Transfer Of Contractual Right of Suit Evidenced in Carriage Contract Under Bill of Lading In Nigeria

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Abstract - Prior to bill of lading (BOL), merchants travelled along with their goods; then recorded the goods in the ship's mates's register; and finally started selling the goods while in transit by way of BOL, indicative that BOL is negotiable. Common law doctrine of privity of contract did not allow the transfer of right to sue to a non-party to the contract. This created hardship to cargo owners which made many jurisdictions to enact laws in this regard. Bill of Lading Act 1855 (BLA) was enacted in United Kingdom which applied as Statute of general application under section 375 Merchant Shipping Act 1990 (MSA) in Nigeria; and conferred contractual rights of suit on consignees and endorsees, but on the passing of ownership upon or by reason of such consignment or indorsement on the shipment of the goods simultaneously. The repeal of section 375 MSA by section 439 MSA 2007, created a lacuna and doctrine of privity of contract is the extant law in Nigeria. The aim of this study is to evaluate laws governing the transfer of contractual right of suit to third party under bill of lading in Nigeria. The specific objectives of this study are to: (i) ascertain the extent to which the extant law of common law doctrine of privity of contract covers the transfer of right of suit to third party under bill of lading in Nigeria; (ii) determine the impediment(s) of the common law to transfer right to sue in the absence of any legislation; (iii) determine the applicability of doctrine of privity of contract as it relates to transfer of contractual right of suit to third party under bill of lading; and (iv) proffer possible suggestions on how to fill the lacuna created by the repeal of Merchant Shipping Act 1990 Laws of Federation of Nigeria 2004. This work adopted doctrinal approach with reliance on primary and secondary source materials. It finds that the common law doctrine of privity of contract in Nigeria is retrogressive. This work recommends for the amendment of the relevant statute to cure this defect/lacuna just like other commonwealth nations for best international practices.

Index Terms - Bill of Lading, Carriage Contract by sea, Negotiability of Bill of Lading, Privity of Contract, Transfer of Right of Suit

1. INTRODUCTION

Title to sue has been an issue in English law for a very long time. The common law did not allow the transfer of title to sue to a third party by virtue of the doctrine of privity of contract; which provides that the right and obligation created from the contract cannot be conferred or imposed on non-parties to the contract. In the contract of carriage by sea only the shippers and the carriers are parties to it; therefore the third party holder of bill of lading for consideration has no right to sue. In *Julius Berger (Nig) Plc v TRCB Ltd*,[1] Peter-Odili JSC stated that, 'a beneficiary of a contract to which he is a party cannot sue on such a

[1.] [2019] 5NWLR (Pt 1665) 219, 256 para A.

contract nor would a stranger to a contract sue to enforce the contract'. The general principle of privity of contractual relationship has its origin in the English common law system which was received into Nigerian legal system as received English laws in 1900. This is due to the fact that consideration is a fundamental element in any valid contractual relationship. Judges have continuously in many cases resorted to the doctrine of privity of contract in determining contractual disputes. Various scholars and writers[2] have written extensively on privity of contract and considered its exceptions to the rule, but not on a third party right of suit under a sea carriage contract evidenced by bill of lading.

2. GENERAL CONCEPT OF NEGOTIABILITY OF BILL OF LADING TO TRANSFER OF CONTRACTUAL RIGHT OF SUIT

As general rule every owner can sue to protect his or her title and can transfer ownership without any impediment whatsoever, since ownership is considered as the best title which creates absolute interest to the property or goods. Due to the barrier of the rule of privity and the statutory barrier under the Bill of Lading Act 1855 (BLA), pledgee (normally finance banks) could not sue and common law courts avoided such kind of barrier by applying the concept of implied contract. Under this concept it is assumed that there is an implied contract between the holder and the carrier. Sassoon[3] states that 'the bill of lading creates a privity between its holder and the carrier as if the contract was made between them'.

