IN THE PRIVY COUNCIL

No. 9 of 1985

26/85

ON APPEAL FROM

THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N

SCANCARRIERS A/S — Appellant

- and -

AOTEAROA INTERNATIONAL LIMITED — Respondent

CASE FOR THE APPELLANT

I N D E X

Record

(A) Introduction

1. This is an appeal from a judgment of the Court of Appeal of New Zealand (Cooke J. (presiding), McMullin and Somers J.J.) delivered on 28th September, 1984 by which the Court reversed the judgment of the High Court (delivered on 17th August 1983 by Wallace J.) dismissing the Respondent's claim. The case concerns the legal effect of dealings between the parties about the prospective carriage by the Appellant of waste paper intended to be shipped to India by the Respondent during 1982.

(B) Facts

2. The background is summarised conveniently in the first two pages of the judgment of Wallace J. in the High Court. pp.372-3

3. The Respondent is a small private company carrying on business in Auckland. Its principal shareholder is Mr. Cash, who started the company in 1975. The primary business of the company was the export of waste paper. Mr. Cash became aware of a market for waste paper in India, but he had difficulty in arranging transport at economic rates. p.372

4. The Appellant is a Scandinavian shipping company. As described by its Deputy Managing Director, Mr. Moen, it and its predecessors have for many years been engaged in the European/Australasian trade. It is a member of the New Zealand European Shipping Conference. p.315-7

5. Late in 1981 it recognised an imbalance in the volumes of cargo carried, which meant that there was surplus capacity on its north-bound sailings. It proposed to take advantage of this capacity by introducing a new service to Dubai in the Arabian Gulf, which could be serviced by a short deviation from the normal route through the Suez Canal. From Dubai, other

ports in the Arabian Gulf and in India and Pakistan could be serviced by transhipment vessels.

6. The Respondent was among the companies from whom business was sought in New Zealand for the new service. Discussions ensued over a period of some two months - December 1981 and January 1982. Two relevant meetings took place on 29th January, 1982. One meeting was between Mr. Cash and an English associate of his, Mr. Wilson, on the one hand, and Mr. Teskey on the other. Mr. Teskey was employed by The East Asiatic Company (NZ) Limited which was the Appellant's agent in Auckland. It reported to the Appellant's office in Wellington, New Zealand, which in turn reported to head office in Hovik, Norway. The second meeting was between Mr. Cash on the one hand and Mr. Robinson, the Appellant's New Zealand marketing manager, on the other. At the first meeting, there was discussion concerning the surplus capacity on the Appellant's north-bound sailings and the possible tonnages of waste paper which the Respondent would be interested in shipping. At the second meeting which was quite separate, the rate of freight and packaging of cargo were discussed.

p.177 1.12-23
pp.372-3
p.181 1.45
p.205-6
pp.33-4
p.127
p.183-4
pp.205-6

7. Following his meeting with Mr. Cash, Mr. Robinson sent a telex on 3rd February, 1982 to the Respondent setting out a freight rate as a promotional rate for six months, and requirements relating to the packaging of cargo. Availability of space was not a matter discussed with Mr. Robinson and no reference was made to it in the telex.

p.206 1.35
Doc.39

8. The Respondent presented some 919 tonnes of waste paper of various grades for shipment on the "BARRANDUNA", which was the first of the Appellant's vessels to call at Dubai. Because of space constraints arising from difficulties in stowing the paper (which was packaged unsatisfactorily), 271 tonnes were

p.2 1.30
p.406 1.5
p.405
p.405 1.40

short-shipped. The Respondent alleged that the short shipment caused difficulty to him in the negotiation of a letter of credit for one parcel of paper actually shipped, and for the payment of freight for that parcel. The parties then negotiated a contract by which a bill of lading was issued for that parcel despite the non-payment of freight, the Appellant promised to take the short-shipped cargo on its next sailing, and the Respondent promised to pay the outstanding freight within three days after such sailing.

