

# Trade and Transport Alert

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## Is the Australian Register of Ships evidence of title?

Yes, the Australian Register of Ships is evidence of title. A later registered mortgagee will obtain an indefeasible title over an earlier unregistered interest as long as the later mortgagee was not a party to any fraud.

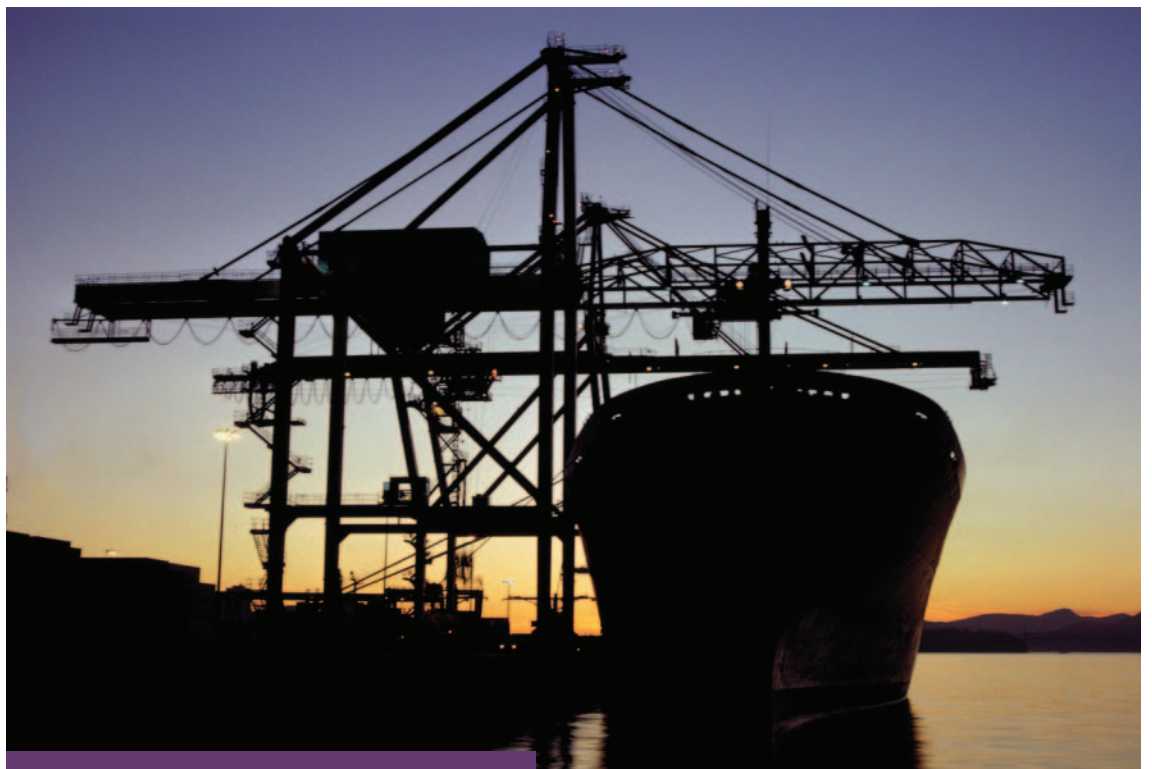
*Advertising Department Pty Ltd v The Ship MV "Port Phillip" [2004] FCA 1762*

### Facts

In January 2002 the plaintiff, Advertising Department Pty Ltd and Ray Evans (Evans) entered into a partnership agreement (Agreement) to purchase a 22 metre motor yacht named the MV "Port Phillip" (yacht). Under the agreement, the yacht was held in Evans' name but was to be "owned" by the partners as tenants in common in the proportions in which they contributed to the partnership capital.

An important feature of the agreement was the existence of an unregistered goods mortgage over the yacht. This mortgage was granted to the plaintiff on 15 March 2002 and meant that the plaintiff had the legal title to the yacht as security and Evans, or Evans and the plaintiff as partners, retained the right to redeem the mortgage. This right would remain an equitable right until the time for discharge.

In fraud of the plaintiff, Evans registered the yacht in the Australian Register of Ships, declaring himself to be the sole owner of all 64 shares. This registration was effected on 13 August 2002.



In September 2002, Evans approached the second defendant, BMW (a finance company), to borrow \$195,756 on the security of the yacht. BMW granted the loan, and as security, took a ship's mortgage in statutory form over the 64 shares. The mortgage was registered on 4 October 2002. In March 2003 Evans received a further \$296,155 from BMW. This advance was also secured by the mortgage. Evans defaulted under both loans and BMW sought to sell the yacht to recover its debt.

In March 2004 the plaintiff discovered that Evans was the registered owner of the 64 shares and that he had mortgaged these to BMW. The plaintiff had the yacht and another ship owned by Evans arrested on 5 April 2004. Evans obtained the release of the ships by executing a bill of sale of the yacht in favour of the plaintiff. The plaintiff then lodged a caveat over the yacht with the Registrar of Ships.

