

THE UNDEAD — GRANT V NORWAY REVISITED

I. INTRODUCTION

Like the protagonist in a series of B-grade horror movies, *Grant v. Norway*,¹ decided a good one-and-a-half centuries ago, keeps coming back to haunt modern visitors who stray into its realm.

In that case, the master of a ship signed a bill of lading acknowledging that 12 bales of silk were shipped. The indorsees of the bill advanced money on the goods so represented to have been shipped. The goods were never shipped and the indorsees sued the shipowners to recover the amount they had advanced. The Court of Common Pleas held that a ship's master had no authority to sign a bill of lading for goods not put on board. Jervis, C.J., delivering the judgment of the court, posed the question as:

[W]hether the master of a ship, signing a bill of lading for goods which have never been shipped, is to be considered as the agent of the owner in that behalf, so as to make the latter responsible.

His Lordship concluded that:

If, then, from the usage of trade, and the general practice of ship-masters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and, in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped.

The decision had an uneasy passage through time under the scrutiny of various 20th. century English judges and re-emerged in Singapore in the 1991 judgment of Karthigesu J. in *Blue Nile Co. Ltd. v. Emery Customs Brokers (S) Pte. Ltd.*² The defendants in that case were freight forwarders who had issued the bills of lading in question. These bills falsely indicated that three shipments of black tea had been made. The plaintiffs who were the purchasers of the tea accepted these bills and later found out that there was no shipment as alleged in the bills of lading. They did receive a shipment of part of the contract amount from another ship and sued the defendants for the short-fall.

¹ (1851) 10 CB 665.

² [1992] 1 SLR 296.

The plaintiffs alleged that the defendants at the time when they issued the bills of lading knew and/or ought to have known that the said representations contained therein were untrue and/or were made recklessly not caring whether they were true or false. In brief, this was a claim based on an allegation of fraud. The plaintiffs alternatively relied on an alleged negligent misrepresentation by the defendants. The ground of negligence was not dealt with substantively and may be disregarded for our purposes.

The defendants, in their defence, pleaded, inter alia, that the three bills of lading were fraudulently issued by one Alfred Tan, their employee, without their consent or authority. Accordingly, they denied making any representations by the bills of lading.

The plaintiffs managed to obtain summary judgment before the senior assistant registrar on the ground that there was no defence to the claim since the defendants had admitted their employee's fraud.

The defendants appealed to the High Court. In *Blue Nile Co. Ltd. v. Emery Customs Brokers (S) Pte. Ltd.*, Chan J. accepted the defendants' argument that since the plaintiffs' primary claim is based on an allegation of fraud, the plaintiffs were precluded by the terms of O. 14 r. 1(2)(b) of the Rules of the Supreme Court 1970 from applying for summary judgment (The relevant provisions have now been amended). However, Chan J. did not close the door on the plaintiffs' claim entirely. He suggested that:

They could have applied for judgment on the ground that the defence did not disclose a defence in law in that the defendants were liable for the fraud of their servants, *Grant v. Norway* notwithstanding. They chose not to do so. Moreover, this judgment does not prevent them from doing so on that basis.³

Chan J. went on to indicate that he did not consider that *Grant v. Norway* had conclusively decided the issue:

Grant v. Norway, on the face of it, provides a defence in law. If *Grant v. Norway* is good law in Singapore and is applicable to the facts as alleged by the defendants, it provides a complete defence to the action.⁴

Thus prompted, the plaintiffs applied to strike out certain portions of the defence pursuant to O. 18 r. 19(1) of the Rules of the Supreme Court or under the inherent jurisdiction of the court and have judgment entered in

³ [1990] 2 MLJ 385, p. 387.

⁴ *Ibid.*, p. 388.

their favour against the defendants. The application was heard before Karthigesu J. The learned judge aptly summed up the issue thus:

It is not disputed that these paras of the defence support a defence founded on *Grant v. Norway* (1851) 10 CB 665; 138 ER 263. Accordingly, it is not disputed that should I decide that *Grant v. Norway* is not applicable to the facts of this case or that *Grant v. Norway* is not good law in Singapore then the defence founded on *Grant v. Norway* must fail in limine.⁵

As it turned out, Karthigesu J. held that *Grant v. Norway* was good law in Singapore, but that it did not apply on the facts to offer the defendants a good defence. There were corollary points raised on the bank's purported negligence in accepting the bills and also as to the effect of bills of lading issued by freight forwarders. These points detract from *Grant v. Norway* and will not be addressed.

II. THE PROBLEM WITH *GRANT V NORWAY*

A. *The Non Sequitur*

The liability of the shipowner in this area can arise in two ways. First, based on the idea of estoppel, a representation by his agent which is binding on him will preclude him from denying that the goods are in fact received on board. That being so, the shipowner will have to account for any short delivery of the goods so represented to have been shipped. Secondly, any loss suffered by the party who rely on the representation may be recoverable from the shipowner based on either fraudulent or negligent misrepresentation.

It is not proposed to dwell on nice distinctions between these two possible sources of the shipowner's liability. In either case, the question is whether the representation of the agent can be treated as that of the principal so that the principal is held responsible for the statement.⁶

The premise on which *Grant v. Norway* was decided was indisputable. The master had no authority to sign bills of lading for goods that are not put on board. Such lack of authority was perhaps well known to people in the trade. However, by coming to the conclusion that when the master had no

⁵ *Supra*, note 2, p. 301.

