

26/85

IN THE PRIVY COUNCIL

No. of 1985

O N A P P E A L F R O M

THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N

SCANCARRIERS A/S

Appellant

- AND -

AOTEAROA INTERNATIONAL LIMITED

Respondent

VOLUME I

RECORD OF PROCEEDINGS

PART I

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Agents for:

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Solicitors for the Respondent

IN THE PRIVY COUNCIL

No. _____ of 1985

ON APPEAL FROM

THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

SCANCARRIERS A/S

Appellant

AND

AOTEAROA INTERNATIONAL LIMITED

Respondent

RECORD OF PROCEEDINGS

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PART II - EXHIBITS

1. Plaintiff's exhibits:

Volume II

- "1" Agreed Documents
Nos. 1 to 99
- "2" Agreed Documents
Nos. 100 - 227
- "3" Photograph (Omitted)
- "4" Schedule for years 1979 to
1983 (inclusive) showing
Gross Profit on Sales -
Aotearoa International
Limited
- "5" Memorandum 'Price Increases
Negotiated after "Barranduna"
Shipment' - Aotearoa
International Limited
- "6" Schedule - Aotearoa
International Limited - as
Exhibit 4 but including
Projected Sales Figures for
Indian Export Programme for
1983
- "7" Telex advice Irrevocable
Letter of Credit
ILC/6216/597
- "8" Documentary Credit PS 348/82
- "9" Letter - Messrs Chapman Tripp
to Mr N.G.L. Burton dated
6 April 1982
- "10" Copy form of Waiver of
Priority by Prior
Chargeholder
- "11A" Letter - New Zealand Trade
Commissioner, Bangkok, to
Mr A.J. Stamp, Development
Finance Corporation of
New Zealand, dated
29 October 19791

- "11B" Letter - First Secretary
(Commercial) N.Z. Trade
Commission, Jakarta, to
Mr A.J. Stamp, dated
25 September 1979
- "12" "Calculation for Aotearoa
International Limited
Regarding Claims Against
ScanCarriers"
- "13" (1) Schedule - March 1982 -
Sales Actual and
Projected - Aotearoa
International
- (2) Schedule - April 1982
Projected Sales -
Aotearoa International
- (3) Schedule - May 1982 -
Projected Sales -
Aotearoa International
- (4) Schedule - June 1982 -
Projected Sales -
Aotearoa International
- (5) Schedule - July 1982 -
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- "14" TOMBARRA Voyage 64 - Tentative
Allocation 7.4.82
- TOMBARRA Voyage 64 - New Zealand
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- TOMBARRA Voyage 64 - New Zealand
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- Telex - ScanCarriers,
Wellington to ScanCarriers,
Sydney, cc Hovik
- "15" Letter - The East Asiatic
Company (New Zealand) Limited
to Mr J. Dreury, Tredex (N.Z.)
Ltd dated 28th May 1982

"16" Copy - ScanCarriers Bill of Lading No. A57 - 238 Pallets Mixed Waste - BARRANDUNA Voyage 72 - with endorsements (Bound with transcript of conditions on reverse)

2. Defendant's Exhibits:

- "A" Set of 5 photographs marked "A", "B", "C", "D" and "E" (Omitted)
- "B" Typed copy telex - P. Cash to M.M. Chopra dated 24.2.82
- "C" Set of 9 photographs marked "F", "G", "H", "I", "J", "K", "L", "M" and "N". (Omitted)
- "D" Incomplete Copy Not Negotiable ScanCarriers Bill of Lading A57 - 238 Pallets Mixed Waste - BARRANDUNA Voyage 72
- "E" Copy ScanCarriers Bill of Lading A.223 endorsed "Pro Forma" - 239 pallets Waste Paper - TARAGO Voyage 48
- "F" Report - David J. Ross, ACA
- "G" Copy telex - ScanCarriers, Wellington, to ScanCarriers, Hovik, dated 14.4.82
- "H" Specimen form contract of affreightment

PART III DOCUMENTS OMITTED FROM THE RECORD

No. Description of Document

IN THE HIGH COURT OF NEW ZEALAND

1. Warrant to Sue
2. Writ of Summons
3. Memorandum of Appearance and Declaration of

Authority to Act

4. Notice of Motion for Order for Discovery Against Defendant
5. Notice of Motion for Order that Plaintiff Give Security for Costs
6. Affidavit of Stephen Leslie Franks in Support of Motion for Security for Costs
7. Affidavit of Paul Arthur Cash
8. Judgment of Sinclair, J., dated 20th October 1982
9. Notice of Motion for Order for Further and Better Particulars and Directing Trial
10. Affidavit of David Andrew Johnston in Support of Motion for Particulars
11. Notice of Motion for Order Directing Plaintiff to make Discovery
12. Statement of Defence dated 26th October 1982
13. Notice of Motion for Order Granting Leave to File Statement of Counterclaim Against Person Not a Part to the Action
14. (2nd) Affidavit of Stephen Leslie Franks
15. Order Directing Plaintiff to Make Discovery
16. Notice of Motion by Defendant for Adjournment of Trial
17. Memorandum of Counsel for Defendant Concerning Date of Hearing
18. Affidavit of Gregory James Thwaite in Support of Motion for Adjournment
19. (2nd) Affidavit of Paul Arthur Daniel Cash in Opposition to Motion for Adjournment
20. Minute of Chilwell, J., dated 26th November 1982
21. Notice of Motion for Order Striking Out Defence for Non-Compliance with Order for Discovery
22. Notice of Motion for Judgment on Counterclaim
23. (3rd) Affidavit of Stephen Leslie Franks in

Support of Motion for Judgment on Counterclaim

24. Memorandum of Counsel for Plaintiff as to Fixture Date
25. Minute Barker, J., dated 17th December 1982
26. Affidavit of Documents of Defendant
27. Affidavit of Documents of Plaintiff
28. Notice of Motion of Defendant for Examination of Witness Before Trial
29. Order for Examination of Witness Before Trial
30. Certificate of Examining Registrar
31. Notice of Motion for Order Giving Defendant Liberty to Inspect Books of Bank
32. Order to Inspect Books of Westpac Banking Corporation

IN THE COURT OF APPEAL OF
NEW ZEALAND

33. Praecipe to Set Down for Hearing
34. Notice of Motion for Conditional Leave to Appeal to Her Majesty in Counsel 10 October 1984
35. Order Granting Conditional Leave to Appeal to Her Majesty in Counsel 5 November 1984
36. Notice of Motion for Grant of Final Leave to Appeal to Her Majesty in Counsel 30 January 1985
37. Affidavit of Thomas John Broadmore in Support 30 January 1985

NO. 1

IN THE HIGH COURT OF NEW ZEALAND
IN ADMIRALTY
AUCKLAND REGISTRY

AD 333/82

10

BETWEEN

AOTEAROA
INTERNATIONAL
LIMITED a duly
incorporated company
having its registered
office at Auckland
and carrying on
business as an
Exporter

In the High Court
of New Zealand

No. 1

Statement of Cla
5 October 1982

20

PLAINTIFF

A N D

SCANCARRIERS A/S a
company duly
incorporated in
Norway and carrying
on business in New
Zealand and elsewhere
as a Maritime Carrier
under the name and
style Scandinavian
Australian and New
Zealand Carriers
Limited

30

DEFENDANT

40

STATEMENT OF CLAIM

Tuesday the 5th day of October 1982

THE PLAINTIFF SAYS:

1. BOTH it and the Defendant are duly
incorporated.

50

2. ON or about the 29th January 1982 the
Plaintiff and Defendant agreed to a special base
rate of \$US 120 per tonne to cover the freight
charge on waste paper to be shipped from New
Zealand to India until the 29th July 1982.

In the High Court
of New Zealand

No. 1

Statement of
claim

5 October 1982

3. THE agreement referred to in the preceding paragraph was partly oral and partly in writing. The Plaintiff will refer to the Defendant's Telex advice to it dated 3 February 1982 and to the matters agreed orally between P.A.D. Cash on behalf of the Plaintiff and D. Teskey and J. Robinson on behalf of the Defendant, more especially in and about the month of January 1982 at the offices of the Defendant's Auckland agent, the East Asiatic Company (New Zealand) Limited, Princes Street, Auckland, and at the Plaintiff's own offices at Fox Street, Auckland. The Defendant's said servants or agents represented and/or warranted the availability of space on a monthly basis to fulfil the probable requirements of the Plaintiff to ship not less than 1000 tonnes on every sailing during the period up to and including July 1982.

10

4. IN reliance on the arrangements made with the Defendant, the Plaintiff sought and procured purchases of waste paper in New Zealand and the sale of same in India and the Plaintiff duly advised the Defendant of its wish to make a first shipment of approximately 1000 tonnes on the sailing of the vessel "Barranduna" in March 1982.

20

5. ONLY 638.789 tonnes of waste paper was shipped abroad the "Barranduna" in March 1982. 280.610 tonnes which the Defendant was required to ship under the arrangements referred to in paragraph 4 hereof, and which was actually delivered to the Defendant for shipment, was left behind.

30

6. THE Defendant well knew that to carry out the export of waste paper from New Zealand to India the Plaintiff in the course of its business needed to enter into firm contracts with both its suppliers in New Zealand and its purchasers in India.

40

7. THE Defendant well knew further that the Plaintiff would need to actually ship its cargo before being able to obtain payment from its purchasers by way of letters of credit.

8. AS a result of the short-shipment and the breach of contract on the vessel "Barranduna" of 280.610 tonnes the Plaintiff suffered loss or damage amounting to \$39,896.29, particulars of which are as follows:

50

Contract price free on board exporting
vessel for 271.12 tonnes \$34,439.10

Export Incentive Bonus	3,874.39	In the High Court of New Zealand
Loss of profit on 6.10 tonnes white waste and 3.78 tonnes ledger waste, never shipped	1,582.80	
	<hr/>	No. 1
	\$39,896.29	Statement of claim
	<hr/>	

10 9. THE Plaintiff duly procured further contracts 5 October 1982
for the purchase of paper in New Zealand and for
the sale thereof in India and duly advised the
Defendant that it wished to make a shipment of
approximately 1000 tonnes of cargo on the sailing
of the vessel "Tarago" in April 1982. The
Defendant wrongfully refused to carry any further
cargo for the Plaintiff on the "Tarago" other than
the waste paper which it had earlier failed to
20 ship on the "Barranduna". The Defendant refused
to accept that any of the arrangements made by it
previously were of a binding nature.