p.406

p.406 l.30 et seq

9. In the event, the Appellant carried the short-shipped cargo on its next vessel, the "TARAGO", but the Respondent did not pay the freight either for the parcel shipped on the "BARRANDUNA" for which the freight remained outstanding, or for the short-shipped cargo carried on the "TARAGO". As a result, the Appellant exercised a right of lien and sale contained in its bill of lading, carried the waste paper on to Europe, and eventually sold it in Gothenburg.

p.407 l.1-35

10. The Appellant declined to accept any further bookings from the Respondent for shipments of waste paper to India either on the "TARAGO", or on the subsequent sailing (there was also a fourth sailing within the six month period covered by the promotional freight rate).

p.41 l.12.-40

(C) Respondent's Claims

11. Although the precise way in which the Respondent has formulated its contentions has altered during the course of the litigation, in broad terms it alleged that the dealings between the parties, including in particular the two meetings of 29th January, 1982 and the telex of 3rd February, 1982, amounted to a contractual commitment by the Appellant to carry up to 1,000 tonnes of waste paper for the Respondent on each

pp.1-2

of its sailings to Dubai, for on-carriage to India, during a six-month period ending on 29th July, 1982.

12. In addition, the Respondent claimed that the settlement contract (referred to in para. 8 above) did not constitute a settlement of matters arising from the short-shipment on the "BARRANDUNA", either because no concluded agreement had been reached, or because the agreement was vitiated on the grounds of economic duress. p.16 p.414

13. On the basis that there was no settlement, the Respondent claimed damages in respect of the short-shipment and the subsequent lien and sale of the paper shipped on the "TARAGO".

14. The Respondent further claimed damages for the loss of profits it contended it would have made from shipments during the six-month period to July 1982, and also damages on account of the loss of market in India after that date.

(D) Previous Court History

15. At trial before Wallace J. the Appellant succeeded. The Court found that the Appellant had not contractually committed itself to hold open sufficient space on its sailings until the end of July 1982 to accommodate the anticipated requirements of the Respondent. Against the background of all the evidence, in particular the way in which bookings were made in New Zealand by shippers and shipowners and of the position (which emerged plainly from the evidence) that the Respondent made no commitment of any sort to the Appellant, the Court concluded -

> "I do not consider a reasonable person experienced in shipping would have thought [the Appellant's representatives] had committed the [Appellant] to hold available such a large tonnage for one shipper who had no obligation to ship or to pay deadfreight if the cargo did not eventuate". p.396 1.30-40

16. The Court held that the telex did not constitute a contract or even an offer open for acceptance at a later date. p.397 1.15

17. The Court concluded that the Appellant and the Respondent had entered into a contract by which the issues concerning the waste paper which had been short-shipped on "BARRANDUNA" were resolved. The waste paper was to be shipped on "TARAGO" and the freight for the waste paper which had been shipped on "BARRANDUNA" but which had not been paid was to be paid within three days of the sailing of "TARAGO". The contract did not deal with the freight on the waste paper which had not been shipped on "BARRANDUNA". The conclusion was that this would be dealt with in the usual way in terms of the bill of lading. p.414 1.10-15

18. In relation to this contract the Court found that there was no economic duress negativing the element of consent on the part of the Respondent. p.416 1.22

19. The Court then held that the Appellant was entitled to payment of freight on the waste paper carried on "TARAGO" and in the absence of payment, was entitled to a lien on the waste paper with the result that it was authorised to on carry it and sell it in terms of the bill of lading. Therefore, the Respondent's claim for damages failed but the Appellant's counterclaim for non-payment of freight both in respect of "BARRANDUNA" and "TARAGO" succeeded. p.418 1.20

20. On appeal to the Court of Appeal, the issues before the Court were the freight rate "agreement", economic duress and the "TARAGO" freight. The Respondent succeeded on the first issue, but failed on the other two issues.