⁶ For example, in Bower, *The Law Relating to Estoppel by Representation* (3rd. ed., 1977), para. 275, *Grant v. Norway* is discussed in relation to estoppel whereas in Conant, "Liability of Principals for Torts of Agents: A Comparative View" (1968) 47 Nebraska L.R. 42, p. 56, the case was discussed with respect to the principal's vicarious liability for his agent's misrepresentations.

authority *in a particular transaction* the other party must be taken to have notice of it, Jervis J.'s reasoning created a catch-22 situation.

The hitch is that, on the *Grant v. Norway* approach, a person must know first of all whether the statement is true before he can decide whether the agent has authority or not. This is surely a fallacy. If the person can already determine whether something is true or false, the agent's statement serves no purpose. If the word is binding only if it is true, what is the purpose of reliance on the agent's word? This is tantamount to saying: "Yes, you may rely on what he says, unless it is false."

Grant v. Norway does not fit easily among other decisions on the effect of representations in bills of lading. In the earlier case of *Howard v. Tucker* in 1831, it was held that a bill of lading signed by a captain representing that freight had been prepaid would bind his principals the shipowners although freight was never paid.⁷ In later cases, the courts also held that statements in the bill of lading about the condition of the goods would estop the shipowner from proving otherwise.⁸ As pointed out by Scrutton:

The rule is unsatisfactory, for a person making payments against tender of the bill relies just as much, if not more, on the representations as to quantity as he does on the representations as to good order and condition. The theoretical distinction may be that in the latter case the owner is bound by the contract of carriage made by the master, and is therefore bound by all its terms; whereas in the *Grant v. Norway* situation the owner cannot be bound by a contract to carry goods, when in truth there are no goods to carry. This explanation is not convincing. In the first place, the question is not whether there is a contract of carriage, but whether there is an estoppel. Secondly, the explanation does not cover the case where *some* goods are shipped, albeit not as many as are stated in the bill.⁹

Scrutton went on to make the additional point that the common law rule that the bill of lading is nevertheless *prima facie* evidence of the quantity shipped "makes the principle of *Grant v. Norway* even more anomalous, since there seems no reason why the master should have authority to make the representation *prima facie* evidence, if he has no authority to create an estoppel or otherwise to make the owner liable."¹⁰ He was referring to the enigma illustrated by Lord Watson's statement in *Smith v. Bedouin*:

The master of a ship has no authority to grant bills of lading for goods

⁷ (1831) 1 B & Ad. 710; 38 ER 951.

⁸ See e.g. *Campania Vacongada v. Churchill* [1906] 1 KB 237; *The Tromp* [1921] p. 337.

⁹ Scrutton, *Charterparties and Bills of Lading* (19th. ed., 1984), p. 115n.

¹⁰ *Ibid.*; see e.g. *Smith v. Bedouin* [1896] A.C. 70, p. 75.

which were not put on board his vessel; but, when he signs a bill acknowledging the receipt of a specific quantity of goods, the shipowner is bound to deliver the full amount specified, unless he can shew that the whole or some part of it was in fact not shipped.¹¹

On a more sympathetic view, it has been said that *Grant v. Norway* was decided before developments in the law of agency and related rules on vicarious liability rendered it an anomaly.¹² Perhaps a look at the relevant rules will highlight how awkwardly *Grant v. Norway* is perched among the body of case law on agency.

B. *The Principles of Agency*

1. *The categories of authority*

The authority of an agent may be classified under three categories: express, implied and ostensible. While the first two categories are authority which the agent actually possesses, the third category, which is sometimes referred to as “apparent” authority, is neither real nor actual. It is a creature of the doctrine of estoppel. The difference between ostensible and implied authority is neatly summarised by Fridman in the following words:

The apparent authority must be carefully distinguished from the *implied* authority, in particular that variety of implied authority which has been called *usual* authority, which some agents may possess over and above the express authority granted them by the principal. *Implied* (including in this context *usual*) authority is the authority which in fact the agent possesses as a result of the construction of his contract of agency in the light of business efficacy, or of the normal practices and methods of the trade, business, market, place, or profession, in which the agent is employed. *Apparent* authority, on the other hand, is the authority which, as a result of the operation of the legal doctrine of estoppel, the agent is considered as possessing, in view of the way a reasonable third party would understand the conduct or statements of the principal and the agent.¹³

¹¹ *Ibid.*, p. 77.

¹² See eg. Reynolds, “Warranty of Authority” (1967) 83 L.Q.R. 189, p. 194; Stoljar, *The Law of Agency* (1961), p. 76.

¹³ Fridman, *The Law of Agency* (6th. ed., 1990), p. 108. See also *Freeman & Lockyer v. Buckhurst* [1964] 2 Q.B. 480, at 503, per Lord Diplock. There is some argument as to whether ostensible authority can properly be based on estoppel. See Reynolds (ed.), *Bowstead on Agency* (15th. ed., 1985), p. 290. However, we need not be concerned with the finer theoretical points here.

