods on the faith that they were bound to do so, pay the higher contract price instead of the lower market price, and lose their right to reject and suffer damage accordingly*”¹⁴⁵, it is natural to infer also that the parties will have contemplated that the buyer might expose himself to similar liability by unwittingly tendering the very same documents to a sub-buyer.

5.3 Under the Norwegian Maritime Code

5.3.1 Compensation for the loss of chance to reject

Selvig states that in “*most of the cases*” where the carrier is liable under NMC Section 300, “*the loss will be the amount the buyer has paid when taking up the bill of lading.*”¹⁴⁶ If the buyer has after paying against the documents discovered that the goods were shipped outside of the shipment period and rejected them, this measure is certainly appropriate as a starting point. However, since the B/L has been antedated, the fact that the goods are not of

¹⁴² It could also be seen as A becoming indirectly liable for B’s loss of benefit of the sub-sale, as the figures here places B in the same position as he would have been in had he rejected A’s tender and bought substitute goods to fulfil the sub-sale with C. This should perhaps limit B’s claim against A, if B would by this measure be placed in a better position than he would have been had A tendered a correct B/L showing shipment outside the shipment period.

¹⁴³ To use the terminology in Benjamin, 19-213

¹⁴⁴ [1928] 2 K.B. 604, p. 612

¹⁴⁵ [1928] 2 K.B. 604, p. 613

¹⁴⁶ Selvig, p. 158, author’s translation

contract description is hidden. This defect is not discoverable upon examination of the goods, and as such, it is far from certain that it will be discovered in time to reject the goods. Nor is it necessarily the case that the buyer would have rejected the goods, even if he had the requisite knowledge at the correct time.¹⁴⁷ If the buyer has not rejected the goods, e.g. because he has sold them, used them or taken delivery and still has them, he has *prima facie* not suffered a loss equivalent to the full purchase price, but has suffered a market loss equivalent to the difference between the contract price he has paid and the value of the goods he has received.

5.3.1.1 Compensation for the market loss

How to calculate the buyer's market loss brings up similar issues as under the sales contract in regards to the time when the market loss should be calculated, and as such who carries the risk for price fluctuations. Unfortunately, this issue does not appear to have been addressed directly in academic literature or case law.

Jacobi appears to assume that it is the difference between the contract price and the value of goods at arrival or "current value" that is relevant.¹⁴⁸ The evidence for this position is scarce however. In a Danish judgement from 1908,¹⁴⁹ the buyer recovered from a Norwegian carrier the difference between the contract price and the market price of the goods. There was no difference in price between the date the B/L was taken up and the date when the goods arrived. In a Danish judgement from 1923,¹⁵⁰ the only discussion of the calculation of the market loss is that the figure supplied by the buyer was not estimated too highly.

¹⁴⁷ Jacobi, Adam "Antedaterede konossement", p. 48; see also discussion in chapter 3 above.

¹⁴⁸ Jacobi, Adam "Antedaterede konossement", p.

¹⁴⁹ ND 1908.305

¹⁵⁰ UfR 1923.642

In Falkanger, on the application of the principle that the buyer should be placed in the same position as if the B/L had not been antedated, it is stated simply that the buyer's "*loss resulting from reliance on the bill of lading will correspond to the drop in the market price of the goods.*"¹⁵¹ Similarly, Jantzen states simply that "*had the correct date been supplied, [the buyer] would have known that shipment was completed after the stipulated shipment date, and he could therefore have refused to take up the bill of lading or to receive the goods. The carrier must compensate this loss*"¹⁵².

It is accordingly difficult to say anything concrete about when the market loss should be calculated. The principle stated in Jantzen, that the purchaser should not be left worse off than if there had been no mistakes in the B/L is however of some assistance.¹⁵³ By applying this principle, it appears clear that the buyer should recover the market loss of a price fall subsequent to acquiring the documents, if he has been induced to keep them because of the misleading statement. Such a loss is clearly caused by reliance on the B/L.

5.3.2 Compensation for other types of loss under NMC Section 300

The wording of NMC Section 300 could on a narrow construction be said to only cover the buyer's loss of chance to reject or the buyer having paid more than is due under the contract. However, it seems accepted that a buyer could recover e.g. loss suffered because in reliance of the shipment date stated in a bill of lading, he expected the goods to arrive by a certain date "*and therefore did not obtain goods from other sources to maintain production until the arrival of the consignment*".¹⁵⁴ This shows that the carrier may be responsible for other types of losses than just the loss of chance to reject.