21. The Court held that the freight rate set out in the telex was contractually binding and that, to give p.435

effect to the Appellant's contractual undertaking as to freight rate, it was necessary to imply a term to the effect that the Appellant would not arbitrarily refuse space to the Respondent at the agreed rate. On the basis that the Appellant's refusal to carry the Respondent's cargo resulted from a desire to take higher paying cargo, the Court held that the refusal was arbitrary. The Court held that the Respondent had provided consideration, namely in the detriment which it suffered in expending effort and money to obtain orders for shipment to India. The Court analysed the telex as amounting to either "an acceptance of an implicit offer by the [Respondent] to use reasonable endeavours to find cargo" or as "an offer accepted by the [Respondent's] subsequent conduct". p.436 1.35 p.438 1.10 p.437 1.35-50

22. The other issues before the Court of Appeal were the arguments concerning economic duress and the "TARAGO" freight. On each issue the Court agreed with Wallace J. for the reasons he expressed. pp.438-9 pp.440-1

(E) Appellant's Submissions

(E1) Summary of Submissions

23. The Appellant's submissions may be summarised as follows -

23.1 The oral discussions and telex did not give rise to a contract. In particular -

23.1.1 On its true construction, the telex did not amount to an offer by the Appellant;

23.1.2 (On the basis that the submission set out in paragraph 23.1.1 above is not accepted and the telex did amount to an offer) it was at most a standing offer capable of being accepted voyage by voyage until it was revoked or expired through effluxion of time;

23.1.3 Further or alternatively, if it be held (contrary to the Appellant's contention) that the telex on its true construction amounted to an immediate promise not to revoke the offer for six months, or that a term is to be implied into the telex that the Appellant would not arbitrarily refuse to carry the Respondent's cargo at the freight rate set out in the telex, such a promise or implied term has no contractual effect since the Respondent provided no consideration.

24. In response to the cross appeal -

(1) There was no economic duress negativing the element of consent on the part of the Respondent to the settlement contract;

(2) The Appellant was entitled to recover freight on the waste paper shipped on the "TARAGO" in accordance with the terms of its usual form of bill of lading.

(E2) Analysis of Submissions

(E2.1) Status of Oral Discussions and Telex

25. The Appellant submits that the oral discussions and telex did not constitute an offer to enter into a contract with the Respondent. An offer is an expression of willingness to contract on certain terms made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed. In determining whether the offeror has expressed such an intention, the Courts take an objective approach:

Oscar Chess Limited v. Williams [1957], 1 W.L.R. 370.

It is submitted that the following factors are relevant to the objective analysis in this case and lead to the conclusion that, as at the date of the telex, there was no more than an informal indication by the Appellant that space was likely to be available for the carriage of the Respondent's cargoes and as to the likely and intended rate of freight for the next six months:-

25.1 At the meetings of 29th January, 1982, several issues were discussed. The meetings were not connected but were independent. Indeed Mr. Cash did not mention the meeting with Mr. Robinson in examination in chief. The discussions were of an exploratory nature and no decisions were reached. Mr. Cash was aware that the Appellant's New Zealand representatives were not authorised to commit the Appellant. The telex confirmed two aspects of the discussions, namely price and packaging. However, the telex went no further than this. In particular, no commitment was given at any time as to the availability of space. Plainly, even after the sending of the telex, a significant number of details remained to be agreed before any shipment was made; pp.34,49,127 184,199, 205-6 p.49 1.5-10

25.2 The evidence makes it quite clear that there was no obligation whatsoever on the Respondent: it made no promise to ship with the Appellant nor did it undertake any other obligation. The Respondent's position on its arrangements with the Appellant was that there was no agreed tonnage; the Respondent could vary tonnage to suit itself; indeed, the Respondent could ship with someone else. As a matter of contractual intention, it is highly unlikely that one party would bind p.58 1.8-28

itself in the manner alleged by the Respondent while allowing for no obligation at all on the other. The Court should avoid reaching the conclusion that a party has so bound itself unless there is compelling evidence that this is what was intended. There was no such compelling evidence in this case;

Chitty on Contracts, 25th Ed., 1983, Vol. 1 para. 128.