Reynolds further clarifies that:

The idea that by allowing this agent to act in certain ways the principal is making representations to third parties is an artificial one, especially where the “representation” simply amounts to putting someone in a position which carries usual authority, or using the services of a professional person whose activities carry a usual authority.¹⁴

2. *Vicarious liability for a servant’s tort*

At this juncture, we should also consider some overlap between the rules of agency and the vicarious liability of a master for his servant’s actions. A servant’s actions may be analysed in terms of agency and apparent authority to determine whether they fall within his ostensible authority. This means that if the servant commits a fraud contrary to his actual authority, so long as the fraud is unknown and he is ostensibly acting on behalf of his employer, his employer will be liable for his actions.¹⁵ On the other hand, when analysed strictly in terms of the master-servant relationship, can a servant who commits frauds for his own benefit be said to be acting “in the course of his employment” so as to render his employer vicariously liable? Stoljar suggested that it could be difficult treating such acts as falling within the course of the servant’s employment.¹⁶ He favoured applying the test of ostensible authority to determine the principal’s liability in such a situation. Nonetheless, the oft-cited House of Lords decision in *Lloyd v. Grace, Smith & Co.*¹⁷ has brought about a convergence of results on this point. In that case, Lord Macnaghten interpreted the judgment of Willes J. in *Barwick v. English Joint Stock Bank*¹⁸ in the following terms:

What Willes J. said was this: “The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master’s benefit, though no express command or privity of the master be proved.” To that statement of the law no objection of any sort can be taken. But it is a very different proposition to say that the master is not answerable for the wrong of the servant or agent, committed in the course of the service, if it is not committed for the master’s benefit. Willes J. does not, I think, say anything of the kind.¹⁹

¹⁴ *Ibid.*

¹⁵ Stoljar, *supra*, note 12, p. 75.

¹⁶ *Ibid.*

¹⁷ [1912] A.C. 716.

¹⁸ L.R. 2 Ex. 259.

¹⁹ *Op. cit.*, p. 732.

His Lordship went on to consider Lord Blackburn's view of *Barwick's* case:

"The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud." That, my Lords, I think is the true principle. It is, I think, a mistake to qualify it by saying that it only applies when the principal has profited by the fraud. I think, too, that the expressions "acting within his authority", "acting in the course of his employment" and the expression "acting within the scope of his agency" . . . as applied to an agent, speaking broadly, mean one and the same thing. What is meant by those expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the other. Whichever expression is used it must be construed liberally, and probably, as Sir Montague Smith observed, the explanation given by Willes J. is the best that can be given.²⁰

The explanation of Willes J. were quoted in an earlier part of Lord Macnaghten's judgment:

"In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."²¹

Thus, Lord Macnaghten managed to find liability without relying on ostensible authority. A servant committing fraud for his own benefit can still be considered to be acting in the course of his employment. The threshold appears to be when his action becomes a "frolic of his own", in which case he no longer renders his employer liable for his misbehaviour.

This minor digression on the alternative ground of vicarious liability serves to clear the field for a more vivid look at the principal's responsibility for his agent's statements. If the agent is not a servant, the doctrine of ostensible authority will come into play. If the agent is also a servant, the above discussion shows that the same result can be reached in more ways than one.

3. *Ostensible authority in signing bills of lading*

While the master in *Grant v. Norway* did not have express or actual

²⁰ *Ibid.*, pp. 735–6.

²¹ *Ibid.*, p. 733.

authority in signing a “shipped” bill of lading when the goods were not on board, to the third party relying on that bill of lading, he had ostensible authority because it could not be known that the goods were not shipped. In fact, it was this very statement that the third party was relying on.

Grant v. Norway, and subsequent cases trying to rationalise *Grant v. Norway*, confuse an act belonging to a class of acts that the agent has neither actual authority nor ostensible authority to do, and an act within a class of acts which the agent has authority to do but without the knowledge of the third party does wrongfully and thereby exceeded his actual authority.²²

An example of the earlier act is found in *Cox v. Bruce*, where an agent was held to have no authority to make statements about the quality of goods shipped on board.²³ The agent had neither actual nor ostensible authority to make such statements, whether they were true or not. Third parties, therefore, should not rely on such statements. It is submitted that *Russo-Chinese Bank v. Li Yau Sam*,²⁴ which has often been cited in support of *Grant v. Norway*, can also be explained on this ground. The compradore in that case had no authority to receive money, and this was known to third parties dealing with him. So, it could not be said that when he received money, he was either actually or ostensibly receiving money on his principal’s behalf.

Unfortunately, the reasoning of Jervis C.J. was repeated too often in later judgments that refused to overrule *Grant v. Norway*, including the judgment of Karthigesu J. in the *Blue Nile* case where his Honour held that:

[*Grant v. Norway*] was decided on the very special duties and responsibilities of a ship’s master in the mid-nineteenth century and the very special relationship a ship’s master had with his owners in those days which “from the usage of trade, and the general practice of ship-masters’, there was an express limitation to his authority to sign bills of lading known to all mercantile persons. This was because “a bill of lading is an acknowledgment by the captain, of having received the goods on board his ship”, *Lickbarrow v. Mason* per Buller J. Therefore, “the authority of the captain to give bills of lading, is limited to such goods as have been put on board” and above all is known to all by

²² See eg. *Cox v. Bruce* (1886) 18 Q.B.D. 147, p. 151; *The Saudi Crown* [1986] 1 Ll.L.R. 261, p. 265

²³ *Op.cit.*

²⁴ [1910] A.C. 184.

general usage. This I apprehend was the ground on which *Grant v. Norway* was decided.²⁵

An example of how the principle of ostensible authority is distorted in an attempt to justify *Grant v. Norway* can be found in the judgment of MacKinnon L.J. in *Uxbridge Permanent Benefit Building Society v. Pickard*:

Any one dealing with the captain of a ship must be taken to know that he has, and can only have, authority to sign a bill of lading for goods which have been shipped, and therefore he can have no ostensible authority to sign a bill of lading for goods which have not been shipped. Knowing that limitation of his actual, and therefore of his ostensible authority, the third party is put on inquiry to ascertain whether the act he is performing is in fact authorized.²⁶

Macotta J., in commenting on the reasoning of MacKinnon, said in *Rasnoimport v. Guthrie*:

[T]here appears to be a *non sequitur* in the statement that there can be no ostensible authority because there is no actual authority.²⁷

In the same vein, Sheen J. in *The Nea Tyhi* said that he does “not understand how the conclusion follows from the premise.”²⁸ Stoljar added the following remarks:

[I]t is absurd to say that the shipmaster has no apparent authority to sign a bill of lading for goods which have not been shipped, since the fact that the goods have not been shipped is precisely what is non-apparent, indeed as non-apparent as the clerk’s secret fraud in the solicitor cases In other words, a shipmaster has no less apparent authority to sign a bill of lading than a managing clerk has to sign a receipt for the deposit of title deeds.²⁹

III. THE POSITION IN ENGLAND

Despite the irregularity of *Grant v. Norway*, it has found support, albeit reluctant support, in modern case law. It is opportune to examine just how firmly it still stands as an authority in English law.

²⁵ *Supra*, note 2, p. 305.

²⁶ [1939] 2 K.B. 248, p. 258.

²⁷ [1966] 1 Ll.L.R.1, p. 10.

²⁸ [1982] 1 Q.B. 606, p. 611.

²⁹ *Supra*, note 12, p. 76.

In *The Nea Tyhi*, Sheen J. attempted a brief review of the case law up to 1982 and came to the conclusion that *Grant v. Norway* had survived as an exception to the general principle on vicarious liability.³⁰

Of the cases considered by Sheen J., the two House of Lords decisions in *George Whitechurch Ltd. v. Cavanagh*³¹ and *Kleinwort, Sons & Co. v. Associated Automatic Machine Corporation Ltd.*³² are the most problematic. The cases of *Cox v. Bruce*,³³ *V/O Rasnoimport v. Guthrie and Co. Ltd.*³⁴ and *Russo-Chinese Bank v. Li Yau Sam*³⁵ as well as the later case of *The Saudi Crown*³⁶ form only a weak life-support system for *Grant v. Norway*. Although *Grant v. Norway* was not overturned, these decisions were decided by *not* applying that case to the facts.

On the other hand, the House of Lords in *George Whitechurch Ltd. v. Cavanagh* and *Kleinwort, Sons & Co. v. Associated Automatic Machine Corporation Ltd.* appeared to have applied *Grant v. Norway* to the facts. In the *Whitechurch* case, the secretary of the appellant company had signed a certification on a transfer of shares acknowledging that the shares were in the appellants' office. It turned out that no such shares were in the office. The question was whether the appellant company was estopped, *inter alia* by the certification, from denying the transferee's right to be placed on the register of shareholders. The House of Lords held that there was no estoppel against the company. In the course of delivering the leading judgment in the case, Lord Macnaghten also delivered *Grant v. Norway* from a timely death:

But in permitting its secretary to certify transfers it cannot be supposed that a company authorizes the secretary to do more than to give a receipt for certificates which are actually lodged in the office. I cannot think that a company is estopped by the certification of its secretary if he gives a receipt or an acknowledgment for certificates which have not been lodged with him. If authority be wanted for this proposition, it seems to me that there is ample authority to be found in the case of *Grant v. Norway*.³⁷

³⁰ *Op. cit.*, p. 610. Sheen J.'s judgment was cited with approval by Karthigesu J. in the *Blue Nile* case, *supra*, note 2, p. 307.

³¹ [1902] A.C. 117.

³² (1934) 151 L.T. 1.

³³ *Supra*, note 22.

³⁴ *Supra*, note 28.

³⁵ *Supra*, note 24.

³⁶ *Supra*, note 22.

³⁷ *Supra*, note 31, p. 125.

Two very important points may be made about Lord Macnaghten's reliance on *Grant v. Norway*:

- (1) First, he extended *Grant v. Norway* beyond a shipmaster situation.
- (2) Secondly, he employed the same reasoning (and hence the same fallacy) that Jervis J. had relied on, i.e. that an agent's misstatement was made without authority and therefore it did not bind the principal.

On the first point, it is clear that Lord Macnaghten treated *Grant v. Norway* as of general application in agency law. This is also reflected in the judgment of Lord James in the same case:

But, on the other hand, can it be reasonable that an agent who is empowered to acknowledge the receipt of certain documents is to bind his principal by fraudulently and criminally giving acknowledgments of documents never in his hands? There is on the one hand a risk cast on the members of the public who rely upon the honesty of the agents; but how far greater would be the risk of the principal if he were to be liable for the frauds of the agent, which might be affected to an unlimited extent ruinous to the principal? It appears to me to be impossible to hold the company bound by the act of Wells [the secretary] without overruling the judgment in the case of *Grant v. Norway*.³⁸

On the second point, the House of Lords did not consider the very pertinent questions of ostensible authority, or the course of employment. It is impossible to reconcile the House of Lords' application of *Grant v. Norway* with these principles. Lord Robertson, who doubted the majority's approach to the question, correctly pointed out:

It seems to me extremely doubtful whether *Grant v. Norway* can be held, or has ever been held, to represent the general law, or to do more than determine the law about shipmasters and bills of lading; and whether, assuming it to have the wider bearing, it is reconcilable with the doctrine of Lord Selborne in *Houldsworth v. City of Glasgow Bank*. I find it extremely difficult on principle to hold that the scope of an agent's employment can be limited to the right performance of his duties, or to say that an agent within whose province it is truly to record a fact is outside the scope of his duties when he falsely records it, when the question of liability to be decided is whether a loss is to be borne by the principal who placed him there, or by an innocent third party who had no voice in selecting him.³⁹

³⁸ *Ibid.*, p. 134.