10. THE Plaintiff procured further contracts for
the sale of waste paper in India and duly advised
the Defendant that it wished to make a shipment of
approximately 1000 tonnes of cargo on the sailing
of the vessel "Tombarra" in May 1982. The
Defendant wrongfully refused to carry any cargo
for the Plaintiff on the "Tombarra".

30 11. HAD the Defendant carried out its contractual
obligations, the Plaintiff would have shipped
during the period March to July inclusive
approximately 4500 tonnes of various grades of
waste paper and achieved a net profit on same of
some \$480,298.83. As a result of the Defendant's
breaches of contract, the Plaintiff was only able
to make a single part-shipment on the "Barranduna"
and to obtain a gross profit thereon of
40 \$63,458.14. The Defendant has suffered a loss and
damage on the said 4500 tonnes which should have
been shipped of \$416,840.69. In addition, the
Plaintiff could reasonably have expected to
achieve a slight price differential increase of
\$10,998.56 and its total loss of profit in the
circumstances is thus \$427,839.25.

50 12. AS a further result of the Defendant's
breaches of contract, the Plaintiff has been
unable to carry forward its waste paper exporting
business to Western India. Its market and general
reputation in India have been in effect destroyed
and it has been unable to keep the obligations it
entered into with its suppliers in New Zealand.

In the High
Court of New
Zealand

The Plaintiff has suffered loss or damage in the
circumstances in the amount of not less than
\$480,298.83.

No. 1

WHEREFORE THE PLAINTIFF CLAIMS to recover from
the Defendant:

Statement
of Claim

5 October
1982

- (a) The sum of \$39,896.29 (as referred to in
paragraph 8 hereof)
- (b) The sum of \$427,839.25 (as referred to in
paragraph 11 hereof)
- (c) The sum of \$480,298.83 (as referred to in
paragraph 12 hereof)
- (d) Interest on the said sums pursuant to the
provisions of the Judicature Act 1908
- (e) The costs of and incidental to these
proceedings
- (f) Such further or other relief as to this
Honourable Court may seem meet.

10

20

THIS STATEMENT OF CLAIM is filed by BERNARD HUGH
CLARK, solicitor for the Plaintiff, whose address
for service is at the offices of Messieurs Earl
Kent & Co., Solicitors, Third Floor, General
Assurance Building, corner Queen and Darby
Streets, Auckland.

NO. 2

30

No. 2

AMENDED STATEMENT OF DEFENCE AND COUNTERCLAIM

 day the day of December 1982

Amended
Statement
of Defence
and Counter-
claim

THE DEFENDANT by its solicitors says:-

A. FOR A FIRST DEFENCE:-

40

28 January
1983

1. IT admits the allegations contained in
paragraph 1 of the statement of claim.

2. IT admits that it sent a telex to the
plaintiff dated 3 February 1982 setting out a
promotional freight rate applicable to the
carriage of waste paper to India, and therefore
agreed that the freight rate therein specified
would apply as a promotional rate to the carriage
of waste paper to India during the period therein
specified pursuant to such bookings as might
thereafter be accepted for the carriage of waste

paper on the defendant's vessels. It further admits that there were discussions between Mr P.A.D. Cash on behalf of the plaintiff and employees of the defendant and its agents during the month of January 1982 concerning such freight rate, but, except as is expressly hereinbefore admitted, the defendant denies each and all the several allegations contained in paragraphs 2 and 3 of the statement of claim.

In the High
Court of New
Zealand

—
No. 2

Amended
Statement of
Defence and
Counter-claim

28 January
1983

10 3. IT admits that on or about 16 February 1982 the plaintiff advised the defendant of its wish to ship 1,150 tons of waste paper from various New Zealand ports to Karachi and Bombay on the vessel BARRANDUNA scheduled to depart from the Port of Auckland during March 1982, thereafter advised the defendant through its agents at the Port of Auckland of variations to such proposed shipments on a number of occasions and presented for shipment on such vessel approximately 910 tonnes of waste paper, but, except as is expressly
20 hereinbefore admitted the defendant has insufficient knowledge as to the truth or otherwise of and accordingly denies each and all the several allegations contained in paragraph 4 of the statement of claim.

4. IT admits that 638.869 tonnes of waste paper out of the 910 tonnes referred to in paragraph 3 hereof was loaded on board the vessel BARRANDUNA on 26 March 1982 and that some 271 tonnes of waste paper was not loaded on board such vessel and was not carried, but, except as is expressly
30 hereinbefore admitted, the defendant denies each and all the several allegations contained in paragraph 5 of the statement of claim.

5. IT denies each and all the several allegations contained in paragraphs 6 and 7 of the statement of claim.
40

6. IT has insufficient knowledge as to the truth or otherwise of and accordingly denies the allegations contained in paragraph 8 of the statement of claim.

7. IN relation to paragraph 9 of the statement of claim the defendant says:

- (a) It has insufficient knowledge as to the truth or otherwise of and accordingly denies such parts of such paragraph as relate to the procuring of contracts for the purchase and sale of waste paper;

In the High
Court of New
Zealand

No. 2

Amended
Statement of
Defence and
Counterclaim

28 January
1983

(b) It admits that the plaintiff requested space for a shipment of approximately 1,000 tonnes of waste paper on the April sailing of the vessel TARAGO;

(c) It admits that it carried on the vessel TARAGO the waste paper referred to in paragraph 4 hereof which was not carried on the vessel BARRANDUNA;

(d) It denies that it was bound by contract or otherwise to allot space to the plaintiff for the carriage of waste paper on the TARAGO, other than the waste paper which had not been carried on the BARRANDUNA;

(e) Except as is hereinbefore expressly admitted or denied, the defendant denies each and all the several allegations contained in paragraph 9 of the statement of claim.

8. IN relation to paragraph 10 of the statement of claim the defendant says:

(a) It has insufficient knowledge as to the truth or otherwise of and accordingly denies that the plaintiff procured further contracts for the sale of waste paper in India;

(b) It admits that the plaintiff requested space for the shipment of further waste paper on the vessel TOMBARRA scheduled to depart from the Port of Auckland in June 1982;

(c) It denies that it was bound by contract or otherwise to allot space to the plaintiff for the carriage of waste paper on the TOMBARRA;

(d) Except as is expressly hereinbefore admitted or denied, the defendant denies each and all the several allegations contained in paragraph 10 of the statement of claim.

9. IN relation to paragraphs 11 and 12 of the statement of claim the defendant says:-

(a) It admits that the plaintiff made a shipment of waste paper on the vessel BARRANDUNA AND SAYS that further waste paper was carried on the vessel TARAGO by agreement with the plaintiff;

10

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30

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- (b) It denies that it is in breach of any contract between it and the plaintiff;
- (c) Except as is expressly hereinbefore admitted or denied, the defendant has insufficient knowledge as to the truth or otherwise of and accordingly denies each and all the several allegations contained in paragraphs 11 and 12 of the statement of claim.

In the High
Court of New
Zealand

No. 2

Amended
Statement of
Defence and
Counterclaim

28 January
1983

10 B. FOR A SECOND AND ADDITIONAL DEFENCE the defendant repeats each and all the several allegations admissions and denials contained in paragraphs 1 to 9 hereof inclusive and says further:-

20 10. THE plaintiff through its managing director Mr P.A.D. Cash knew, or by reason of Mr Cash's experience as an exporter of waste paper ought to have known, that the waste paper presented by it for shipment on the vessel BARRANDUNA and referred to in paragraph 3 hereof would be carried by the defendant on the terms and conditions of its ordinary bill of lading.

11. CLAUSE 5 of the defendant's ordinary bill of lading provided in part as follows:

- 30 "(C) (1) The carrier does not undertake that the goods shall arrive at the port of discharge or place of delivery at any particular time or to meet any particular market or use and ... the carrier shall in no circumstances be liable for direct indirect or consequential loss or damage caused by delay."
- 40 " (5) Save as otherwise provided herein, the carrier shall in no circumstances whatsoever or howsoever arising be liable for direct or indirect or consequential loss or damage. The defences and limits of liability provided for in this bill of lading shall apply in any action against the carrier for loss or damage or delay whether the action be founded in contract or in tort."

In the High
Court of New
Zealand

12. THE waste paper which was not loaded and carried on the vessel BARRANDUNA was loaded and carried on the vessel TARAGO departing from the Port of Auckland on 11 May 1982.

No. 2
Amended
Statement
of Defence
and Counter-
claim

13. IF the failure of the defendant to carry on the vessel BARRANDUNA a part of the waste paper tendered by the plaintiff for shipment on such vessel was in breach of contract or was wrongful (which is denied), and if the plaintiff suffered loss damage or expense as a result thereof (which is also denied), then by reason of Clause 5(C)(1) and (5) of the defendant's ordinary bill of lading and the subsequent shipment on the vessel TARAGO the defendant is under no liability therefor.

10

28 January
1983

C. FOR A THIRD AND ADDITIONAL DEFENCE the defendant repeats each and all the several allegations admissions and denials contained in paragraphs 1 to 13 hereof inclusive and says further:

20

14. CLAUSE 8 of the defendant's ordinary bill of lading provided as follows:-

"If it appears at any time that the goods or any part thereof cannot safely or properly be carried or carried further, either at all or without incurring any additional expense or taking any measure(s) in relation to the container or the goods or any part thereof, the carrier may without notice to the merchant take any measure(s) and/or incur any reasonable additional expense to carry or to continue the carriage thereof, and/or abandon the carriage and/or store the same ashore or afloat under cover or in the open, at any place, which abandonment or storage shall be deemed to constitute due delivery under this bill of lading. The merchant shall indemnify the carrier against any reasonable additional expense so incurred".