¹⁵¹ Falkanger et al, p. 340

¹⁵² Jantzen, p. 531 (Author's translation)

¹⁵³ Jantzen, p. 535

¹⁵⁴ Falkanger et al, p. 340; cf. Jantzen p. 532. Interestingly, the particular example of the buyer suffering loss because he did not acquire substitute goods in time would in most cir-

5.3.2.1 Loss of the benefit of a sub-sale

As illustrated above in chapter 5.2.2.1, the buyer may lose the benefit of a sub-sale as a result of the B/L being antedated. The situation where a buyer loses the benefit of a sub-sale is clearly analogous to the mentioned example of the buyer suffering a loss by not obtaining substitute goods to maintain production. The carrier should as such be liable for this type of loss. The carrier's responsibility for the lost benefit of a sub-sale must however clearly be restricted to instances where the buyer would have been able to fulfil the sub-sale had it not been for the fact that he relied on the shipping date in the B/L. If the buyer would not in any event have been able to fulfil the sub-sale, the loss of profit is not a loss they have incurred in reliance of the information in the B/L.¹⁵⁵

5.3.2.1.1 Damages for the loss of chance to reject in relation to sub-sales

As illustrated above in chapter 5.2.2.2, if an antedated B/L has been tendered to several sub-buyers, several parties can suffer a market loss in respect of their contract and their claims can compound. Because of this, the carrier can become liable for the same market loss more than once. This can happen in two different ways. A buyer might claim back from the carrier the amount he has become liable for to a sub-buyer. Alternatively, the buyer and the sub-buyer(s) might bring their own individual claims against the carrier.

That the buyer may claim back from the carrier the amount he has become liable for to a sub-buyer follows from the example in Jantzen that a buyer should be able to recover for the loss he has incurred by becoming liable for selling more than he could deliver in good faith, because he relied on the information about amount of goods in the B/L.¹⁵⁶ There does

cumstances be too remote to recover against the seller under English law for breach of contract. See e.g. *Hadley v Baxendale* (1854) 9 Exch. 342, where delivery of a mill shaft was delayed, and the mill owner could not recover the loss for the days when the mill was not operational

¹⁵⁵ UfR, 1923.642. See note 154 below.

¹⁵⁶ Jantzen, p. 532

not seem to be any reason why this principle should be limited to only liability in relation to quantity, and not other liability a buyer can incur in relation to a sub-buyer by relying on the information in the B/L.

That the buyer and the sub-buyer(s) might have their own individual claims against the carrier follows from the discussion above in chapter 2.2.2.2 that NMC Section 300 should not be understood to have a requirement that a claimant must be the receiver of the goods.

Whether or not the sub-buyers bring their claims against the buyer or the carrier can affect the total amount the carrier becomes liable for. These points will be explained by illustration, using the same example as in chapter 5.2.2.2 above.

In the example, the market price for the goods had fallen to \$90. Because the B/L was antedated, B paid A the contract price of \$100 and has therefore suffered a market loss of \$10. C paid B \$110 for the same goods, and has therefore suffered a market loss of \$20. C also lost the profit of \$10 he would have made on his sub-sale with D.

Assuming that both B and C would have been able to purchase substitute goods to fulfil their sub-sales if the B/L had not been antedated, the amount the carrier would be liable for does not change depending on whether they both bring their claims directly against the carrier, or if C first claims against B who then claims against the carrier. The carrier also becomes liable to pay for the same market loss twice; once in relation to C and once in relation to B.

If C claims their full loss of \$30 against B, B would claim \$40 against carrier. This is the measure that would be required to put B in the same position as if the B/L had not been antedated, i.e. as if B had rejected A's tender and gone into the market to buy substitute goods to fulfil the sub-sale with C. The carrier would as such be liable for \$40 in total.

If they both bring their claims directly, the carrier should be liable to B for \$10 and to C for \$30, or \$40 in total. It could be argued that the carrier should not be liable for the \$10 of C's claim that represents their market loss. Factually, C would have suffered this loss even if the B/L had been correctly dated, as B would have been able to fulfil the sub-sale using substitute goods. However, it is submitted that C should not be precluded from recovering his market loss from the carrier on this basis. By acquiring the B/L in reliance on the accuracy of the shipment date, C has clearly suffered a market loss they could have avoided in respect of their contract. They should not have to recover this loss from B.

Assuming that both B and C would not have been able to purchase substitute goods to fulfil their sub-sales if the B/L had not been antedated, the amount the carrier would be liable for does change depending on whether C brings a claim directly against the carrier, or if C first claims against B who then claims against the carrier. This is because neither B nor C can recover from the carrier a loss of profit they would not have made had the B/L been dated correctly.¹⁵⁷

If C would not have been able to buy substitute goods to fulfil their sub-sale with D, their claim against B for B's breach of the obligation to tender correct documents would be restricted to C's market loss of \$20.¹⁵⁸ Had the B/L been correctly dated, B would not have paid A \$100 or become liable to C for \$20, but would also not have been paid \$110 by C.

¹⁵⁷ See UfR 1923.642. A buyer had become liable to his sub-buyers because the goods were not shipped in October. The sub-buyer recovered the amount he had become liable for from his seller, less the amount that represented the buyer's profit from the sub-sales. The buyer attempted to recover this remaining amount from the carrier, but was unable to do so because he could not prove that if the B/L had not been antedated, he would have been able to acquire another October shipment as required to fulfill the sub-sales.

¹⁵⁸ See chapter 5.2.2.2 above.