³⁹ *Ibid.*, p. 137.

The majority's opinion was much influenced by the possibly fraudulent conduct of the secretary. Apart from the Earl of Halsbury, who concurred entirely in the judgment of Lord Macnaghten, all the three judges who held that the agent's action did not bind the principal found it pertinent to state that the fraud of the secretary did not benefit the company. Lord Macnaghten said:

The jury found that Wells joined in the fraud for the benefit of the company as well as for the benefit of Raymond. There is not, however, a shadow of evidence to support this conclusion. The finding, so far as the company is concerned, must be disregarded.⁴⁰

A similar consideration can be found in the judgment of Lord James quoted above. Likewise, Lord Brampton thought it important to clarify that:

I do not intend to say that it was no part of the duty of Wells on occasions when a certified transfer was required for shares in the appellant company to exercise an honest discretion to grant it, and to certify to the truth as he knew or believed it to be, and if in framing such a certificate he by mere negligence made an erroneous statement, causing injury to the person to whom it was handed, that he might act upon the faith of it, I do not say that an action might not be sustained against the company, his employers, to recover such damages as might be occasioned by such negligence. But the charge made against Wells was in no sense one of negligence, but one of deliberate fraud, utterly unconnected with the course of his duty as secretary.⁴¹

The above passages show that the majority decided the way they did very much because of the uncertainty prevailing at that time over the vicarious liability of a principal for his agent's fraud. Since then, the same House had clarified in *Lloyd v. Grace, Smith* that an innocent principal could be liable for the fraud of his agent or servant who was acting solely for his own benefit.⁴² There is no way that the majority's opinion in *Whitechurch* could stand with the law on agency as promulgated in *Lloyd v. Grace, Smith*. Both Sheen J. in *The Nea Tyhi*⁴³ and Karthigesu J. in the *Blue Nile* case⁴⁴ made much of the fact that the House of Lords, and in particular Lord Macnaghten who heard both cases, in *Lloyd v. Smith, Grace* did not expressly overrule *Whitechurch* on the *Grant v. Norway* point. Yet we have

⁴⁰ *Ibid.*, p. 124.

⁴¹ *Ibid.*, p. 139.

⁴² *Supra*, note 17.

⁴³ *Supra*, note 28, p. 610.

⁴⁴ *Supra*, note 2, p. 310.

seen that these two House of Lords decisions cannot by any strain of reasoning stand together on the agency point. One or the other must be invalid. If the later decision was made without consideration of the first, it may be *per incuriam* if the earlier was good law. This means that *Lloyd v. Grace, Smith*, together with nearly a century of case law on vicarious liability since then, may have to go down the chute. Both Sheen J. in *The Nea Tyhi*, and Karthigesu J. who adopted his analysis in the *Blue Nile* case, held that *Lloyd v. Grace, Smith* could not have overlooked *Whitechurch*.

The better view is that of Lord Robertson in *Whitechurch*. Lord Robertson analysed the case in terms of estoppel and found that the plaintiff had failed to establish that he had suffered detriment as a result of relying on the purported representation:

My Lords, the case of the respondent is one of estoppel, and it is an essential element in such cases . . . that the person to whom the representation was made has suffered loss by acting upon it; or, to put it another way, has altered his position to his detriment by acting on the representation. In my opinion, the respondent has completely failed in this essential matter.⁴⁵

This reasoning is not inconsistent with *Lloyd v. Grace, Smith* and does not require the House of Lords in the later case to hold that *Whitechurch* was decided wrongly. A further indication that the House of Lords in *Lloyd v. Grace, Smith* may be taken to have altered their position on the agency point may be found in the judgment of Lord Macnaghten in that case. In a judgment reminiscent of that of Lord Robertson in *Whitechurch*, his Lordship in *Lloyd v. Grace, Smith* cited *Houldsworth v. City of Glasgow Bank*⁴⁶ in coming to the conclusion that a principal could be answerable for his agent's fraud. There is therefore cogent reason for saying that the House of Lords in *Lloyd v. Grace, Smith* had impliedly changed its mind on the point on vicarious liability. There is serious doubt, therefore, that *Grant v. Norway* can still stand where the law of agency is concerned.

Unfortunately, in 1934, the House of Lords reverted to Lord Macnaghten's judgment in *Whitechurch* and applied it to *Kleinwort's* case as if *Lloyd v. Grace, Smith* had never existed. It was clearly a step back in time since there was no mention of any authority other than *Whitechurch* and no analysis other than a blind adherence to what was said by Lord Macnaghten in that case.⁴⁷

⁴⁵ *Op. cit.*, p. 135. Lord Robertson's approach was subsequently adopted by Sheen J. in *The Saudi Crown*, *supra*, note 22, p. 264.

⁴⁶ (1880) App. Cas. 317.