30

40

15. SUCH part of the waste paper tendered by the plaintiff for shipment on the vessel BARRANDUNA and referred to in paragraph 3 hereof as consisted of mixed waste was improperly and insecurely packed in one or more of the following respects:-

- (a) The units in which such waste was packed had no solid base so as to enable them to withstand handling by forklift truck without distortion and damage to the units;

- (b) The units in which such waste was packed had no solid base so as to permit units intended to be stowed topmost in the stow to be slid into position between the deckhead and the unit beneath;
- (c) The units in which such waste was packed tended to lose shape when handled whether by forklift or clamps, so that a stow consisting of such units stowed two or more high was unstable and prone to collapse;
- (d) The units in which such waste was packed were relatively high in relation to the area of their base, thereby (cumulatively with the matters set out in sub-paragraphs (a) - (c) above inclusive) increasing their instability and proneness to collapse;
- (e) The handling of the units in which such waste was packed was hazardous for workmen engaged in such handling because of the matters set out in sub-paragraphs (a) - (d) above inclusive;
- (f) The packing covering and banding of the units in which such waste was packed was insufficient to prevent the escape of the contents;
- (g) By reason of the matters set forth in sub-paragraphs (a) to (f) hereof inclusive the units in which such waste was packed were inadequate to withstand repeated handling and the movement inevitably encountered at sea;

In the High
Court of New
Zealand

No. 2

Amended
Statement of
Defence and
Counterclaim

28 January
1983

and therefore could not safely or properly be carried on the vessel BARRANDUNA; and by virtue of Clause 8 of the defendant's ordinary bill of lading the defendant was entitled to abandon the carriage of such part of the waste paper tendered for shipment as was not loaded; and the defendant therefore denies liability for any such damages, loss or expense as may have been sustained by the plaintiff and attributable to the fact that the defendant did not load and carry all of the waste paper on the vessel BARRANDUNA.

D. FOR A THIRD AND ADDITIONAL DEFENCE the defendant repeats each and all the several allegations admissions and denials contained in paragraphs 1 to 15 hereof inclusive and says

In the High
Court of New
Zealand

further:-

16. CLAUSE 15 of the defendant's bill of lading
provided in part as follows:

No. 2

"(1) The carrier may at any time and without
notice to the merchant:

Amended
Statement
of Defence
and Counter-
claim

(a) ...

(b) transfer the goods from one
conveyance to another including
trans-shipping or carrying the
same on another vessel than that
named on the face hereof or by
any other means of transport
whatsoever;

10

(c) ...

(d) ...

20

(e) load or unload the goods at any
place or port (whether or not any
such port is named overleaf as
the port of loading or port of
discharge) and store the goods at
any such place or port;

(f) ...

30

(g) ...

(2) The liberties set out in sub-clause (1)
may be invoked by the carrier for any
purpose whatsoever whether or not
connected with the carriage of the
goods including undergoing repairs,
towing or being towed, adjusting
instruments, dry docking and assisting
vessels in all situations. Anything
done in accordance with sub-clause (1)
or any delay arising therefrom shall be
deemed to be within the contractual
carriage and shall not be a deviation.

40

(3) ..."

17. IF the failure of the defendant to carry on
the vessel BARRANDUNA a part of the waste paper
tendered by the plaintiff for shipment on such
vessel was in breach of contract or was wrongful
(which is denied), and if the plaintiff suffered
loss damage or expense as a result thereof (which

is also denied), then by reason of Clause 15 (1) and (2) of the defendant's ordinary bill of lading and the subsequent shipment on the vessel TARAGO the defendant is under no liability therefor.

In the High
Court of New
Zealand

E. FOR A FOURTH AND ADDITIONAL DEFENCE the defendant repeats each and all the several allegations admissions and denials contained in the paragraphs 1 to 17 hereof inclusive and says further:-

No. 2

Amended
Statement of
Defence and
Counterclaim

18. CLAUSE 16 of the defendant's ordinary bill of lading provided as follows:-

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1983

"If at any time the carriage is or is likely to be affected by any hindrance, risk, delay, difficulty or disadvantage of any kind (other than the inability of the goods or any part thereof safely or properly to be carried or carried further) and howsoever arising (even though the circumstances giving rise to such hindrance, risk, delay, difficulty or disadvantage existed at the time this contract was entered into or the goods were accepted for carriage) and which cannot be avoided by the exercise of reasonable endeavours the carrier (whether or not the carriage is commenced) may either:-

(a) without notice to the merchant abandon the carriage of the goods and place the goods or any part of them at the merchant's disposal at any place or port which the carrier may deem safe and convenient, whereupon the responsibility of the carrier in respect of such goods shall cease. The carrier shall nevertheless be entitled to full freight on goods received for carriage, and the merchant shall pay any additional costs of carriage to and delivery and storage at such place or port; or

(b) without prejudice to the carrier's right subsequently to abandon the carriage under (a); upon notice to the merchant suspend carriage of the goods or any part of them and store them ashore or afloat upon the terms of this bill of lading, against payment of such reasonable additional charges as the carrier may determine. The carrier

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undertakes to use best endeavours to forward goods, the carriage of which has been suspended, as soon as possible after the cause of hindrance, risk, delay, difficulty or disadvantage has been removed but makes no representations as to the maximum period between such removal and the forwarding of the goods to the place of delivery named in the bill of lading".

19. IF the failure of the defendant to carry on the vessel BARRANDUNA a part of the waste paper tendered by the plaintiff for shipment on such vessel was in breach of contract or was wrongful (which is denied), and if the plaintiff suffered loss damage or expense as a result thereof (which is also denied), then such failure was attributable to the delay likely to have been encountered by the vessel in the prosecution of its voyage as a result of difficulties in loading the unstable pallets on which such waste paper was packed, and by reason of Clause 16 of the defendant's ordinary bill of lading and the subsequent shipment on the vessel TARAGO the defendant is under no liability therefor.

F. FOR A FIFTH AND ADDITIONAL DEFENCE the defendant repeats each and all the several allegations admissions and denials contained in paragraphs 1 to 19 hereof inclusive and says further:-

20. BY letter dated 8 April 1982 addressed to the defendant under its former name of Scandinavian Australia & New Zealand Carriers Limited and its agent the East Asiatic Company Limited the plaintiff agreed (inter alia) to enter into an agreement with the defendant in the form attached to such letter.

21. BY such agreement the defendant agreed to issue a bill of lading covering the shipment of the waste paper therein referred to on the vessel BARRANDUNA despite the non-payment by the plaintiff of the freight therefor, and to carry on the vessel TARAGO the waste paper which was not shipped on the vessel BARRANDUNA; and in consideration therefor the plaintiff (referred to in the agreement as "the Company") agreed as follows:-

"5. The company in consideration of the entry into this agreement by the lender [the

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defendant] hereby waives any and all claims that it may now or hereafter have otherwise had against the lender or any of the agents or shareholders or employees of the lender whether for damages at law or otherwise howsoever in respect of arising out of or in connection with the agreement and undertaking by the lender to procure the carriage of the paper to India but without prejudice to any rights of the company arising under this agreement and the lender likewise releases and discharges the company from any and all claims that the lender may now or hereafter have against the company in respect of non-payment of the portion of the freight which but for this agreement might be due or payable by the lender".

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22. IF the failure of the defendant to carry on the vessel BARRANDUNA a part of the waste paper tendered by the plaintiff for shipment on such vessel was in breach of contract or was wrongful (which is denied), and if the plaintiff suffered loss damage or expense as a result thereof (which is also denied), then by reason of Clause 5 of the agreement attached to the plaintiff's letter of 8 April the plaintiff has waived any claim against the defendant in respect thereof.

COUNTERCLAIM

G. FOR A FIRST CAUSE OF ACTION BY WAY OF COUNTERCLAIM

the defendant repeats each and all the several allegations admissions and denials contained in paragraphs 1 to 22 hereof inclusive and says further:-

23. BY virtue of Clause 2 of the agreement referred to in paragraph 20 hereof the plaintiff agreed to pay to the defendant the sum of NZ\$42,252.00 being the balance (calculated on the weight of paper then estimated to have been shipped) of freight due but unpaid in respect of waste paper shipped on the vessel BARRANDUNA at latest within three business days after the departure from Auckland of the vessel TARAGO carrying the paper not carried on the vessel BARRANDUNA.

24. THE vessel TARAGO departed from the Port of Auckland on 11 May 1982 carrying the paper which had not been carried on the vessel BARRANDUNA.

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25. THE plaintiff did not pay to the defendant the sum of \$42,252.00 pursuant to Clause 2 of the agreement within three business days after the departure of the vessel TARAGO from the Port of Auckland, and has thereafter failed and refused to pay such sum to the defendant.

26. BY virtue of Clause 11 (1) of the defendant's ordinary bill of lading, freight is deemed fully earned on receipt of the goods by the carrier and shall be paid and non-returnable in any event.

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27. FOLLOWING receipt on board the vessel TARAGO of the waste paper not carried on the vessel BARRANDUNA, there became due and payable to the defendant in terms of Clause 11 (1) of its ordinary form of bill of lading freight in the sum of \$40,608.86, which sum the plaintiff has failed and refused to pay to the defendant.

28. THERE is now due and owing to the defendant the following sum for freight unpaid:-

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	S	
Amount due per agreement attached to letter of 8 April	42,252.00	
Freight on TARAGO shipment	40,608.86	
	<hr/>	
	\$82,860.86	

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Less

Credit on BARRANDUNA shipment following weighing of paper not shipped and consequential re-calculation of weight actually shipped	4,882.63
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Proceeds of sale of TARAGO shipment in exercise of carrier's lien	6,292.83
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\$11,175.46

Balance due	\$71,685.40 =====
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WHEREFORE the defendant claims to recover from the plaintiff:-

(a) Freight due in the sum of \$71,685.40,
alternatively damages;

- (b) Interest thereon pursuant to Section 87 of the Judicature Act 1908;
- (c) The costs of and incidental to this action;
- (d) Such further or other relief as this Honourable Court shall think fit.