The bill of lading performs three distinct functions: as receipt of goods for shipment; as evidence of the terms of peculiar specie of contract of carriage by sea though unilaterally signed and issued by the carrier on behalf of the ship-owner on demand by the shipper; and as a document of title i.e. its ability to transfer ownership in the goods under the carriage contract, the sale of goods and the raising of financial credit'[4] while the goods are still in transit. It is this third function that donates the bill of lading the negotiability quality to transfer the contractual right of suit to its lawful holder in breach of the terms of the contract of damage to, loss of, mis-delivery or short delivery of the shipment. It is often being referred to as a negotiable document of title[5] for valuable consideration when the buyer pre-sold the shipment to a third party, which has created some confusion as to whether the bill of lading is actually a negotiable or merely a transferable document. Immediately a bill of lading is endorsed, it becomes negotiable and can be transferred to another person for valuable consideration. With the bill of lading, the buyer can prove ownership and surrender same in exchange for the goods.

The Supreme Court of Nigeria in the case of *Delmas v Sunny Ositez International Ltd*[6] acknowledged the three functions of the bill of lading. In the United States of America legal system, by virtue of the provisions of Federal Uniform Bills of Lading Act 1916 (FBLA) and Uniform Commercial Code under American law, bills of lading are clearly defined as negotiable documents, with the exception of straight bill of lading. Also is section 13 of

[2] G O Arishe and E C Akpeme, 'Reforming Privity of Contract Rule in Nigeria' (2014) (12) *Nigerian Juridical Review* 185.

[3] David Sassoon, *CIF and FOB Contracts* (4th edn, Sweet & Maxwell 1995) 113.

[4] Ibid 133.

[5] Bill of Lading as a Negotiable or Transferable Document of Title. Accessed at <https:// www.lawteacher.netbill-of-lading> visited on 21/08/2022.

[6] [2020] All FWLR (Pt 1026) 517, 539.

Negotiable Instrument Act of India 1881,[7] which still operates in many States. Therefore, a buyer in good faith will have an indefeasible title to the goods even if the bill of lading has been wrongfully transferred; except where it is wrongfully procured which defeats the right of the transferee. Therefore, whoever holds the endorsed bill of lading is the owner of the goods it represents. This is similar to the negotiability of a cheque or other negotiable instrument such as the promissory notes and bill of exchange under Bill of Exchange Act 2004 of Nigeria which are transferrable by delivery. Hence, a person can sue upon the instrument as of right, as every holder of negotiable instrument is assumed to be a holder in due course as well as been negotiated for valuable consideration. The negotiable instrument is also payable to order or bearer which can be drawn, endorsed or accepted. Therefore, due to its vital role as an indispensable international sea trade transport document, a bill of lading having these same attributes and qualities and as a holder in good faith, should be equally accorded the same status and force of law by an enabling statute as found in relevant laws of other commonwealth nations.

3. RIGHT TO SUE BY THIRD PARTY UNDER BILL OF LADING IN NIGERIA

This common law rigidity of privity of contract, necessitated for statutory intervention that led to the passing of the United Kingdom Bill of Lading Act 1855 (UK BLA), which was a Statute of general application in Nigeria; and the first statutory attempt to address the problems of title to sue for transit loss or damage faced by cargo owners other than the original shipper. Even with the clear intention of Parliament from the wordings of the preamble, there were considerable difficulties in its operation in its bid to solve the common law doctrine of privity of contract by virtue of its section 1. These difficulties were (1) the BLA recognized only the first two functions of bill of lading i.e., as a receipt and carriage contract but not as a document of title; (2) other transport documents, such as sea waybill and ship's delivery order were not covered; (3) the passing of property and right of suit must be done simultaneously; (4) recovery claims can only be made by tort or bailment actions, rather than by contract which is undesirable because of the duty placed on the claimant in proving the requisite degree of ownership in order to establish negligence; (5) the tendency of upsetting the allocation of risk performed by the carrier; (6) the contractual provisions that incorporates a set of internationally accepted rules, such as the Hague-Visby Rules were evaded; and finally (7) cargo interests under BLA had to plead their claims in diverse ways, such as in tort or bailment, giving rise to different substantive and procedural conditions in each case. That is to the effect that the transfer of contractual rights to suit is linked to the passing of ownership in the goods and the ownership must pass 'upon or by reason of such consignment or indorsement', must pass at the same time as in *The Delfini*[8] but not before or after ownership. Otherwise, BLA will not apply and the consignee will not acquire rights of suit.