⁴⁷ *Supra*, note 32, pp. 2–3.

In terms of precedents, then, we have two lines of decisions of the highest court in England which are mutually incompatible. Lord Macnaghten's reasoning in *Whitechurch* is irreconcilable with his own judgment in *Lloyd v. Grace, Smith*. The above discussion has shown that *Lloyd v. Grace, Smith* should prevail. *Kleinwort*, inasmuch as it relied totally on the former judgment, should be treated as one of those judicial quirks existing at the fringe of established principles.⁴⁸

If *Grant v. Norway* is no longer of general application, does it still apply at all? Sheen J. in *The Nea Tyhi* was straightforward enough to confess that he found it impossible to reconcile *Lloyd v. Grace, Smith* with *Grant v. Norway*, but thought that he was bound by precedents not to declare *Grant v. Norway* bad law.⁴⁹ There is really no rational distinction between a shipmaster and other employees or agents. As far as third parties dealing with the shipmaster are concerned, the normal rules of agency and vicarious liability should apply. Unfortunately, *Grant v. Norway* has persistently been treated as a valid exception to those rules. Even Lord Robertson, who doubted the wide application of that case, seemed to concede that it still represented the law about shipmasters and bills of lading.⁵⁰

This is by no means the only instance in judicial history whereby an anomalous case has been allowed to survive by treating it as a very peculiar exception to the applicable general principles. In the House of Lords decision in *Midland Silicones v. Scruttons Ltd.*, Lord Reid applied the following reasoning in order to depart from a troublesome precedent:

It can hardly be denied that the ratio decidendi of the *Elder, Dempster* decision is very obscure . . . In such circumstances I do not think that it is my duty to pursue the unrewarding task of seeking to extract a ratio decidendi from what was said in this House in *Elder, Dempster*. Nor is it my duty to seek to rationalise the decision by determining in any other way just how far the scope of the decision should extend. I must treat the decision as an anomalous and unexplained exception to the general principle that a stranger cannot rely for his protection on provisions in a contract to which he is not a party.⁵¹

No doubt, a future House of Lords decision may very well overrule the

⁴⁸ The harsh effect of the *Whitechurch* and *Kleinwort* cases had subsequently been alleviated by section 79 of the Companies Act, 1948. The statute does not, however, affect their treatment of *Grant v. Norway*.

⁴⁹ *Supra*, note 28, p. 610.

⁵⁰ *Supra*, note 31, p. 137.

⁵¹ [1962] A.C. 446, pp. 477-9

aberrant *Grant v. Norway*. No doubt also, totally reputable writers like Reynolds have opined that it can be eradicated as being “out of line with other authorities or established principles”.⁵² Nevertheless, it is hard to argue with the pointed remark of Karthigesu J. in the *Blue Nile* case that “[t]he criticism of learned academic jurists is hardly a reason for not considering *Grant v. Norway* as good law in Singapore . . .”.⁵³ Scrutton may be right in saying that “there may be ample justification for a higher court to reverse *Grant v. Norway* and hold that a master is held out by the shipowner as having ostensible authority to make representations as to quantity.”⁵⁴ Until that has been done, however, the force of precedents will in this instance prevail over common sense.

IV. THE POSITION IN SINGAPORE

The point was argued in the *Blue Nile* that *Grant v. Norway* did not form part of the mercantile law which is imported contemporaneously into Singapore via Section 5 of the Civil Law Act. Karthigesu J. responded as follows:

I fail to understand how it can be said that this case is not a mercantile transaction when the overall transaction was the purchase of black tea and the letter of credit was opened to pay for it.⁵⁵

There is certainly a lot to say for the application of Section 5 to contracts of carriage and related matter, but the uncertainties generated by that section are notorious.⁵⁶ A discussion of Section 5 is altogether outside the scope of this article. For the time being, it will not be too unsafe to assume that *Grant v. Norway* and successive cases are applicable in Singapore.

In the *Blue Nile* case, Karthigesu J. was confronted with the prospect of either overruling a long line of authorities approving *Grant v. Norway*, or fall foul of established principles of agency. Like other judges before him, his Honour decided to limit *Grant v. Norway* to its facts. Relying on Lord Robertson’s judgment in *Whitechurch*, Karthigesu J. held that *Grant v. Norway* was decided on the “very special relationship a ship’s master had with his owners in those days.”⁵⁷ Therefore, it was of no avail to the

⁵² *Supra*, note 12, pp. 195–6.

⁵³ *Supra*, note 2, p. 310.

⁵⁴ *Supra*, note 9, p. 115n.

⁵⁵ *Op. cit.*, p. 310.

⁵⁶ For an indepth discussion on Section 5, see Soon and Phang, “Reception of English Commercial Law in Singapore — A Century of Uncertainty” in Harding (ed.), *The Common Law in Singapore and Malaysia* (1985), p. 33.

⁵⁷ *Op. cit.*, p. 305.

defendants in the *Blue Nile* where the relationship was “a straightforward one of servant and master or employee and employer.”⁵⁸

The reluctance of Karthigesu J. to apply *Grant v. Norway* is hardly surprising, and it must be said that his Honour’s decision to read that case very restrictively is not without precedents. There are two observations which may be made on this point.