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10 H. FOR A SECOND AND ADDITIONAL CAUSE OF ACTION BY WAY OF COUNTERCLAIM the defendant repeats each and all the several allegations admissions and denials contained in paragraphs 1 to 28 hereof inclusive and says further:-

20 29. IT was a further term of the agreement attached to the letter of 8 April 1982 referred to in paragraph 20 hereof that the plaintiff would give such charge as might be required by the defendant over the plaintiff's assets with the consent of the plaintiff's bank.

30 30. BY letter dated 29 April 1982 addressed to the plaintiff's solicitors the defendant by its solicitors required the plaintiff pursuant to the terms of the agreement attached to the letter of 8 April 1982 to execute a debenture containing (inter alia) a specific charge over the land of the plaintiff being an estate in fee simple in all that parcel of land containing 796m² more or less being Lot 1 D.P. 76835 and being also the land comprised and described in Certificate of Title Volume 33B Folio 620 (North Auckland Registry) subject to Mortgage No. 982186.2, Mortgage No. 982186.3 and Mortgage dated 14 August 1981 in favour of The Commercial Bank of Australia Limited (now Westpac Banking Corporation).

40 31. THE plaintiff has failed and refused to execute such debenture.

WHEREFORE the defendant claims to recover from the plaintiff:

- (a) An order for specific performance of such part of the agreement attached to the letter of 8 April 1982 as requires the plaintiff to give further security as required by the defendant;
- (b) An order that the plaintiff do execute the debenture forwarded to the plaintiff's solicitors under cover of a letter from the defendant's solicitors dated 29 April 1982;

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- (c) The costs of and incidental to this action;
(d) Such further or other relief as this
Honourable Court shall think fit.

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Statement of
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Counterclaim

STATEMENT OF DEFENCE BY PLAINTIFF TO COUNTERCLAIM

Wednesday the 15th day of December 1982

15 December
1982

THE PLAINTIFF BY WAY OF STATEMENT OF DEFENCE TO
THE ORIGINAL COUNTERCLAIM OF DEFENDANT HEREIN
SAYS:

A. IN REGARD THE DEFENDANT'S FIRST ALLEGED CAUSE
OF ACTION BY WAY OF COUNTERCLAIM

1. IT DENIES each and every of the allegations
set forth in paragraph 23 of the Defendant's
Counterclaim AND MORE PARTICULARLY IT DENIES
that the letter dated 8 April 1982 addressed to
Scandinavian Australian and New Zealand Carriers
Limited gave rise to any legally binding
obligations between the parties thereto AND
SAYS that same was an indication of a then
willingness to enter into an agreement at a future
time AND SAYS FURTHER that in the events that
subsequently transpired such agreement to agree
remained incomplete.

2. AS TO paragraph 24 of the Counterclaim, IT
ADMITS that the vessel "Tarago" departed from the
Port of Auckland on 11 May 1982 carrying a
substantial quantity of the paper (which, albeit
wrongly, had not been carried on the vessel
"Barranduna").

3. AS TO paragraph 25 of the Counterclaim, IT
ADMITS that it has not paid the Defendant or the
parties mentioned in the said letter of 8 April
1982 the sum of \$42,252.00 BUT SAVE as herein
expressly admitted, IT DENIES each and every of
the allegations set forth in the said paragraph
25.

4. AS TO paragraph 26 of the Counterclaim, IT
ADMITS that some of the Defendant's bills of
lading have clausings purporting to justify the
Defendant in acting in fundamental breach of the

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obligations it undertakes BUT SAVE as herein expressly admitted, IT DENIES each and every of the allegations set forth in the said paragraph 26 AND DENIES that the clausing relied on had application in the circumstances of this case and/or was valid in law.

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Counterclaim

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1982

5. IT DENIES each and every of the allegations set forth in paragraphs 27 and 28 of the Counterclaim.

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AND AS A FURTHER AND/OR ALTERNATIVE DEFENCE TO THE DEFENDANT'S SAID ALLEGED FIRST CAUSE OF ACTION BY WAY OF COUNTERCLAIM, THE PLAINTIFF SAYS:

6. THERE was a failure of any consideration flowing from the Defendant to the Plaintiff. The Defendant did not deliver any bills of lading in respect of its receipt of the Plaintiff's cargo aboard the vessel "Tarago" nor did it carry the Plaintiff's cargo to India and/or wrongfully converted same.

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B. AS REGARDS THE DEFENDANT'S SECOND ALLEGED CAUSE OF ACTION BY WAY OF COUNTERCLAIM:

7. IT REPEATS the allegations and denials set forth in the preceding paragraphs 1 to 6 (inclusive) hereof.

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8. IT DENIES the allegations set forth in paragraph 29 of the Counterclaim AND MORE PARTICULARLY IT DENIES being under any obligation to give the parties to the letter of 8 April 1982 a charge over its assets. IT DENIES that any form of charge was ever agreed between the parties to the said letter of 8 April 1982 or that its Bank consented to any form of charge or the giving of same.

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9. AS TO paragraph 30 of the Counterclaim, IT ADMITS that the Defendant's solicitors wrote a letter on or about the 19th April 1982 to Messrs Wilson Henry Sinclair & Martin and that such letter was duly received BUT SAVE as is herein expressly admitted, IT DENIES each and every of the allegations set forth in the said paragraph 30.

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10. AS TO paragraph 31 of the Counterclaim, IT ADMITS that it has not executed any debenture in favour of the Defendant BUT DENIES that it owes the Defendant any monies or that it is under any obligation to execute such a debenture.

In the High Court of New Zealand

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Notes of evidence of Knut Raaum

14 March 1983

THIS STATEMENT OF DEFENCE TO ORIGINAL COUNTERCLAIM is filed by BERNARD HUGH CLARK, solicitor for the Plaintiff, whose address for service is at the offices of Messieurs Earl Kent & Co., Solicitors, Third Floor, Guardian Assurance Building, corner Queen and Darby Street, Auckland.

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NOTES OF EVIDENCE OF KNUT RAAUM TAKEN BEFORE THE DEPUTY REGISTRAR ON 14TH MARCH 1983

Counsel: Clark for Plaintiff
Broadmore for Defendant

THIS DEPONENT being duly sworn saith on oath as follow:

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My full name is Knut Raaum. I reside at Oslo, Norway and am by occupation a Cargo Handling Manager. I was formerly at sea with the Norwegian shipping company Wilh Wilhelmsen and rose to the rank of Master. I hold a Norwegian Masters ticket. I served as master for a year before I came ashore in the same company. ScanCarriers is a partnership and one of the partners is Wilh Wilhelmsen. As cargo handling manager of the company I am directly responsible to the deputy managing director and the managing director. My overall functions as the cargo handling manager are ships port operations pre-planning of stowage, that is what we call central planning. I am also responsible for the logistics and equipment and for cost controlling. The manner in which cargo is carried is within the scope of my authority. I have the responsibility to inspect cargo to see that it can be carried and handled. I have a central planner and travelling cargo superintendent who are responsible to me in Oslo and Sydney. As cargo handler, I was in Dubai when the vessel Barranduna discharged cargo on about the 20 April 1982. It was necessary for me to be there because first of all we received a telephone call from the master. As a result of the telephone call we were expecting some problems with the cargo. The waste paper in No. 3 deck. I was actually on my way to Australia but decided to stop in Dubai. I went aboard the vessel in Dubai. In relation to the waste paper I saw the stowage in No. 3 deck and coming aboard it didn't look too bad, but when we started to break into

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the stowage we saw all the damaged and collapsed units. There were all sorts of units some good ones on the strong pallets, also some weak ones on the second hand pallets, and also units without pallets just on the cardboard tubes. Referring to a bundle of photographs. In photos F and G I see the type of units I am referring to. In photo G, on the right of the photograph are the pallets with the cardboard tubes. The particular problems we encountered were first of all to get the forklift underneath the unit, and you can see that the strapping is not very good, consequently a lot of these units collapsed. They collapsed because the bands broke and they collapsed all over the place. All over the wharf and all over the port. There were difficulties handling some of the other units, quite a few of the units on pallets also collapsed. The conclusion we reached was that in some cases the pallets were not strong enough or the strapping wasn't good enough. In my experience, in the handling and course of a voyage with unitised cargo, normally we shouldn't have any problems, but these were units of all different sizes and different qualities. And thereby create a problem. The handling of the units creates the problem. The sea voyage does not have very much effect, they were all properly lashed and secured. In photos A - E these photographs were taken in Dubai, while I was there, except A could have been taken after I left. I now produce photographs B - E inclusive. Produced as Exhibit A. In the second photo, it shows that these units they have collapsed taking them out of the stowage, and you can also see broken boards and broken pallets. I'm not sure whether these units have the cardboard tubes. I cannot see any. The third photo, shows that was cleaning up, deck No. 3 and we had to put all that loose paper into container bins or half-height container bins and bring them ashore. that paper came from No. 3 deck. Looking at the fourth photo in the bundle, it shows the units leaning over and the forklift truck you can see some broken units. The fifth photo is paper stowed between a container and the bulkhead, and even those units all collapsed. They were stowed between the container and the bulkhead, and they should have been in a very safe place. It was a safe place because they would not have any chance to move. The photos I have referred to fairly represent the conditions of the cargo as I saw them in Dubai. My opinion on the suitability of these units for this voyage from Auckland to India with transshipment was a great percentage would

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14 March 1983

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In the High Court of New Zealand actually have broken on the way to India as many of the units had already collapsed in stow in Auckland.

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Q. Do you know of your own knowledge anything about the cargo having collapsed in Auckland? Or is it from reports?