25.3 The position alleged by the Respondent is inconsistent with the evidence of the usual New Zealand practice. In terms of this practice, there are only two alternatives on the facts. Either there was a contract to carry followed by a contract of carriage or alternatively, there was no antecedent contract but simply a contract of carriage. This accords with general shipping practice under which the alternatives are a contract of affreightment (contract to carry) followed by the usual bill of lading contract (contract of carriage) or alternatively, a bill of lading contract (contract of carriage) only. It is accepted that the degree of formality attached to a contract of affreightment is capable of great variation, and that such contracts need not be recorded in the detailed and precise way referred to by some of the Appellant's witnesses in the High Court; but nevertheless it is submitted that any binding arrangement for the carriage of goods in a vessel in liner service must fall into one or other of these two categories.

p.396

p.352 l.10-20

The Appellant relies on the evidence of Mr. Hobbs as to the booking procedures and

contractual terms associated with the two types of contract. None of the usual features of either type of contract was present in this case.

25.4 If some arrangement which was inconsistent with usual New Zealand practice and shipping practice generally had been agreed, some formality would be expected. The very informality of the arrangements between the parties suggests that they were following the normal practice;

25.5 The arrangements were ordinary terms for liner shipment. In this respect, the Respondent was in the same position as other shippers dealing with the Appellant for shipping space. In the absence of a contract of affreightment, there is no obligation on a shipowner to -

1. Take bookings;
2. Accept cargo for shipment at all;
3. Carry otherwise than on bill of lading terms.

There was no contract of affreightment in this case, merely a statement of intent:

> British Steel Corporation v. Cleveland Bridge Engineering, (1984) 1 All E.R. 504.

26. In the alternative, the Appellant submits that even if the telex did amount to an offer, it was at most a standing offer capable of being accepted voyage by voyage until it was revoked or expired by the effluxion of time. The Appellant validly revoked the offer by indicating to the Respondent that cargoes

offered by the Respondent would no longer be carried at the rate of freight set out in the telex.

(E2.2) Consideration

27. Even if the other requirements for the formation of a contract were present, no consideration was furnished by the Respondent, with the result that there was no contract. In support of this submission the Appellant makes the following points -

27.1 If the telex is to be regarded as completing a contract between the parties, consideration must be found on both sides. In the circumstances this consideration must be executory in nature. In light of the evidence, however, it is plain that the Respondent provided no such consideration. p.58 l.8-28 The Respondent undertook no obligation; it made no promises or commitments to the Appellant. Rather, it regarded itself as free to ship in any amount or even to ship with another shipowner if a better rate could be obtained. On the evidence there was not even a commitment to seek orders or cargo - the Respondent had a complete discretion as to what if any steps it took;

Chitty supra para. 160.

27.2 If the telex is analysed as an offer, a contract would arise only when a booking was made and confirmed in accordance with the terms of the telex. In other words, contracts would arise on a ship by ship basis. The telex could not be converted into a contract covering the period up to the end of July 1982 by the Respondent's efforts to obtain waste paper for shipment on the first

of the Appellant's vessels. Even before the discussions with the Appellant, the Respondent had obtained orders from India; after receipt of the telex it simply continued to seek orders. At all times, the Respondent regarded itself as free to ship with other carriers. Against this background, the Respondent's efforts were independent of the Appellant's telex. The efforts were not made at the request of the Appellant. The Appellant did nothing to induce the Respondent to make the efforts. In view of the fact that the Respondent made no commitment to ship with the Appellant, the efforts were not necessarily referable to the arrangement between them. p.32 1.5-10 p.372 1.30

Chitty on Contracts, supra, paragraph 243.

Dickinson v. Dodds, (1876) 2 Ch. D. 463.

Routledge v. Grant, (1828) 4 Bing. 653.

Combe v. Combe, (1951) 2 K.B. 215.

(E2.3) Economic duress and "TARAGO" freight.

