IN THE PRIVY COUNCIL

No. 9 of 1985

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

SCANCARRIERS A/S

Appellant

and

AOTEAROA INTERNATIONAL LIMITED

Respondent

CASE FOR RESPONDENT:

I. AS TO THE PETITION OF THE APPELLANT:

Reference
Record

1. THIS PART of the case concerns an appeal from the Judgment dated the 28th September 1984 of the Court of Appeal of New Zealand (Cooke, McMullin and Somers, JJ) allowing an appeal from the Judgment of the High Court of New Zealand dated the 17th August 1983 (Wallace, J.) — pp.425 to 441

2. There has been very little dispute between the parties as to the credibility of the various witnesses. The basic facts are not in dispute. Most of the relevant matters are well summarised in the first half of the Judgment of Wallace, J. The main circumstances are referred to also in some detail in the combined Judgment of the Court of Appeal delivered by Cooke, J. — p.394, ll. 13 - 33

Reference
Record

3. The Respondent respectfully adopts the full narrative and reasons for judgment of the Court of Appeal and, more especially, its finding that the Petitioner (Defendant) was in breach of contract. The Respondent (Plaintiff) may seek to refer to additional matters and reasons supportive of the result reached by the Court of Appeal. p.438, ll. 6 - 15

4. The principal issue debated in the Courts below and decided by the Court of Appeal in favour of the Plaintiff was that the negotiations between the parties had resulted in a binding agreement touching on the carriage of goods by sea from New Zealand to India for a particular period on particular terms. Carriage of goods was the original intention and dominant commercial purpose of both parties.

5. The background to the contractual arrangements as contended for by the Plaintiff can be stated fairly concisely.

6. In early 1982, the Plaintiff, a small private concern based in Auckland in the North Island of New Zealand, desired to build up new business by shipment of a large quantity of paper waste to Bombay on the west coast of India. At the same time, the Defendant, a large shipping combine based in Norway, was planning to increase its northbound carrying capacity from Australia and New Zealand and to offer a through bill service to India. pp.372, 373

7. With the introduction of an additional vessel, the Defendant had plenty of space northbound and was active in the solicitation of business. The Auckland agents of the Defendant told the Plaintiff that there would be space available to meet its requirements. The principal witness for the Defendant in that regard was a Mr Teskey and he was "quite sure" that an assurance as to cargo space would have been sought and confirmed. He did not expect the Plaintiff to be later denied space. p. 195, ll. 28 - 42

Reference
Record

8. The Defendant's head office in New Zealand at Wellington on 3.2.82 gave written confirmation to the Plaintiff of a special promotional rate of US $120 per tonne for cargo "to be shipped" for a five month period ending 29.7.82. — Part II I. Agreed Documents Telex Doc. No.39

9. Perhaps there was a mistake in calculating the rate that was offered to the Plaintiff. In any case, it is clear that the advice given by the Wellington head office of the Defendant was not referred at the time to the Defendant's headquarters in Norway. — p.340, ll. 32 - 48

10. When those persons responsible for the Defendant's overall direction in Oslo heard about 1.4.82 of the special freight rate (after there had been an initial part shipment), they did not like what they heard. Thereafter, the Defendant refused to accept any further cargo from the Plaintiff. This part of the case, as was stated by the Court of Appeal, reduces to the narrow point as to whether ScanCarriers was entitled to refuse space to Aotearoa for the reason that the quoted freight rate was thought to be too low. — p. 431, ll. 3 - 40; p. 426, ll. 28 - 32

11. The Defendant's case in the Courts below has been that nothing binding had ever been agreed and that it remained free to honour or not honour the promotional rate quoted as it saw fit.

12. The Court of Appeal indicated, obiter, that, having regard to the factor of the Defendant keenly soliciting business and the "virtual concurrence" of the evidence of Mr Cash, Mr Wilson and Mr Teskey as to what was said at their meeting on 29 January 1982 "it would have been open to the trial Judge to find Mr Teskey did give an oral warranty as pleaded". The Court of Appeal noted that Wallace, J., had not so found but was not prepared to hold that he had been bound to do so. — p. 433, ll. 24 - 35

Reference
Record

13. There being no major issue as to the truthfulness of the three witnesses mentioned and the question rather being as to the proper inferences to be drawn from such evidence, it is submitted that Wallace, J., was in very little better position to decide the warranty question than the judges of an Appellate Court and further that it was implicit from the discussions, when viewed in context, that shipping space would be made available by the defendant Shipping Company.

14. Where as here, the parties to a transaction have proceeded on the basis of an underlying assumption of shipping services being available and, more especially, as one party has incurred considerable time, trouble and expense in promoting a market for the service it will be submitted that neither party should be allowed to go back on the assumption and remove the commercial substratum of their dealing.