A. From reports but also from seeing units in stowage in Dubai.

Mr Clark for plaintiff asks court to note that he objects to the answer previously given because it is now disclosed to have been based on hearsay. The authorities in Dubai charged us for the extra cleaning of the terminal. My travelling superintendent on the spot made a report to the Company. I think paper can be carried on pallets but it must be much better strapped and on stronger pallets. There are many ways to carry waste paper, they can be carried in shrink wrapped units on pallets or on bolsters. In the third photo, H, shows units of waste paper on bolsters, but you can see that you can only go one high. You can only stow the unit one high, you can't put another one on top. They would have to be taken off the bolsters in Dubai and loaded conventionally on to a conventional ship. That would be an additional cost of course. During my time at sea, we carried waste paper many times, from United States to Hong Kong mainly. We didn't encounter any problem it was handled conventionally and it was strapped with steel band and handled with slings or nets. We did not have any problem but that was a different concept of stowage. Reverting back to the Barranduna in Dubai, quite a few units on the third height moved a bit at sea and caused difficulty in getting the forklifts underneath the pallets. In lifting them off, it took us a long time and we had to show much care and took us a long time to bring these units out of stowage.

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Cross-examined Mr Clark

Q. Mr Raam you know what a clean bill of lading is do you not?

A. Yes.

Q. It means does it not that the carrier having inspected the goods to be shipped accepts them as being in apparent and good order for shipping?

A. Yes.

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Q. You know do you not that this cargo was

accepted under sets of clean bills of lading?

A. Yes

Q. As a shipping company you carry different sorts of cargo?

A. Yes.

10 Q. You carry expensive things like Danish porcelain or Swedish glass to things like eggs and wine glasses. You are suppose to take care of that cargo are you not?

A. That is correct.

20 Q. If the packing isn't suitable, the usual practise is either to refuse to take the commodity, or to put a marking on the face of the bill of lading which clearly shows to all concerned that there is an obvious insufficiency of packaging. Correct?

A. Correct.

Defendant's counsel objects to this line of questioning, on the grounds that it is relevant only in the case of a claim for damage to cargo and this claim is not such a claim.

30 Q. Do you know whether this Barranduna cargo was inspected before it was accepted for shipment in New Zealand?

A. I do from reports on that.

Q. Do you know whether it was asked to be supplied in units different to what was supplied or is supplied?

A. I do not.

40 Q. There will be evidence from the plaintiff, that it would have supplied units made up of either four bales, two wide and two high, or units of six bales, two wide and three high. Would you agree that both of that sort of packaging being larger would seem to be more stable, especially at height?

A. Yes, but very difficult to say because so much depends on the pallet and the strapping.

50 Q. There is nothing to stop you even today especially in the ports in the East using conventional methods involving slings or nets is there?

A. Slings and nets would be impossible in this operation, on a roll on roll off ship like this.

Q. Can't you use conventional methods to

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manhandle the individual units, even on a roll on roll off vessel?

A. No, all cargo is handled either in containers, in bolster, on trailers or on pallets.

Q. You have not answered my question. I will put it to you another way. There is a lot of damage caused to cargo is there not by fork hoists. Do you agree?

A. I don't, normally a fork lift would see that there is no damage so long as the cargo is properly unitised. 10

Q. You have still not really answered my question. The fork of a fork hoist can cause damage much the same as a battering ram used by the Romans caused damage thousands of years ago. Correct?

A. I wouldn't compare the two.

Q. Can they both cause damage? 20

A. Yes they can both cause damage.

Q. And returning to the subject, that is what frequently happens even today and even on your ships?

A. That could happen even if the cargo is properly unitised, it could happen to one or two pallets but in this case it happened to a large percentage of the units. 30

Q. What percentage please?

A. Which I think clearly shows that the units were not strong enough.

Q. Would you tell me what percentage please?

A. I can't remember.

Q. How does the out-turn achieved at Dubai compare with the out turn at the next ship of your line, the Tarago? 40

A. The out-turn in Flushing, (the port in Holland), was better due to the fact that the units had been restrapped and re-unitised and put on bolsters and carried on bolsters during the sea voyage.

Q. At last, I think that we are at an agreement that this cargo can be well carried if this cargo is carried on bolsters? 50

A. Yes, and if the units are properly strapped as these were.

Q. The Tarago cargo consisted of the stuff that

wasn't taken aboard the Barranduna, was that correct?

A. Correct.

Q. Are you suggesting that the cargo was restrapped in New Zealand or Dubai or Holland?

A. Restrapped in Auckland and put in bolsters.

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Q. I put it to you that the bales were the same strapping as the bales we have been talking about on the Barranduna. Do you know different?

A. I think we have reports to the effect that they were restrapped in Auckland.

Q. You lack any personal knowledge?

A. I haven't seen it, but this is according to reports from our Wellington office.

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Q. You accept I expect, that you have obligations to carefully load and stow all cargo?

A. Yes.

Q. This is how you earn your freight?

A. That is correct.

Q. Or sometimes fail to earn your freight, in some cases where someone lets you down?

A. I think that is more of a statement.

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Counsel for the defendant objects to the question on the grounds that it is irrelevant.

Q. Do you know the rate of freight that you took on the Barranduna?

A. I'm not sure, that is not my department.

Q. Does US\$120 per tonne remind you?

A. I think I heard the figure US\$120.

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Q. Was more than half that freight needed for the onward transshipment charges to carry from Dubai to India?

A. I don't know.

Q. Did you call in a Lloyd's Surveyor while you were there, at Dubai?

A. I can't remember. I did not.

Q. What is the name of the travelling man who made a report on this cargo at Dubai?

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A. His name is Per Brekke.

Q. I thought you said that he made a report, was that a written report?

A. Yes.

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Q. Where is it?

A. It's in our office in Hovik.

Q. Did you come to N.Z. after you had stopped
over in Dubai?

A. No, Australia only.

Q. Were you ever asked to consider any
alternative four bale unitised packs, or six bale
unitised packs?

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A. I was not involved in that.

Q. I show you a photograph marked 1, and another
photograph marked 2, I ask you whether or not you
agree that they seem to show the same sort of
packs in those photos?

A. Yes they do.

Q. Do they look in apparently good order to you?

A. Not for further handling, with only three
bands.

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Q. How long has Scans been carrying cargo from
N.Z. to the East?

A. It has just recently been introduced, last
year, to Dubai.

Q. Do you know that mixed waste has been shipped
from N.Z. in the past? I don't suppose you do.
Other than by Scans?

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A. I heard it has been done.

Q. It has been shipped by people including the
plaintiff for many years without pallets.

A. No I don't know but I suppose that is a
conventional operation.

Q. With the Barranduna cargo, I think you
yourself said that it is the handling that seems
to create the problems.

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A. I mean the handling of these units.

Q. Rough handling or bad handling can cause a bad
out-turn can it?

A. Yes, but so can banding.

Q. Would you look again at photo D of exhibit A,
on the left hand corner there is apparently a
sound pallet is there not?

A. I think it is a broken pallet.

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Q. Well in the extreme left hand corner we have
unbroken wood and a little above that is the

unbroken piece.

A. I think the whole pallet is broken.

Q. That could have broken through rough handling could it not?

A. I would rather say it is broken because the pallet isn't strong enough.

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10 Q. I know you would rather say that, but without being there and examining the pallet I put it to you that you are simply guessing.

A. I was there in Dubai and I would say that they used utmost care in taking the pallets out of stowage. They took much longer than anticipated.

Q. Mr Raam, did you actually look at the pallet in the photo. Do you remember doing so when you were in Dubai?

20 A. No I cannot say for sure that I looked at this particular unit, but there were units like this one.

Q. I suppose you would be critical of the pallets and binding shown in photo L?

A. I do not know, these units look quite good.

Q. Would it surprise you that that was before they were handled by ScanCarriers?

30 A. I would say that most of these units would have turned out in this same condition.

Re-examined Mr Broadmore

Q. Were all the pallet boards of the same standard in your opinion?

A. No I think that I have mentioned that before and that some of the pallets looked quite good but others were of a poor standard.

40 Q. The photo with L on the back, does that appear to have coloured magazine waste on it?

A. Yes.

Q. And broken pallet board in photo B?

A. Yes.

Q. Does that appear to have white paper material on it?

A. Yes.

50 Q. Look at photo D, does that also have a pallet board and white paper on top of it?

A. That is correct.

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Q. In your evidence you generally referred to units of waste paper. Now, by word units, do you mean all different types of unit which you have seen in the photographs?

A. Yes I do.

Q. My friend asked you about conventional shipping, of waste paper, I wonder if you could tell us what the differences are in shipping on a conventional ship and a roll off ship such as the Barranduna.

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A. In a conventional operation, we would handle much smaller units bundles, they would be manhandled into nets, and lowered into the vessel's cargo hold, where they would be again manhandled and put into stowage.

Q. And on a roll on roll off ship?

A. They would be handled on a fork lift.

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Q. My friend asked you whether these units were accepted on clean bills of lading, and asked you whether that meant they had been shipped in apparent good order and condition. What do you understand by the use of the word apparent?

Objection what the witness thinks the word means is a question for the court to decide.

Q. When you answered my friend's question, you laid some stress on the word apparent.

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A. Because I think the people who saw these units in the shed in Auckland, they would no doubt think they could be handled safely looking at this properly stowed in the shed.

Q. Have you had personal experience of working with conventional and with roll-on roll-off ships?

A. Yes I have.

Q. What is your experience of the relative degrees of damage suffered by cargo shipped by those alternative modes?

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A. I would say that the roll-on concept is the superior to the concept of the conventional with regard to damaged cargo.

Q. I asked you that Mr Raam because my friend put to you that fork lifts themselves cause damage like Roman battering rams. How would damage caused in that way, compare with damage that might be sustained by conventional operation?

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A. I think you would find very little damage done by the forklift.

TAKEN AND SWORN BY ME AT AUCKLAND THIS 14TH DAY OF MARCH 1983.

Deputy Registrar.

Mr Broadmore appeared for the Defendant.

Mr Clark appeared for the Plaintiff.