28. The Appellant adopts the reasoning of the Court of Appeal and the learned Judge.

(F) Analysis of the Court of Appeal's Judgment

29. The Court of Appeal held that there was a contract between the parties arising out of their discussions and the telex and that the Appellant had breached an implied term of that contract. The Appellant's submissions will focus on the three central elements of the Court's reasoning, namely -

29.1 Its analysis of the dealings between the parties;

29.2 Its analysis of the consideration furnished by the Respondent;

29.3 Its analysis of the term to be implied in the contract.

(F1) Dealings Between the Parties.

30. The Court of Appeal gave undue weight to the fact that the parties appear to have agreed a freight rate. The Court assumed that because the parties had agreed a freight rate this agreement had to be given contractual effect. However, the fact that parties have agreed one aspect of an arrangement has no particular significance if they have yet to settle other important details. The issue is not whether there was some element of agreement between the parties but whether there was a contract. p.435 1.1-30

(F2) Consideration.

31. The Appellant makes the following comments by way of criticism of the Court of Appeal's analysis of the issue of consideration -

31.1 Against the background of the evidence, the telex cannot properly be regarded as an acceptance of an implicit offer by the Respondent to make reasonable efforts to find cargo. The Respondent did not regard itself as in any way committed to the Appellant. It felt that it was free to ship with another shipowner if it so desired. It retained for itself a complete discretion on the question of shipping with the Appellant. Accordingly, an offer to use reasonable endeavours to find p.58 1.8-28

paper for shipment could not be of any benefit to the Appellant, and it is unrealistic to regard such an offer as implicit in the exchanges between the parties, or to treat it as providing consideration for a commitment by the Appellant to carry such cargo as the Respondent might choose to offer.

31.2 The discussions concerning space and the quotation to the Respondent of the promotional freight rate cannot be analysed as an inducement to the Respondent to spend time, money and effort in obtaining cargo for shipment. The Respondent's incentive was rather to develop its trade to India and to make a profit for itself. It had arranged orders prior to the discussions with the Appellant's representatives. Even after the discussions, the Respondent continued to negotiate with other shipowners over shipping space consistently with its view that it had no commitment to the Appellant; p.32 1.5-10 Doc.65 p.59 1.30-40

31.3 As to the view that the telex was an offer accepted by the Respondent's subsequent conduct in attempting to obtain orders, the Appellant submits that the Respondent's efforts were not undertaken at the request or initiative of the Appellant. Nor, even if the telex is construed as an offer, should it be construed as an offer capable of acceptance by the Respondent continuing to make reasonable endeavours to obtain orders. The Appellant respectfully submits that the Court of Appeal failed sufficiently to distinguish between acts capable of amounting to consideration, and acts capable of

amounting to acceptance of an offer of a unilateral contract.

(F3) Implied Term.

32. The Court of Appeal held that a term should be implied into the contract to the effect that the Appellant could not arbitrarily withhold space from the Respondent. By way of background to the Appellant's criticism of this aspect of the judgment of the Court of Appeal, attention is drawn to the fact that an implied term was not pleaded in the Respondent's statement of claim; and because it was barely touched on in the Respondent's opening in the High Court, it was neither canvassed in evidence nor considered in counsel's final addresses. In the result, the matter was not dealt with at all in the judgment of Wallace J. p.436 1.30

33. The Appellant makes the following specific criticisms of the Court of Appeal's treatment of this issue -

33.1 The consequence of the decision of the Court of Appeal is that while the Appellant cannot arbitrarily refuse space, for example, where a higher freight rate is available for other cargo, the Respondent is free to act "arbitrarily" and place its cargo with those who offer a lower freight rate. The Appellant has been criticised for "single-minded pursuit of economic self interest" but the result achieved by the Court of Appeal permits the Respondent to adopt the very conduct for which the Appellant has been criticised. It would not be reasonable to imply a term which results in such a lack of mutuality of obligation. p.436 1.10

33.2 Another consequence is that despite the assertion of the Court of Appeal to the contrary, the decision effectively gives the Respondent an option of space on all of the sailings in the six month period. This result arises from the practicalities of administering the implied term. For example, the Appellant would have to hold space until objectively it could be said that the Respondent was too late. However, it is commercially unreal to suggest that other shippers can be kept waiting until the Respondent makes up its mind. If it is too late for the Respondent, it is likely to be too late for everybody else as well. Furthermore, the option is achieved at no cost to the Respondent. The question which must be asked is whether reasonable commercial men would have negotiated such an agreement.