15. The Court of Appeal did not have to consider the effect of S.6 of the Contractual Remedies Act 1979. That Act was, as its Preamble indicates, intended to reform the law relating to remedies for misrepresentation and breach of contract. p. 438, 11.37-43

16. If, as will be submitted, the Plaintiff was induced to enter into the contract with the Defendant by Mr Teskey's misrepresentations, then it will be submitted that it is entitled to damages for breach in the same manner and to the same extent as if the representation relied upon were a term of the contract which has been broken.

17. The Court of Appeal rejected the Defendant's argument that the so-called "freight agreement" had no binding effect. It considered that to give business efficacy to the Telex of 3.2.82, in its context that an implied term was necessary. The Managing-Director of the p. 436, 11.12-17

Reference

Record

Plaintiff, Mr Cash, in his evidence put the question "What is the use of getting a freight rate if you have no space?" It will be submitted that receipt, storage and issue of some sort of bill of lading, and carriage to destination are all vital ingredients to the commercial intention of the parties in this case. p.50, ll.7 - 8

18. The term implied by the Court of Appeal goes no further than the reasonable dictates of necessity in the circumstances known and accepted by the representatives of the parties in New Zealand.

19. THE RESPONDENT MOST RESPECTFULLY SUBMITS that the appeal of the Petitioner should be dismissed with costs for the reason that the decision of the New Zealand Court of Appeal is entirely correct in the circumstances.

II. AS TO THE PETITION OF CROSS APPEAL OF THE RESPONDENT:

20. THIS FIRST PART of the case by way of cross appeal concerns the Plaintiff's cross appeal from those parts of the Judgment of the Court of Appeal in which the Court of Appeal dismissed two separate (but connected) issues decided by Wallace, J., in the High Court. The first of these issues relates to the question of economic duress. The second relates to the counterclaim by the Defendant for "freight" on cargo received by the Defendant aboard the vessel "Tarago". pp.438 to 441

21. While there is very little dispute as to the facts or circumstances relevant to the two issues, they are not dealt with in great detail in either the Judgment of Wallace, J., or the Judgment of the Court of Appeal.

Reference

Record

22. The starting point must be that ScanCarriers did accept an initial consignment comprising 920 tonnes of waste paper for carriage on the "Barranduna". When the ship sailed from Auckland on the 26th March 1982, a substantial portion of this cargo (271.12 tonnes) was not taken. The Plaintiff claimed loss of $39,896.29 as a result of such short-shipment. p.2, ll.47 - 55 p.3, ll. 1 - 9

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23. In response, the Defendant said that it had agreed to enter into an agreement with the Plaintiff whereunder it was to issue a bill of lading covering the waste paper actually shipped on the "Barranduna" and that, in consideration, the Plaintiff was (inter alia) to waive all claims in respect of the short-shipment. p.12, ll.41 - 55 p.13, ll. 1 - 17

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24. It will be submitted that certain significant matters or circumstances were passed over or at least given insufficient recognition by the learned trial Judge in his consideration of the voluntariness of the settlement arrangements relied on by the Defendant Shipping Company.

30 25. It is clear that both parties appreciated that, in order to meet its obligations (both as regard payment for goods and payment of freight in advance), the Plaintiff needed to negotiate the irrevocable letters of credit it had obtained from its Indian purchasers and that to do this it must obtain from the Defendant shipping documentation for the goods accepted by the Defendant in Auckland within a reasonable time and that the question of time was of critical importance. pp.188, 189 - p.198, ll.29 - 46 p.199, ll. 5 - 7

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Reference
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26. The Defendant acted in breach of contract in failing to uplift the cargo that it had accepted. The Defendant compounded its fault by failing to give to the Plaintiff any form of shipping documentation either in respect of the goods shipped or the goods accepted but left behind.

27. So far as the goods which had been shipped were concerned, the Defendant threatened to abandon their carriage by offloading in Timaru in the South Island of New Zealand, which would have meant that the Plaintiff was unable to obtain payment from the prospective purchasers.

28. The High Court gave emphasis to the fact that the Plaintiff had not made payment to the Defendant of freight monies in advance and in result upheld the shipowner's defence in regard the short-shipment claim. p.416, ll.25 - 49 p.417, ll. 1 - 4

29. Wallace, J., ruled that the settlement pleaded by the Defendant was valid and had not been forced on the Plaintiff by economic duress. He declined to find that the Defendant's attitude or actions had amounted to improper pressure and his view was that the settlement arrangements had been "reasonably acceptable" to the Plaintiff.

30. The Court of Appeal treatment of the matter is brief. It was not prepared to disturb Wallace, J's conclusion on the duress issue. It categorised the situation in relation to the settlement as having been "a confused one" and considered that the settlement was a prudent and sensible compromise, made in good faith, with legal advice on both sides. p.438, ll.44-48 p.439, ll. 1-46 p.440, ll. 1 - 2

Reference
Record

31. The Respondent will submit that both the High Court and the Court of Appeal were wrong in giving effect to the settlement exacted by the Defendant. This again does not involve any great conflict as to the factual matters.

32. The Defendant's own pleading accepts that the Plaintiff agreed to the settlement in consideration of it agreeing to issue bills of lading and further agreeing to carry on "Tarago" the cargo which was not shipped on "Barranduna".