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No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Examination

NO. 5

NOTES OF EVIDENCE TAKEN BEFORE THE
HON. MR. JUSTICE WALLACE

MR CLARK OPENS AND CALLS AT 4.12 P.M.

PAUL ARTHUR DANIEL CASH (sworn) :

I live at 20 Marine Parade, Herne Bay. That was a Company house sold by the Westpac Banking Corporation. I am the managing director and principal shareholder of Aotearoa International the Plaintiff.

You are now 33 years old? Yes.

You went to schools at Richmond Rd, and Auckland Grammar? Yes

You formed the Plaintiff Company in 1975 with initial capital of \$400? Yes.

The other shareholder was your mother? Yes.

She is still a share holder and guarantor of the Company securities? Yes.

Can you recall what additional banking accommodation you were successful in obtaining? \$5,000 in all.

Was the capital of Company increased in 1981 shortly before the events we are about to hear to \$60,000? Yes.

Did the Commercial Bank make a condition for increased help? Yes.

What facility did you have in 1981 after that increase of capital? Up to \$35,000.

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Until last year had your company grown from the start? It had yes.

Can you tell me approximately what the total sales were in year ending 31st March 1981?. \$29,000.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Can you tell approximately what they were in year following ending 31st March 1982? \$865,000.

Can you tell us what was the position in regard to gross sales for year ending 31st March 1983? About \$450,000.

10

Examination
- continued

You prepared the document that I read to His Honour referring to concentration on the Indian Market? Yes.

When was that prepared? Sometime in late 1981.

Was or tell us whether or not your later information confirmed or detracted from the views you expressed in that 6 page precis?

20

If anything the market in India was more than we first thought.

You will recall referring in that precis to your Company being undercapitalised, has that always been the situation to a lesser or greater extent? Yes.

30

The Company has been able to make use of Government export promotion incentives and suspensory finance and that sort of thing? Yes.

What has been the principal source of the build up of funds in the Company prior to the 1982 calendar year? In regard to the asset position of your company, has it been taxed profits or by way of the support given to you under Government policies in exports which opened up new markets? Mainly export incentives.

40

That precis I referred to seemed to indicate your intention of increasing sales to India prospectively in following year 1982? That is correct.

What was the commercial contents in supply of

waste paper in New Zealand at that time? Very good. There was a big surplus. New Zealand Forest Products had circularised all waste paper merchants stating that they no longer required waste paper from various merchants.

In the High Court of New Zealand

In terms of export business had you had any experience of exportation prior to the end of 1981? I did.

No. 5.1.
Plaintiff's Evidence
Paul Arthur
Daniel Cash

10

Briefly tell us what you were successful in selling wastepaper to, did you sell specifically to Japan? Yes.

Examination
- continued

The Far East, Singapore, Hong Kong? Not to those markets.

Did you sell to Indonesia? Yes, Penang.

20

What had you sold in terms of value to Thailand? About 3,000 tonnes.

About what value would 3,000 tonnes cif. be? About 3 years of my turnover, about 2 million dollars.

30

What was it that you had been selling mainly in various grades of waste paper? We sold blue printout, white ledger, old corrugated containers, pure white woodfeed.

What is that? It mainly comes from off cuts of envelopes trims and waste paper.

What else? We had just started mixed waste.

You shipped this paper, all of it goes by ship I take it? Yes.

40

Tell us approximately the variation in value in 1982 and the beginning of 1982, between some of those grades mentioned, I am speaking of a price calculated as though it were an f.o.b. sale, what was that stuff worth on the wharf or as loaded into an overseas ship at beginning of 1982? Mixed waste - f.o.b. value was in excess of \$300 per tonne, going right down to \$70 for mixed waste.

Mixed waste - that is in US dollars.

Mixed waste comes down fairly low does it? Yes.

In the High
Court of New
Zealand

You told us you shipped the largest quantity of waste paper to various places prior to the year 1982, did you ever have to accept a bill of lading that was not clean in that way? Not to my knowledge.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Did you ever find that you could not deliver to the shipping companies the space you had asked shipping company to provided? No.

10

Did you have experience other way round in wanting to ship more?

Examination
- continued

About 12 to 15 months we were severely restricted. This is the area before the end of 1981? Yes, up until early 1981.

When so far as you recall did you have dealings with the defendant and who with? With regards to this matter it was late 1981. With either two of four gentlemen, Dave Teskey, John Robinson, John Torgesen and Brett Freer.

20

Who was Dave Teskey, what did he do? He was sales representative for East Asiatic. Their offices were in Princes Court in Princes Street.

Who was John Robinson? He came from Scans office in Wellington.

And Mr Torgesen, who was he? He was the manager of East Asiatic.

30

Brett Freer? I understand he was on the sales staff of East Asiatic also.

Did those gentlemen tell you in general terms the sort of thing that was set forth in announcement of new Arabian Gulf Service to their agents? Yes.

Did they go on to solicit you business and ask you what sort of quantities you would be able to ship? They did.

40

Did over a period of time you have discussions on question of freight rate? We did.

In the calendar year 1981 were discussions in regard to freight rate conclusive or inconclusive? Inconclusive.

Tell us what was the difference in area between what they were suggesting and what you were suggesting? We said \$100 a tonne and they wanted \$150 at that stage. They were wanting \$150.

In the High
Court of New
Zealand

When did you first go to India? Either 1979 or 1980.

Previous to that had you met here in Auckland a man by name of Nigel Wilson, who is also in court? Yes.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

What did he do in way of business? He worked for a firm of international brokers, H.D. Hackett Ltd.

Examination
- continued

Did you meet him several times after that in the UK and become acquainted as result of matters discussed with his knowledge and interest in wastepaper business in India? Yes.

Did he then even prior to your meeting with ScanCarriers have more knowledge of the Indian situation than you had? That is right yes.

Were you working on the notion of a very great expansion of export of waste paper to India in 1981 before you had any actual dealings with ScanCarriers? Yes.

As a result of information you received did you invite Mr Wilson to come to New Zealand in January 1982? I did yes.

The New Zealand Trade Commissioner became personally known to you at that time and will be coming to give evidence? Yes, either tomorrow or Thursday.

Did you receive Government assistance in Indonesia from the Embassy there in Djakarta? Yes.

Those people gave support for the Development Finance Corporation did they not? Yes.

Going back to Mr Nigel Wilson, you told us that you saw him twice in the UK after 1978 before the return to New Zealand of yourself in January 1981? Yes.

Did you travel to India yourself again after 1979? I did, in July 1981.

In the High
Court of New
Zealand

Had you been given an introduction by that time to an Indian gentleman Chopra who was associated with Mr Wilson? No.

—
No. 5.1.
Plaintiff's
Evidence

Were you engaged in 1981 in some shipments of waste paper to India and by what shipping means? We did several small shipments with the Shipping Corporation of India.

Paul Arthur
Daniel Cash

Did that shipping line provide a regular service or not? It was supposed to be an 8 to 10 weeks service but it was more like a ten to 12 weeks service.

10

Examination
- continued

Did they give you a freight rate for voyage to voyage or what was it? By the time we reached agreement on sales it was \$124 a tonne.

That is approximately. That is US dollars.

20

Was that to take you to the West Coast of India? No the East Coast.

Calcutta.

Were you working in collaboration with Mr Wilson in the latter part of 1981? Yes I was.

Did you receive the telex that I read which appeared to come from Mr Wilson dated 21st December 1981, relating to letters of credit having been established under specific numbers by a number of prospective purchasers in India? I did.

30

Mr Wilson's telex seems to come under title Wanda G, do you know what that is? Not really.

I referred in opening to two further telexes addressed to you of 5th January 1982, and 20th January 1982, referring in latter case particularly to intended visit by Mr Wilson to Auckland, why was he coming to Auckland? To negotiate with ScanCarriers for the carriage of our freight, and the roll on roll off service.

40

You told us you already had with Nigel Wilson's help solicited and got firm orders from India to send them waste paper? Yes

In regard to those orders advised in that telex of

50

31st December 1981, how was it proposed at that time to arrange shipment to India,

In the High
Court of New
Zealand

We were very hopeful of shipping on the "Sun Opal" which was a trans-vessel [? tramp vessel].

10 Did Winstone Korean joint venture were they prepared to join you and send cargo to East on "Sun Opal"? It was a condition for the "Sun Opal" that both cargoes would be available.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

In shipping work is that a condition of minimum quantity sometimes known as the inducement? Yes.

Examination
- continued

Can you recall when Mr Wilson did arrive in New Zealand? Yes it was either on the 28th or 29th January 1982.

20 You have indicated you had discussions with number of gentlemen previous to that from ScanCarriers? Yes.

Had anyone seen you at your premises to look at your stuff? Yes, the cargo was inspected not only on my premises but on the premises of all my suppliers.

30 I take it you were not present when they went to your suppliers? I was.

You were present when they came to look at the premises at Te Papapa? Yes.

When was that? I can not recall at the moment.

40 They had seen waste paper of yours packed in your own premises and at Te Papa which are premises of Paper Reclaims which were your biggest supplier. Yes.

Did you at the end of January go with anyone to the East Asiatic to come to some business agreement. Yes.

Can you tell us the dates and who was with you? The date was 29th January. I went with Mr Nigel Wilson and we met with Mr David Teskey.

50 Was anyone else present? No.

In the High
Court of New
Zealand

Any notes taken at that interview? Yes Mr Teskey did jot down some notes.

Were you discussing at that time the shipments only to Bombay or southern India? We were discussing shipments to India, but more specifically to Bombay.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Did you know how many ships Scans were going to have in 1982? Not at that meeting.

10

Examination
- continued

Did you find out later they had three roll on roll offs, the Barranduna, the Tarago, and the Tombarra? I did yes.

You know what their approximate carrying capacity was? I believe about 15,000 tonnes.

Did Mr Teskey at this conference or other time tell you anything as to how full or empty the vessels were expected to be and how much they would take? Yes, this was very important due to the fact we had been having trouble with space allocated on other shipping companies and we wanted to make sure sufficient space was available.