Prior to 1990, section 1 of United Kingdom Bill of Lading Act 1855 (BLA) applied *verbatim* in Nigeria as a Statute of general application under section 375 Merchant Shipping Act 1990 which therefore provided the legal basis upon which a consignee or an endorsee could sue the carrier for breach of contract of carriage by sea evidenced by bill of lading. Consequently, it has been consistently declared that a third party has no *locus standi* to sue

[7]. See <bdlaws.minlaw.gov.bd/sections_detail.php?id =46&sections_id=1322> accessed on 15 September 2022.
[8]. [1990] 1 Lloyd's Rep 252, 274.

on the bill of lading. In *Pacers Multi Dynamics Ltd v M V 'Dancing Sister'& anor*,[9] the Supreme Court held that by virtue of section 375(1) of the MSA 1990, only a consignee of the goods named in a bill of lading or an endorsee to whom the property in the goods have passed and by virtue of same, will be able to sue on a bill of lading contract. Also in *BM Ltd v Woermann-Line*,[10] the apex court held that even in an action for bailment, it is not possible to make a party whose name appears only in regard to notification of the arrival of the consignment assume the role of a bailor or bailee. This position was reiterated, although unfortunately, in almost all cases where the courts have had to determine the right of a plaintiff described as a notified party on the bill of lading; even when the evidence showed the plaintiff was actually the owner of the goods and not the agent for the receiver of the goods as held by the Supreme Court in *Pacer Multi-Dynamics Ltd v. M.V. Dancing Sister*,[11] where it was held:

> A notify party or addressee is the party who is to be notified of the arrival of the goods and is often an agent for the receiver of the goods who arranges for their clearance. He has no right of audience before the Court. A notify party is not a party to the contract contained in a bill of lading. He is a total stranger to the contract contained in the bill of lading.

Under the Nigerian legal system, the common law doctrine of privity of contract is extant in rules relating to bill of lading even in the 21st century, as only the parties to a contract can sue or be sued on the contract; but not a stranger even if the contract is made for his benefit. The Supreme Court held in *Gbedu v Itie*:[12]

> From the fore-going, it becomes really necessary to explain what is privity of contract. The doctrine of privity of contract portrays that as a general rule, a contract affects the parties thereto and cannot be enforced by or against a person who is not a party to it. In short only parties to a contract can sue or be sued on the contract and a stranger to a contract can neither sue or be sued on the contract even if the contract is made for his benefit ... him liable upon it. Moreover the fact that a person who is a stranger to a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue or be sued upon the contract.

In relation to contract under bill of lading, it is however settled by plethora of cases that by virtue of the once subsisting section 375 MSA 1990, the only persons who have right to is either a named consignee of the goods in a bill of lading or an endorsee to whom the property in the goods have passed. Eventually, section 375 of the MSA 1990 which for the rights of consignee of goods and endorsee of bills of lading and the whole Act have been repealed under Part XXXI section 439 (Repeal of Cap. 224 L.F.N.1990) of MSA 2007 without a subsequent enactment or a pending bill at the National Assembly to cover the field even in the near future.

9. [2012] 4 NWLR (Pt 1289) 169.
10. [2009] 13 NWLR (Pt 1159) 149, 180-181.
11. *Pacer Multi-Dynamics Ltd* 187 -188.
12. [2020] 3 NWLR (Pt 1710) 104, 112.