### The issue before the Court

The issue before the Court was whether the true owner (ie an unregistered goods mortgagee) of a ship has priority over a registered mortgagee who took his mortgage from a person who by fraud became registered as the owner?

### Findings

The Court dismissed the plaintiff's action, finding in favour of the defendants. His Honour Finkelstein J held that:

“The register of ships is evidence of title. If a person in good faith acquires an interest in a ship from the registered owner, he will obtain

an indefeasible title that will defeat any prior unregistered right or interest, regardless of whether the prior right or interest is legal or equitable. It makes no difference that the owner obtained his registration by fraud, provided the person who acquired the interest was not party to, or did not know of, the fraud.”

In reaching his decision, Finkelstein J examined the history of the relevant legislation to determine the proper construction of the Commonwealth *Shipping Registration Act 1981*. His Honour concluded that the policy of these acts was to ensure that the Australian register is the record of title to a ship.

### Implications

- This case provides clear authority that the Australian register of ships is evidence of title to a ship.
- Where a purchaser without any knowledge of fraud acquires an interest in a ship from the registered owner, even where this interest of the registered owner was procured by fraud, their registered title is indefeasible.

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# Is a “straight bill of lading” a bill of lading under the Hague-Visby Rules?

A straight, non negotiable bill of lading has been held to be a “bill of lading” within the meaning of the Hague-Visby Rules by the UK House of Lords.

*J I MacWilliam Co Inc v Mediterranean Shipping Company S.A. The “Rafaela S”* [2005] UKHL 11 (11 February 2005)

## Facts

Four containers of printing machinery were damaged in the course of their carriage by sea from Felixstowe to Boston. The carrier was Mediterranean Shipping Company SA (carrier) and the buyer was J.I. MacWilliam (buyer). The terms of the contract of carriage issued by the carrier were contained in a “straight consigned” or “non-negotiable” bill of lading. The bill of lading did not contain the words “to order” which would have made the bill of lading transferable or “negotiable”. The buyer claimed against the carrier that the machinery was damaged on arrival.

There was a dispute as to whether the buyer was entitled to compensation under the Hague-Visby Rules (Rules) package limits enacted in the UK by the *Carriage of Goods by Sea Act 1971* (UK COGSA) or the claim was subject to the US *Carriage of Goods by Sea Act 1936* (US COGSA). This was a relevant issue because the limitation amount under the Rules was US\$150,000 whereas under the US COGSA it was US\$2,000.

The main issue for determination by the House of Lords was whether a straight bill of lading not made out to a consignee is a “bill of lading or any similar document of title” under Article I(b) of the Rules.

## Findings

### **London Arbitration award and English High Court**

The arbitrators found in the carrier’s favour and held that a straight bill of lading was not a “bill of lading” or “similar document of title” under the Rules. The Commercial Court also found in the carrier’s favour.

### **English Court of Appeal**

The Court of Appeal held that a straight bill of lading is a bill of lading within the meaning of the Rules. Lord Justice Rix decided that the Rules applied because although the bill was non-negotiable, it was otherwise in the form of a negotiable bill of lading and was required to be produced to obtain delivery from the carrier.

### **House of Lords**

In a unanimous decision the House of Lords upheld the judgment of the Court of Appeal. Lord Justice Bingham adopted a broad approach to the interpretation of the expression “bill of lading or any similar document of title” and concluded:

- the document was headed “Bill of Lading”;
- it contained the type of provisions usually found in a bill of lading; and
- it was required to be presented to obtain delivery of the cargo, it should not be considered to be a mere receipt or sea waybill.

Lord Justice Rodger adopted a similar approach and noted that “everything about this form suggests that the parties issuing or receiving it, whether or not the words “or order” were added, would regard the document as a bill of lading”.

A further key point in the House of Lords’ decision was that a straight bill of lading, and the rights thereby attaching, is transferred in exactly the same way as a classic bill of lading. The only difference is that a straight bill of lading can only be transferred once whereas a classic bill of lading can be transferred any number of times.





## Implications for Australian jurisprudence

The decision clarifies the position in respect of cargo being shipped under the Rules to Australia pursuant to a straight, non-negotiable bill of lading. In this case, the Rules will be applicable and the straight bill of lading will need to be presented to obtain delivery of cargo.

For outbound cargo from Australia, the current position has not been affected because of Australia's implementation of an amended form of the Rules which includes a broad definition of "sea carriage document" which classifies a "straight, non-negotiable bill of lading" as a bill of lading for the purposes of the Rules.

There has been doubt as to whether a straight bill of lading must be presented for the delivery of goods. The current foreign jurisprudence tends to suggest that a straight bill of lading must be presented for delivery of goods in the same way as a classic bill of lading. This case supports that view. Although it was not an issue for determination, the House of Lords decided this case on the basis that a straight bill of lading must be presented for delivery of the goods. In fact, Lord Bingham likened both a classic bill of lading and a straight bill of lading as *"a key which, in the hands of the rightful owner, is intended to unlock the door of the warehouse"*.

Anyone involved in the delivery of goods after sea carriage would be well advised to only deliver goods upon presentation of an original bill of lading, be it negotiable or straight.

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