20

Mr Teskey told us the reason why they were putting shipping to Dubai were ships southbound were reasonably full and ships going northbound were only half full.

30

South bound from Europe and northbound from New Zealand? Yes.

Which were full? Southbound was full and northbound was half full.

You said Mr Teskey and another man enquired of you as to what sort of volumes you would think of shipping with them? Yes we indicated we would ship 1,000 tonnes per vessel.

40

Was money mentioned at any stage? I think we were trying to negotiate a better freight rate than the one they had given us at \$125. He had given us a freight rate verbally on the telephone.

Did the period of the freight have any

significance to you and did you ask Mr Teskey for any particular period? Did the period of freight have any significance to you? Yes, it would enable us to have regular shipments to our clients.

In the High
Court of New
Zealand

Did you tell Mr Teskey this? I did Yes, I told him we had enquiries for 4,000 to 6,000 tonnes from India.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

10

There is a document produced, a telex of 3rd February 1982, remember that telex? Yes I do.

Is that the text of the telex you then received? That is correct. The document speaks for itself in its own language, I think it proper to ask whether or not the period then was what you had asked for and was acceptable to you in regard to discussions? Yes it was. Mr Wilson and myself were delighted.

Examination
- continued

20

The nature of the packaging, was that something you were or were not able to comply with in prospective shippings? Yes, we did comply.

If stipulated could you have provided different types of packaging? Yes we could have and we were going to for different shipping.

30

ADJOURNED 5 P.M.

RESUMED WEDNESDAY, 8th JUNE, 1983, at 10 A.M.
PAUL ARTHUR DANIEL CASH (continuing to Mr Clark) :

What is the correct position? The tonnage was correct at 2,000 tonnes. the turnover was 1 million dollars and not 2 million dollars.

40

And accordingly it was to markets other than Thailand? Correct.

But Thailand was the largest? Correct.

The exports were mainly waste paper but there were some small amounts of fish.

At the close of evidence yesterday we had got to the stage of your making a few comments in regard to the telex of 3rd February 1982, did you go to India thereafter? Mr Wilson decided to go back to London via India and he was delighted with the

In the High
Court of New
Zealand

news from the telex.

He was able to speak to his agent, Chopra, and orders resulted.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

At that time when did you expect the first Scan ship Barranduna to be arriving in Auckland? We were told it would be about mid march for the first vessel.

Examination
- continued

Did you decide when you had further information as to a further trip to India before the final date of loading? Yes

I had to go to India because we received a telex and there were problems with the letter of credit and the regulations.

Did you meet with customers in India in March? I did yes. I met with Mr Rajgahia.

Were the prices you firmed up the same as Mr Wilson's? No I had to take a reduction.

How was the pricing in the territories you visited at this time compared to earlier times? There was a general downturn in the western world for waster paper and prices in India were higher.

Did shipment in March have any particular significance to you? Yes it was essential because the Indian Government's financial year ended in March so all orders had to be shipped in March before that expired. This is why when I arrived in India this was the reason why customers were prepared to establish Letters of Credit, because the shipment would be effected in March. I had to personally assure Mr Rajgahia we had tonnage and we had the shipping space and the shipping would be effected in March.

Most of the wastepaper went from Auckland? Correct.

About how soon before the 26th March the date referred to would you have arranged to have the cargo sent down to Auckland wharf? About 5 days.

Did any Scans people look at the cargo before the ship arrived and it was loaded? Both Captain Robinson and I and on arrival of the ship Mr Anvin.

10

20

30

40

50

Any complaints? No.

I would like to refer you to document 89 in the agreed bundles of documents (Exhibits 1 and 2). I show you the telex to assist in your memory of the matter, would you tell us of the events of the day when your cargo was short-shipped? When I arrived on the wharf early in the morning, of the vessel's sailing, and I spoke with John Robinson at that time. He informed me that the vessel had a time problem in loading in Auckland. It had to sail that night and they were going to leave some cargo behind. But don't worry, our Captain Andersen wants you to be back in your office by 11 o'clock because he is going to telephone you. At 11.45 Captain Andersen phoned me and explained the situation. He told me that there was a time factor involved because of the high costs while the ship was in port, they were sailing the vessel to either Napier or Tauranga, but not to worry because any of our cargo left behind they would truck down to meet the vessel. As I recall I then suggested to Captain Andersen that we could try and get different quotes from different carriers to see which was the most competitive in order to help Scans.

Did you get in touch with any road carriers? Yes I contacted the road contractors, or my staff did. Trailways who had already confirmed to us had the Order.

When did you find things might be different? When I went back to the Wharf at 5.30 that night. I saw Mr Anvin.

Did he give you an explanation? Yes, he said that there was a space problem as well as a time problem. When they tried to stack the units three high in the vessel they became unstable, so they could only stack the units two high and consequently lost a lot of space.

Was the material going on all the decks then available to take it or was there decks left clear for other cargo? No, captain Anvin told me at the time that the deck originally set out to take the waste paper had been filled with a late order from Australia. I told him I was not satisfied with his explanation because we were advised to make

In the High
Court of New
Zealand

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Examination
- continued

In the High
Court of New
Zealand

sure the pallets did not exceed 8ft. 6 in height so that they could stack them in the vessel, two high.

Had they been attempting to treble stack? Yes they had.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Have you ever seen again or your customers seen again the short shipped cargo left behind in Auckland and then sent on the Tarago sailing? No.

10

Examination
- continued

Moving to a general topic, how did you get the money to pay your suppliers and your freight, what was the mechanics of your getting money? By negotiating a letter of credit.

For present purposes the Letters of credit had been established some time before by Auckland Bank and notified so that you could put in train negotiations by your own bank, Commercial Bank of Australia, now changed to Westpac Banking Corporation? Yes.

20

In regard to this cargo that

Had you made any promises to your suppliers to pay them? yes I had.

What was the date of the promise? The agreement was that they would be paid after negotiations of letters of credit.

30

The normal letter of credit requires a "shipped on Board" bill of lading to be presented to the correspondent bank as one of the conditions for negotiation of the credit? Yes.

How did you get money to pay for the freight on consignment overseas? By negotiating a letter of credit.

40

In other words the same way as you got money for your New Zealand suppliers? Yes.

Reverting then to the short shipment on the Barranduna, how did this affect your company immediately in terms of not having or not being able to negotiate letter credit? I came to what is called a liquidity crisis.

Of what dimension? Vast.

About how much in terms of money? Between \$130,000 and \$150,000. That is US dollars.

10 Did the money problem come to you in two distinct forms, the stuff that was aboard ship on its way to Timaru, the last port of call, for which you had no shipping documents, and the stuff that was still on the wharf which also lacked any shipping documents? Yes, we did not have a tonnage of the mixed waste, or the hard white shavings. The shipping company was unable to weigh the cargo at that time.

Were you able to obtain any shipping documentation on e.g. receipt for shipment basis out of Scan? No.

20 Did you ask for one? yes we tried to negotiate.

Were you able to receive any shipping documentation e.g. bill of lading, without notation as to whether or not they had been paid? No, except for the tonnage that we knew had gone on board, not the mixed waste. We had negotiated and paid for that tonnage.

30 You say the shipping company did give you bills of lading where they had been paid the freight and you had been able to get the money by negotiating letters of credit? Yes.

The problem area was exclusively the goods that were short shipped and the goods shipped but in respect of which you did not have any shipping documentation at all? Correct.

40 You have indicated you were endeavouring to get shipping documents and you tried to get credit from Scans in relation to the period of a month or more between the Barranduna sailing and anticipated sailing of the next ship? Correct.

Do letters of credit normally have a time limit within which they can be negotiated? Yes in most cases they stipulated shipping period and expiry date and last day for shipment.

50 Was that a consideration also in regard to goods

In the High
Court of New
Zealand

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Examination
- continued

In the High
Court of New
Zealand

either short shipped or where you had no shipping documents from the shipping company? yes.

In regard to the short shipment were you ever able to get a substitute letter of credit from anyone? No I was not.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Did you try? I definitely tried. I went to India later on at the end of May.

Were there negotiations in April of bills of lading in regard to a broken shipment through the Commercial Bank? Yes there was.

10

Examination
- continued

Would you look at agreed documents 114, 115 and 116: do you remember receiving a letter from Mr Sommerville the relieving manager of the CBA Bank? Yes I do remember.

Remember there having been discussions between Mr Burton your solicitor and the bank at that stage? Yes I had asked my solicitors to intervene.

20

Is there anything in that letter that you now look at that you disagree with what was going on about the bank not wanting to grant a waiver? I knew that.

And the bank saying that your overdraft would remain at \$35,000? Yes.

30

And there have been massive dishonourings of cheques within the last few days, the bank says? Correct.

The dishonourings of cheques, how did you come to let that happen? This part of the agreement with the suppliers was with letters of credit and in most cases when the vessels sailed from Auckland or a New Zealand port in most cases when the vessels sailed from Auckland or a New Zealand port we gave post-dated cheques for that date.

40

Have you ever had cheques of anything like this dimension being referred to you as the drawer previously? Not of this dimension no.

In regard to the documents 115 and 116, at the time you signed both of those - they were both

50

signed by you - there was little time since the Barranduna had departed? Yes.

In the High
Court of New
Zealand

Did you have any shipping documentation from the shipping company in respect of the short shipped or non freight paid cargo? No we didn't.

Were any formal agreements or securities as obviously envisaged ever settled between solicitors or executed? No.
In neither case? In neither case.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Were you wanting space on further shipments after the Barranduna had departed? Yes I was.

Examination
- continued

Did you ask East Asiatic? Yes I did, right up until the last Barranduna, we requested space on every vessel.
Just once or twice? Many times.

What sort of response did you get? Very negative.

Did you think it proper to go to Wellington to see the head man about space? Yes I did. In view of the vessel wanting to stack 3 high we had to find a new pack and I took photographic proof down to Captain Andersen that this new pack would stack 3 high, not only stack 3 high stack 3 high free standing.

Do you produce as Exhibit 3 a photo similar to that you had shown Captain Andersen? Yes, that is the actual photo I showed him or at least one of the photographs.