B's claim against the carrier would therefore be restricted to \$10, which would put him in the same position as if the B/L had not been antedated.

If C claims directly against the carrier, the carrier would be liable for C's market loss of \$20. B would on these facts not have a claim against the carrier. B has suffered a market loss of \$10 because the B/L was antedated, but also made a profit of \$10 on his sub-sale with C that he would not have made had the B/L been correctly dated. Accordingly, B is in the same position as if the B/L had not been antedated.

5.4 Relationship between the seller's and the carrier's liability

When calculating the damages in relation to either the seller or the carrier, account is not to be made of the fact that the buyer has a claim against the other.¹⁵⁹ The buyer cannot however recover back the same loss twice.¹⁶⁰

There has been some debate as to whether the buyer can claim against the carrier if he has settled with the seller, or whether the carrier's liability in respect of the same type of loss can be greater than that of the seller.¹⁶¹ The basis for this appears to be a judgement in the Norwegian Supreme Court from 1949,¹⁶² where the responsibility of the seller was seen as the primary responsibility. However, in that case it was held that the buyer's settlement with the seller covered the entirety of the buyer's losses in respect of the B/L being incorrect, and so strictly speaking no issue arose as to whether the carrier's responsibility could go beyond that of the seller. Jacobi also states that the Danish courts appear to determine

¹⁵⁹ Selvig, p. 159; *Hindley & Co Ltd v West Indian Produce Ltd* [1973] 2 Lloyd's Rep 515, p. 519;

¹⁶⁰ Solvang, p. 40 note 26

¹⁶¹ Selvig, p. 159

¹⁶² Rt. 1949.527

the carrier's responsibility autonomously, not by reference to the seller's liability in Danish sale of goods law.¹⁶³

6 CONCLUDING REMARKS

The losses we have examined in this thesis all arise by operation of the sales contract giving buyers the right to reject goods that are shipped outside of the shipment period, regardless of whether the value of the goods are affected by late shipment or the buyer otherwise suffers any loss because of it. A lot could be said about whether a buyer should have this opportunity to escape from the consequences of a bad bargain. However, the more relevant question in regards to the issues examined in this thesis is the justification for allowing the buyer to recover damages “*for what is in effect the loss of the right to reject.*”¹⁶⁴

That even an innocent seller can become liable to compensate the buyer for his loss of chance to reject has been criticised by both the judiciary and academic commentators. The harshness of the rule is illustrated by the facts of *the Kastellon*, where “*neither the sellers nor the buyers were aware of [the antedating]*”¹⁶⁵ and “*[the goods] arrived ... precisely at the time for which the buyers had asked for delivery, and it cannot have made any difference to them whether the oil was shipped on Jan. 31 or Feb. 1.*”¹⁶⁶ Mr Justice Donaldson was therefore of the opinion that the sellers were “*reasonably aggrieved ... when the buyers took advantage of what the sellers regarded as a legal technicality*”,¹⁶⁷ and awarded the buyer's claim “*[w]ith some regret, because there is little merit in the buyers' contentions*”.¹⁶⁸ The sentiment expressed by Mr Justice Donaldson is referred to approvingly in

¹⁶³ Jacobi, Adam, p. 82

¹⁶⁴ McKendrick, 13-070 p. 692

¹⁶⁵ Huilerie etc, p. 204

¹⁶⁶ Huilerie etc p. 204

¹⁶⁷ Huilere etc p. 204

¹⁶⁸ Huilere etc p. 207

Treitel.¹⁶⁹ Benjamin points out that allowing the buyer to claim damages that places him in the same position as if he had rejected “*conflicts with the policy of the rules that limit the right to reject*”,¹⁷⁰ and that the need to deter fraud or the seller’s own blameworthiness cannot justify this result if the seller is wholly innocent.¹⁷¹ Benjamin therefore submits “*that the law would be in a more satisfactory state if such damages were available only where the seller (or someone for whom he was responsible) was to blame for the false statements, or at least knew of their falsity at the time of tender of documents.*”

In respect of the carrier, it is easier to see a justification for their liability for market losses. As pointed out by Falkanger, the value of the statements in the B/L “*hinges to a large extent on the legal rules associated with it*”.¹⁷² Regardless of the merit in the buyer being able to escape a bad bargain, the buyer should be entitled to rely on the shipment date in the B/L. This policy is strengthened if they are able to recover losses from both their buyers and the carrier. It should also be noted that unlike the seller’s liability, the carrier’s liability is not strict. A certain element of fault, even if just negligence, is required for the carrier to become liable. That this qualification makes little difference in practice does not mean that the carrier unreasonably becomes liable for the buyer’s market loss. It is precisely because it is so important that the shipment date is correct, that the carrier should in almost all circumstances have understood that an antedated B/L was likely to be misleading.

¹⁶⁹ Treitel 20-053

¹⁷⁰ Benjamin, 19-213

¹⁷¹ Benjamin, 19-214

¹⁷² Falkanger, 272

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