33. There can be no doubt but that the Plaintiff was under considerable financial and other pressure in face of the failure and/or refusal of the Defendant to provide bills of lading.

34. The short point is as to whether such pressure was proper or improper. If the Defendant was acting in breach of contract, then it is submitted that, prima facie at least, it was acting improperly.

35. The Plaintiff will submit that, having regard (a) to the basic object or purpose of the relationship; and (b) to the mandatory provisions of the Sea Carriage of Goods Act, 1940 (and more especially Article III of the Hague Rules as incorporated in the Schedule to the Act) it was entitled to have all the goods accepted by the Defendant carried to India and to have receipts in usual bills of lading form issued in respect of all of the goods.

36. The Defendant, having failed to carry out its obligations in regard shipment of part of the cargo presented for the "Barranduna" at Auckland, exercised duress in two ways:

(i) by withholding all shipping documentation, and

(ii) by threatening to discharge the cargo taken aboard "Barranduna" at Timaru thereby forcing the Plaintiff to accept its terms.

(i)
p.39,11. 1-46
p.70,11. 3-39
p.71,11. 1- 7
p.99,11.27-35
pp.100,101
p.331,11.41-49
p.332,11. 1-10
p.342,11.20-48
p.349,11. 2-14

(ii)
p.265,11.37-41

Reference
Record

37. THE RESPONDENT MOST RESPECTFULLY SUBMITS that the Appellant's claim to the benefit of settlement and/or waiver by the Respondent of all proper claims in respect of the "Barranduna" short-shipment should be disallowed for the reason that the "settlement" resulted from duress.

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38. THE SECOND PART of the Respondent's cross appeal relates to the claim for "freight" on the cargo put aboard the "Tarago" prior to its departure from Auckland on 11 May 1982. p.14, ll. 1-47

39. The Defendant pleaded that, following receipt on board "Tarago", there became payable to it $40,608.86 in terms of its
20 bill of lading.

40. The Plaintiff, by way of defence to this claim, alleged that there was a failure of consideration flowing from the Defendant and that the Defendant had not delivered bills of lading in respect of the cargo nor carried the cargo to India as it had undertaken. p.16, ll.42-48

30 41. In the High Court, Wallace, J., ruled on this point also in favour of the Defendant. He considered that the answer to the Plaintiff's complaint of fundamental breach was that the Defendant would have carried to destination had the Plaintiff paid the freight therefor and that once the Plaintiff failed to pay the freight, the Defendant was entitled to act as it did in terms of its bill of lading. p.419, ll. 6-18

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42. Wallace, J., thought it was "reasonable" for the Defendant to choose to carry the Plaintiff's cargo to Europe rather than to incur either the cost of carrying from Dubai to India or storage charges in Dubai. p.421, ll.16-19

Reference

Record

43. The Court of Appeal, while noting that freight is not normally earned unless and until goods are carried to, and made available at, the proper place, nevertheless considered that Clauses 11 and 12 of the Defendant's bill of lading entitled to recovery. The Court of Appeal also thought that the Defendant had acted reasonably in deciding not to unload the goods at Dubai. p.440, ll. 6-49 p.441, ll. 1- 9

10 44. The short point in issue on the Respondent's Cross Appeal remains as to whether or not the Defendant was entitled in law to receive freight for carrying goods to India, notwithstanding that it did not do so.

45. From the Plaintiff's viewpoint, delayed carriage of its cargo to Timaru or Oslo conferred no benefit. It would have been better if the Defendant had not obtained
20 possession of the goods. Then at least the Plaintiff would have been likely to obtain something for them.

46. The Defendant may or may not have been able to sell the goods in India had they reached there but, in the absence of bills of lading, it was unable to sell them anywhere. The Defendant's withholding of bills of lading of itself was wrongful and
30 disentitled it to recover monies for its services.

47. It will be submitted that the Defendant's fundamental obligation was to carry the goods to the contracted destination (and to provide bills of lading) but that it did neither.

48. It will be further submitted that the
40 Plaintiff's failure to pay freight did not entitle the Defendant to abandon its carriage to India or to deviate to Northern Europe.

Reference

49. The learned Judge in the High Court was wrong in law in his opinion that non-payment of freight after receipt of cargo justifies non-performance of the contract of carriage.

50. Also, it will be submitted that the language of the Defendant's bill of lading is not apt to excuse the its deviation and/or deliberate non-performance.

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51. The Defendant's possessory lien and, more importantly, right of sale presuppose performance by it of its contractual obligations. The words used do not give any right of deviation or stoppage in transit.

52. The abandonment at Dubai of the agreed voyage was such a breach as to relieve the
20 Plaintiff of any further obligation otherwise to pay freight.

53. THE RESPONDENT MOST RESPECTFULLY SUBMITS that the Appellant's claim for "Tarago" freight should be rejected for the reason that the Appellant never earned same and/or that the Appellant in the circumstances
30 that transpired became disentitled to recover same.

B. Clarke