First, Karthigesu J. tried to rationalise *Grant v. Norway* — a Herculean task. It is easier, and probably preferable, to recognise *Grant v. Norway* for what it is: to borrow Lord Reid’s words in *Midland Silicones v. Scruttons*, “an anomalous and unexplained exception to the general principle.”⁵⁹ Instead, Karthigesu J. accepted both Lord Macnaghten and Lord Robertson’s judgments in *Whitechurch*. These two judgments are not compatible on the agency point.

Secondly, assuming that *Grant v. Norway* could still stand as an authority in limited circumstances, just what are those circumstances? We have seen that it could not be treated as laying down any general principle. Lord Robertson thought that it did “no more that determine the law about shipmasters and bills of lading.”⁶⁰

Does it mean then, as Karthigesu J. had decided, that *Grant v. Norway* must be strictly construed to be applicable only to a quantum statement in a bill of lading signed by a shipmaster? His Honour refused to apply it to excuse freight forwarders for a quantum statement in a bill of lading signed by their employee. Karthigesu J. based the distinction on the differences between the shipmaster and the ordinary employee’s authority.

What if the issue had been the liability of a shipowner for the signature of an agent who was not the shipmaster? Would it make a difference if shipowners are sued for the signature of shipping agents? This would not be the kind of straightforward servant and master relationship that Karthigesu J. faced. This issue had in fact been judicially considered. In *V/O Rasnoimport v. Guthrie*, Mocatta J. proceeded on the basis that the shipowner could not be bound by the wrong statement of loading brokers about the quantity shipped.⁶¹ The tenor of his judgment indicated that he considered the signature of the shipmaster and other agents as being of the

⁵⁸ *Ibid.*, p. 306.

⁵⁹ *Supra*, note 51, p. 479.

⁶⁰ *Supra*, note 31, p. 137.

⁶¹ *Supra*, note 27.

same effect. Closer to home, in a 1949 Malayan decision, Evans J. in *OCBC v. Malayan Chungnan Sinyeck Co. Ltd.* held that a bill of lading signed by shipping agents falsely acknowledging that a cargo of pepper was shipped did not bind the shipowners.⁶² This case was not cited in the *Blue Nile* judgment. The judgment of Evans J. appeared only in headnotes and gave no clue as to the *ratio decidendi* other than that:

[A]s no pepper was in fact shipped the Bill of Lading did not conclusively bind the owner and, as in the facts of the case, the Bills of Lading were issued by the first defendants knowingly and without regard for the truth of the representations made, their act could not be binding on the [shipowners].⁶³

Evans J. seemed to have in mind the by-then outmoded idea that principals were not liable for the fraud of their agents. The list of cases referred to included neither *Grant v. Norway* nor any of the cases we discussed above. It is doubtful just how strong an authority this case is.

Be that as it may, we are faced with at least two cases which held that shipowners were not liable for signatures of agents who were not shipmasters. Is there an explanation for the non-binding nature of these agents' signatures and the binding nature of an employee's signature in the *Blue Nile* case? Logically, there could be none. However, it must be pointed out that the survival of *Grant v. Norway* itself is brought about not by logic either, but by the sheer force of precedents.

In an oblique way, it could be said that the *Blue Nile* case was supported by the 1949 *OCBC* case. In that case, the shipowners were not liable for the statement made knowingly by the shipping agents and without regard for its truth. The shipping agents were, however, liable for the statement, which must have been made by an employee of theirs.

This unsatisfactory state of affairs exists primarily because *Grant v. Norway* has not been buried once and for all. It is questionable whether much tear would have been shed if Karthigesu J. had decisively ruled that *Grant v. Norway* is no longer law.⁶⁴ His Honour may have said that it was not necessary to decide the point, since he had held that it was not

⁶² [1949] 15 M.L.J. xiii.

⁶³ *Ibid.*, p. xiv.

⁶⁴ On the other hand, there are practitioners in Singapore who feel that overruling *Grant v. Norway* at this point will do more harm than good. Some English judges have also remarked in passing that *Grant v. Norway* has not really caused as much inconvenience as feared. See e.g. the *Whitechurch* case, *supra*, note 31, p. 126 (per Lord Macnaghten), p. 134 (per Lord James).

applicable to an employee — employer situation. Nonetheless, this refusal to discard *Grant v. Norway* had forced him to draw the unhappy distinction between employer-employee and shipmaster-shipowner.

On the other hand, his exercise of judicial restraint is understandable. His Honour did have the backing of numerous English cases that had demonstrated the same degree of reluctance to do away with *Grant v. Norway*.

V. THE HAGUE-VISBY RULES

Counsel for the defendants in the *Blue Nile* case argued that *Grant v. Norway* was no longer applicable in Singapore because of the adoption of the Hague-Visby Rules (“HVR”) by the Carriage of Goods by Sea Act 1972 and in particular having regard to art. III r. 4 of the HVR. In the circumstances of that case, Karthigesu J. did not consider it appropriate to examine the relationship between *Grant v. Norway* and the Rules.

While we are on the subject, it is pertinent to consider whether, had the HVR been in issue, *Grant v. Norway* would be obsolete. Art. III r. 3 (b) of the HVR provides that the carrier shall, on demand of the shipper, issue a bill of lading showing:

Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

Art. III r. 4 provides that such a bill of lading shall be prima facie evidence of the receipt of such quantity of goods by the carrier. Where the bill has been transferred to a third party acting in good faith, however, proof to the contrary shall not be admissible, i.e. the bill shall be conclusive evidence of the quantity shipped.