The only subsisting legislation in Nigeria relating to bill of lading provision is to be found in an 'unrelated' Statute and under Part X 'Presumptions and Estoppel' section 172 of the Evidence Act 2011. It however reproduces only paragraph II of the repealed section 375 Merchant Shipping Act 1990. That is to say that:

> Every Act of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, is conclusive proof of that shipment as against the master or other person signing the same, notwithstanding that some goods or some part of them may not have so shipped, unless such holder of the Act of lading 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 hand of the shipper or of the holder or some person under whom the holder holds.

This by necessary implication means that it is no longer the intendment of the Parliament that a consignee or endorsee or third party should have transferred to a right of suit under bill of lading. It can also be deducted that this sole provision currently existing on rules relating to bill of lading deals only on proof and representation of goods on board a vessel for shipment. The section neither considered if the bill of lading is transferrable nor who is a lawful holder of a bill of lading nor on whom the rights of suit under carriage contract by sea has been vested in. Moreover, is it right to be properly referred to it as an 'Act' in the section, considering what an Act is? An Act of the National Assembly creates a new law or changes an existing law. An Act is a Bill that has been approved by both Houses of the National Assembly and being given Assent to by the President of the Federal Republic of Nigeria in accordance with section 58(1) of the 1999 Constitution of the Federal Republic of Nigeria (Fourth Alterations).

Again under of article III (4) of Carriage of Goods by Sea Act,[13] a bill of lading is *prima facie* proof that the carrier received the goods contained therein for carriage; and under article 16(3) of United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act,[14] the bill of lading or shipped bill of lading is *prima facie* proof that the carrier received the goods stated therein and no evidence is admissible to the contrary, particularly when it has been transferred to a third party or consignee who relied on such statement in good faith. These Statutes without more, replicated the provisions of Hague Rules and Hamburg Rules respectively without consideration of the third party lawful holder of bill of lading right of suit in order to accommodate the special specie of contracts covered by bill of lading as a document of title.

[13] Cap. C 2 vol. 2, LFN 2004; Cap 47 vol. 2, Annotated LFN 2014. Nigeria adopted the Hague Rules 1924 and it is applicable to every contract of carriage of goods by sea covered by a bill of lading where the port of shipment is a port within Nigeria and only to outward voyages from a Nigerian port. *JFS Inv. Ltd v Brawal Line Ltd* [2010] 18 NWLR (Pt 1225) 495, 530 para G; *Leventis Tech Ltd v Petrojessica Ent. Ltd* [1999] 6 NWLR (Pt 605) 45; *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Pt 498) 124.

[14] Act No 19 2005, which applies to carriage by sea contracts between two different states when the port of loading and port of discharge or the place where the bill of lading or other transport document are issued are in a contracting state. Therefore, it applies to inward and outward shipments of goods under bill of lading or other transport documents.

4. LAWS ON THIRD PARTY RIGHT OF SUIT OF OTHER COMMONWEALTH NATIONS

In as much as the issue of substantive rights under bills of lading has been the focal point of much legislative, judicial and academic interests for some time now, the issue of contractual transfer of rights of suit has become of peculiar focus in the entire commonwealth. One of the prime functions of a bill of lading, as variously stated, is as a contract or evidence of a contract and most claims under bills of lading are contractual ones.

The difficulties in the application of UK BLA, led to the review and eventual reform that birthed UK Carriage of Goods by Sea Act (COGSA) 1992 on the recommendations of the English and Scottish Law Commission.[15] With the coming into effect of UK COGSA 1992, it expressly makes the holder of the bill of lading have all rights of suit under the carriage contract and can even exercise this right as if he had been a party to the contract under its section 2(1); as well as divesting the initial party to the original contract of all the rights under the contract under its section 2(5). In as much UK COGSA 1992 has solved almost all the problems related to the title, the well established common law concept of implied contract remain available so that it can be used where UK COGSA 1992 is inappropriate. UK COGSA 1992 allows the lawful holder of bill of lading to sue the carrier in contract for damage to or loss of the goods covered by that bill; i.e. it expressly removed also the connection between passing of property and transfer of contractual right of suit. It also made changes for the separation of contractual rights and liabilities which made all holders subject to liabilities, even those holding the bill of lading as security, such as banks.