33.3 On analysis, if the Respondent had a contract containing an express term concerning space of about 1,000 tonnes, the obligation on the part of the Appellant would be much the same as it is under the implied term. However, the Court accepted that there was no express agreement concerning provision of space. The reason why the appellant would be in much the same position arises from the definition of "arbitrary" and from the examples which are given by the Court. For example, a refusal would not be "arbitrary" according to the Court if the Respondent was by-passing the Appellant, was not making timely bookings or was not building up cargo. However, if the Respondent was not interested in pursuing the arrangement (the result of these examples), then it is unlikely that any request would be

p.436 1.45-50

made for space, so that these are not genuine "refusal" examples. Similarly, the other examples of non-arbitrary behaviour probably amount to frustration. Elimination of the examples given by the Court of Appeal leads to the conclusion that under the implied term there was effectively an absolute commitment on the part of the Appellant in relation to space. Both Courts accepted that there was no such commitment. The Court of Appeal has endeavoured to tread a middle ground which does not exist.

33.4 The principles in accordance with which a term may be implied into a contract are well-known.

> B.P. Refinery (Westernport) Pty Limited v. Shire of Hastings (1977) 52 A.L.J.R. 20

On the assumption that there was a contract between the parties, the Appellant submits that the term implied in this case does not meet the established principles. In particular:

33.4.1 Because of the one-sided nature of the resulting contract, it cannot be said to be fair and equitable;

33.4.2 It is not required to give business efficacy to the contract. In the context of shipping practice the contract would be perfectly viable without it;

33.4.3 The term is not, from the viewpoint of each party, so obvious that it goes without saying;

33.4.4 It runs counter to the finding that there was no express commitment concerning the availability of space.

33.5 In any event, if there was a contract and the term formulated by the Court of Appeal can be implied into it, the Appellant's behaviour was not "arbitrary" within the meaning of the term. The behaviour of the Respondent fully justified the Appellant in refusing to ship further cargoes. The financial position of the Respondent was such that it was unable and unwilling to pay freight. The Appellant also had legitimate complaints about the condition of the cargo presented for shipment.

(G) Summary of Reasons for Appeal

34. The Appellant's reasons for appeal may be summarised as follows -

34.1 The oral discussions and telex did not give rise to a contract. The telex was not an offer, or if it was an offer, it was at most a standing offer capable of being accepted on a voyage by voyage basis until it was revoked or expired through the effluxion of time, and it was effectively revoked by the Appellant declining to accept further cargoes;

34.2 In any event, if the other elements required for the formation of a contract were present when the telex was sent, the Respondent provided no consideration, with the result that there was no contract;

34.3 In dealing with the freight rate agreement, the Court of Appeal assumed that because the

parties had agreed a freight rate, the agreement had to be given contractual effect. However, the freight rate was only one aspect of the arrangements: other important details remained to be settled;

34.4 In dealing with the question of consideration, the Court of Appeal failed to give due weight to the fact that the Respondent undertook no obligation whatsoever with regard to the Appellant. None of the actions of the Respondent could, on the evidence, constitute consideration;

34.5 Even if a contract can be established, the Court of Appeal was wrong in implying the term which it formulated. The term runs counter to the finding that there was no express term in relation to availability of space and cannot be justified on the basis of the established legal principles;

34.6 If there was a contract and an implied term, the behaviour of the Appellant was not arbitrary in the circumstances having regard to the behaviour of the Respondent.

35. In respect of the cross appeal -

35.1 There was no economic duress negativing the element of consent on the part of the Respondent to the settlement contract;

35.2 The Appellant was entitled to recover freight on the waste paper shipped on "TARAGO" in accordance with the terms of its usual form of bill of lading.

STEWART BOYD, Q.C.

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