The first point to note is that, unless a third party invokes it, the article does not reveal much of a departure from *Grant v. Norway*. Once a third party transferee acting in good faith relies on the bill, the position becomes comparable to the operation of an estoppel. The technicalities of an estoppel, such as the requirement of detriment, are of course avoided.

The main question is whether “evidence of receipt” is the same as evidence of shipment. Prof. Tan Lee Meng suggested that there is a difference:

It is pertinent to note that under the Hague-Visby Rules, the bill of lading is only evidence of the *receipt* of the goods by the carrier and not of their *shipment*. Thus, if a bill of lading has been issued for goods

which have not been shipped, the carrier is entitled to prove that the goods have not been shipped by relying on the rule in *Grant v. Norway* that a master has no authority to issue a bill of lading in respect of goods which have not been put on board his vessel. The carrier may be liable as bailee of the goods since he is unable to deny that he has received the goods but that is a different question altogether.⁶⁵

Not everybody saw this distinction. Carver, commenting on the amendment to the HVR which introduced Art. III r. 4, said that “The anomalous rule in *Grant v. Norway* . . ., for what it was ever worth, has been disposed of by the amendment, so far as bills of lading subject to the amended Hague Rules are concerned.”⁶⁶ In *Att.-Gen. of Ceylon v. Scindia Steam Navigation Co. Ltd.*, the Privy Council treated the article as providing for prima facie evidence of *shipment* and accordingly allowed a claim for damages for short delivery.⁶⁷

The British Law Commission in a White Paper entitled “Rights of Suit in Respect of Carriage of Goods by Sea” made the following observations:

Although it is arguable that there is an important difference between a document saying that goods have been shipped and one indicating that they will in the future be shipped, it has also been argued that the fact that the document states that goods have been received for shipment merely indicates that the bailment of the goods has started at an earlier stage than in the case of a shipped bill of lading, a distinction of fact which makes no difference in law. Traders and bankers alike deal with “received for shipment” bills of lading and “shipped” bills of lading in the same way.⁶⁸

It may be that the point is still arguable as it had never arose as a direct issue. Because of the very narrow circumstances in which the liability of the carrier will differ according to whether there was “shipment” or merely “receipt”, it is unlikely that we will have the benefit of a judicial pronouncement on this point soon. As matters stand, art. III r. 4 is generally viewed as an antidote to the bothersome *Grant v. Norway* where the HVR are applicable.

Nevertheless, there could be a theoretical barrier to the application of art. III r. 4 where no goods are shipped at all. Sometimes, contracts of carriage

⁶⁵ Tan Lee Meng, *The Law in Singapore on Carriage of Goods by Sea* (1986), p. 153.

⁶⁶ Carver, *Carriage By Sea*, (13th. ed., 1982), Vol. 1, p. 308.

⁶⁷ [1962] A.C. 60.

⁶⁸ Great Britain Law Commission (Law Com. No. 196, Scot. Law Com. No. 130), “Rights of Suit in Respect of Carriage of Goods by Sea” (1991), p. 19.

are made when the goods are received by or on behalf of the carrier. When no goods are shipped, it is arguable that the bill of lading is null and void because it purports to record a contract which was never made.⁶⁹ As there is no contract of carriage, and as the carrier by art. I para, (a) of the HVR is defined to include the owner or charterer who enters a contract of carriage with a shipper, the Rules will have no application in the first place. Arguably, then, the carrier will not be caught by art. III, r. 4.⁷⁰

VI. COMING CHANGES?

The problems caused by *Grant v. Norway* had been recognised as early as 1855 when the Bills of Lading Act (“BLA”) was enacted. Section 3 is often seen as an attempt to solve those problems. It reads as follows:

Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

This section has been found to be virtually useless to the third party wronged by a false statement. The defects in the section have been succinctly summarised by the British Law Commission:

Section 3 does not give a cause of action for the non-delivery of goods represented to have been shipped. Nor does it provide conclusive evidence against the carrier, even where the carrier’s agent had actual authority to sign. Instead it merely provides conclusive evidence as against the master or person signing the bill, against whom there is usually no cause of action since such people rarely contract personally. Even if the master contracted personally with the shipper, it would often not be practically useful to sue him.⁷¹

⁶⁹ *Heskell v. Continental Express* [1950] 1 All.E.R. 1033.

⁷⁰ *Supra*, note 68, p. 29.

⁷¹ *Ibid.*, p. 28.

The British Law Commission, therefore, recommends that the rule in *Grant v. Norway* be abolished. They suggest that:

[A] bill of lading, representing goods to have been shipped or received for shipment and in the hands of the lawful holder in good faith, should be conclusive evidence of such shipment or receipt as against the carrier.⁷²

Section 4 of the The Draft Carriage of Goods by Sea Bill which is proposed in substitution of the BLA reads as follows:

A bill of lading which—

- (a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and
- (b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading, shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.⁷³

If the recommendations ever come to be adopted as law in England, the difficulties posed by *Grant v. Norway* will be put to rest at long last. Section 5 of the Civil Law Act will arguably ensure that the case rests just as peacefully in Singapore.

CHAN LENG SUN**

⁷² *Ibid.*, p. 29.

⁷³ *Ibid.*, p. 52. The Commission has also decided that uncertainties as to whether “received for shipment” bills of lading came within the ambit of the 1855 BLA be resolved by treating such bills on the same footing as “shipped” bills of lading. See pp. 19, 47.

* I am grateful for the comments offered by a number of practitioners on the issues addressed in this article.

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