Despite the relevant practical changes made by the UK COGSA 1992, there are two other important facts that are also worthy of mentioning from this law reform. First, in as much as the reform solved the practical problems of the BLA, the law reform also saw it as bringing English law in line with other major jurisdictions which scores an important point in its favor. In the 'lawful holder' mode of transfer of contractual rights of suit to non-party third party, the Law Commission refers to its unifying effect in regards to other legal systems. Second, is the effect the law reform had upon other jurisdictions that had initially used the connection between passing of property and rights of suit. These are indicative of the relevance that commercial certainty and uniformity play in the international carriage of goods by sea milieu. The UK COGSA 1992 came into force to solve the difficulties created by BLA on the recommendations of the English and Scottish Law Commission; which *inter alia* provides in effect that rights of suit are transferred to a third party lawful holder of a bill of lading in good faith by virtue of section 2(1) COGSA 1992. The UK COGSA 1992 also allows for the transfer of liabilities under section 3 COGSA 1992. This in particular means that contractual rights and liabilities are not transferred at the same time; and in effect a holder of the bill of lading may acquire rights but may not be subject to liabilities against the carrier. Consequently, UK COGSA 1992 not only severed the link between the transfer of rights of suit and the passing of property in the goods but also provides for the separation of contractual rights and liabilities, by means of three documents - bill of lading, sea waybill and ship's delivery order under section 1(1). The efficient and practical provisions of UK COGSA 1992 have inspired other countries to reform their outdated national legislation on

[15]. The Law Commission and the Scottish Law Commission, Rights of Suit in Respect of Carriage of Goods by Sea (Law Com No 196 and Scot Law Com No 130, 1991).

transfer of contractual right of suit to keep up with technological and maritime developments; which intends to assist but not to hinder international trade in order to adequately perform the intendments of the merchants.

It is worthy to note that some commonwealth countries to which Nigeria is a member, have adopted relevant provisions with similar effect or *verbatim* but *mutatis mutandis* of the UK COGSA 1992, towards the transfer of contractual rights of suit *via* statutes. South Africa adopted Sea transport Documents Act No. 65 of 2000 like other commonwealth countries, which have the same effect as UK COGSA 1992. Singapore has enacted Bills of Lading Act Cap 384 1994 which is *in pari materia* with UK COGSA 1992; while Australia uses different techniques ranging from improving on BLA 1855 and *verbatim* adoption of UK COGSA 1992 in Sea-Carriage Documents Act 1996. Hong Kong enacted Bills of Lading and Analogous Shipping Documents Ordinance 1993. New Zealand enacted provisions with the same effect as UK COGSA 1992 under section 13B of Merchant Law Amendment Act 1994. While Canada is the only major Commonwealth country that still operates the provisions of the BLA 1855, which is implemented by her own Bills of Lading Act RS C 1985. Other Europeans countries like Italy adopted a unique legal method of third party right of suit; while other nations like China followed after some similarity of UK COGSA 1992.

5. CONCLUSION

Law evolves with time to meet the exigencies of developing modern concerns and realities. The bill of lading is a very vital document and of paramount importance in international trade carriage contract of goods by sea; as well as for the international sale of goods, international financing of trade and transport insurance. It is pertinent that Nigeria therefore, should recognize the *sui generis* specie contract of carriage evidenced in a bill of lading though signed by a party i.e. the carrier. This will enable a third party, consignee or endorsee who is actually the ultimate owner of the goods represented in the bill of lading and therefore most concerned with the performance of the carrier under the carriage contract; to obtain adequate remedy in contract, as against lesser remedies obtainable in tort of negligence or bailment, for loss of, damage to or mis-delivery of goods against the carrier or in all three. In furtherance of same, Nigeria should have an enabling statute that will be in uniformity with other major maritime jurisdictions; as well as be proactive to accord a legal framework for the admissibility of e-bill of lading which has become manifestly pertinent with the difficulties encountered globally in international marine contracts due to the COVID 19 lock down.

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