Were you successful in Wellington in getting the allocation of space? No Captain Andersen told me all future shipments on ships were full, and that if I would like to pay something like \$150 a tonne he might be able to find me some space. Did Captain Robinson give any encouragement in that regard? Yes, he was in on the meeting, and when Captain Andersen left the room to order me a taxi back to the airport, Captain Robinson said I wouldn't even bother thinking about \$150, there is no space.

Did you make your own enquires as to whether space was being offered to other people? I did yes.

In the High
Court of New
Zealand

No. 5.1.
Plaintiff's
Evidence

Paul Arthur
Daniel Cash

Examination
- continued

Did those enquiries

I want to return briefly to the April, I think that you then did receive in respect of the partly shipped consignment some form of bill of lading and that the Commercial Bank did negotiate a draft on your behalf to the value of about NZ\$70,000? That is correct.

Did the Commercial Bank subsequently however reverse that credit and put your bank account into debit? They did.

10

What did you do with the money that you received by the negotiation and credit since reversed? Paid the suppliers.

In regard to the cargo in respect of which there were bills of lading marked freight unpaid, was or did that cargo ever reach your customers in India? No.

20

You told us that you went to India in the month of May? Yes, late May.

What was your reception? Very hostile.

They didn't like you at all? No I lost all credibility I would say.

30

So far as the Barranduna is concerned, you prepared for the bank I think and it is in the bundle of documents, a written account of the financial results of that matter? That is correct.

I would like you to look at document 191 of the combined dossier, at that stage you had an office and some storage facilities in Parnell? Yes I did.

40

And you had I think some staff who were employed in your office? I had two office staff. And 2 or 3 people in the storage part.

And you had some vehicles and equipment? I did yes.

They have all gone including the premises? Almost all gone.

The premises have gone, most of the staff have gone? We still have a little area in the premises.

In the High Court of New Zealand

Have you a truck any more? No, the forkhoist has gone.

Did the shipments on Barranduna however come to your premises or were they supplied direct by the supplier to the ship? They were supplied direct.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

The statement that you have put before the court, it forms the basis does it nor of the claims for loss of profit set forth in the Statement of Claim? Correct.

Examination
- continued

It was made by you with a businessman's knowledge of his own business including the financial position of your company in the year in question and previous years? MR CARRUTHERS OBJECTS.

Have you in addition tabulated on a comparative basis the way in which your company has operated (Exhibit 4)? I have.

That is your own work? It is, yes

There are included in the agreed documents, profit and loss accounts and balance sheets for year ending 31 March 1982 and 1983; have you seen your own balance sheets and profit and loss accounts? Yes

Would you tell us what the first 3 lines of your report cover?

The tonnage we should have shipped was 919.399 tonnes, and the actual tonnage shipped was 638.789, leaving behind 180.63.

Under that heading commodity you have a number of variations tell us what CPO stands for? Computer print out. The 2nd is mixed waste. The third line is hard white shavings. 4th line is white ledger. And the bottom line is magazines.

Those were actual grades that were intended to go on the Barranduna? Correct.

In the High
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Zealand

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Examination
- continued

Were there any other grades that might have been included in your exportation programme? Yes we had Letter of Credit established for OCC, for cardboard cartons, and for part envelope trim, which we refer to as prime kraft, and also we were probably then in a position to export old newspapers.

Who were your main suppliers at this time? Paper Reclaim, Mr Grant Taylor who will be giving evidence. Also Trade Ruling & Binding. Data Waste. Central Trading in Wellington, Mr Peter Shepherd. He will be coming to court also. And from Christchurch or Timaru Pengelly Construction, and Paper - I can't remember.

10

Will you tell the court what tonnages you expected to be available of the grades that were actually shipped on the Barranduna? We were buying or could have bought 100 metric tonne computer printout, 100 metric tonne hard white shavings per month, 600 tons mixed per month, 60 tons magazines per month and 40 tons white ledger. What have you done in your next calculation? Taken the tonnage of each grade we expected to get. This is taken on the tonnages on the Barranduna.

20

I see that you make a computation of total gross profitability, and proceed to deduct figure on account of Barranduna, and stipulate total remaining for period \$416,410.69? Correct. Over a six month period? Correct.

30

Does that assume that the prices over that period would be identical, that calculation? We would have had the same profit whether the prices were identical or not.

Does the question I put to you, does the figure of 416,000 assume that the prices paid in India would be the same as the Barranduna? Not necessarily. Market prices in India we had negotiated increases in the grades and the contracts for those increases.

40

I refer to the 2nd full paragraph on page 2, would you read it out? READS.

Now for some reason it looks as if I have taken \$6.75 and multiplied it, as I only got the total

50

which is incorrect. Therefore there would be a difference in the total.

As a result of this accounting problem you have understated the price adjustment upwards? That is correct.

10 Are you content that your claim be based on the lower figure of price differential? Yes I am, but I just wanted to point out the mistake.

You haven't included any old newspaper or old cardboard cartons? That is right, or prime kraft.

20 Has there been a market in India for those commodities if you have time and money to export it? Yes there was for OCC and prime kraft and we had several letters of credit which we had. Old newspapers the market had since developed within that time.

Have you sent these commodities to other markets in Asia? I have. Are you presently able to put a figure on the amount by which you understated the price increases? I could possibly do that in the morning adjournment.

30 Can you tell us approximately what quantity based on your experience of OCC you would have expected to sell over 3 months - over 6 months, and the gross profit on that? I would yes. I can give the quantities.

Had you gone to any expense in regard to the exploring of the prospects of the India market? Yes I had, considerable expense. A good deal of that would be travelling and hotels? Yes.

40 Can you assist the court as to the sort of money you had spent prior to or up to your last visit in May 1982 in travels to India? About \$40,000. That is just on travel, not telexes, and that does include my trip to America.

You said you paid your suppliers or most of them? I did yes. You told us your business has retrenched? Yes.

50 The house you and your family live in is in Marine Parade, Herne Bay? Yes.

In the High
Court of New
Zealand

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Examination
- continued

In the High
Court of New
Zealand

It was sold by Wilson Henry Nominees as first mortgagee last month? Correct yes.

They sold and you have to get out? I have to get out at the end of next month.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Did you attend the auction? I did yes.

What was the price bid by the bank? \$212,500.

Do you know the price the Bank hopes to get on selling? No.

10

Examination
- continued

Had you received any offers higher than that figure previously?

Yes I had a sale for the house of \$240,000.

When was that? One or two months before.

In regard to the business to Indian continent after the end of July, if you ask the court to assume that all your expectations had been fulfilled, the tonnage taken, and shipped, would you have had any assurance of being able to arrange cartage for any period beyond that? Yes we had a six months contract period and we would have enough reserves to stock pile and get charter services.

20

In relation to an ordinary shipment through Russell & Somers, on a back to back basis, what do you actually do in advance of the Cumberland coming to Auckland before it sails to East; firstly, what do you tell your supplier and how do you carry out your obligations to supplier? This depends on the supplier and the situation the company is in at the time.

30

Just going back to back? We normally give the supplier a post dated cheque for after the shipment date, and when we have negotiated the shipment we give a postdated or open or undated cheque, and when we do negotiate we advise the supplier to put the cheque through its banking system.

40

In effect the supplier gives you credit? Yes.

What about the freight when you want to get bill of lading marked "freight prepaid" and you haven't any money? What happens normally all the document required, we put bill of lading into the shipping company and when the ship has sailed and shipping company prepared to release bill of lading, we go to the shipping company with a cheque and then immediately proceed to the bank to negotiate the letter of credit.

10 Sometimes there are technicalities, documents are not in order, and we are unable to process a letter of credit. It might be found sometimes shipping companies, or cheques to them, bounce once. After negotiation they are paid.

So much for the general, when the Barranduna left Auckland there was a good quantity of stuff left on the wharf? Yes.

20 Did you nevertheless have to pay for that and paid for it within a reasonable time? We had to pay the suppliers yes.

Notwithstanding that it was not back to back and never back to back? That is correct.

30 Has the same situation applied in relation to the stuff that .. Did you pay your suppliers for all the cargo that actually went on the Barranduna or within a short time thereafter? I did, yes.

MORNING ADJOURNMENT 11.30A.M.

RESUMED 11.45 A.M.

A typed schedule has been prepared showing price increases in line with what you set out in your document No. 191, would you produce that schedule as Exhibit 5? Yes.

40 You concluded that the OCC, the profit achieved would be a comparatively small export incentive allowed by the Inland Revenue? Yes. I put in through you a Table as Exhibit 6 which shows relationship between bottom line, between gross profit on f.o.b. sales; I would like to put in Exhibit 6, which is the same schedule but with your estimation in a final 1982 column of what could have been achieved in the Indian exports programme? Yes. (EXHIBIT 6).

50 Explain if you would how this Table is composed

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and what it is meant to show? Its made up of sales made from 1979 until the actual sales in 1983 and then projected sales in 1983, less the freight, and we arrive at an f.o.b. value. Gross profit is taken from that bottom figure. And we have the [export] incentive and promotion figure, which gives total gross profit. Then over all those years we have percentage of gross profit on f.o.b. sales. If we average those sales up including my projections the average is about 48.9%.

10

Cross-
Examination

Cross-examined Carruthers:

I want you to give us some idea of what a thousand metric tonnes of waste paper looks like; does that amount to about 3,000 cubic metres? It depends on the grade. Mixed waste is about 6ft. long 16 inches high by 30 inches, and they equal about 1.2 tonnes.

20

So on that basis we are looking at somewhere between 2 and 3,000 cubic metres? Probably, yes. It would be about 3,000 or 3,500 actually. And on that basis a thousand metric tons would fill something like 100 railway trucks or 100 containers? About that.

What you are saying is that you intended to ship at least that amount monthly between March and July 1982? That is correct, yes.

30

And in making the arrangement which you did, with ScanCarriers, you relied on the telex of 3rd February 1982? We relied on our meeting with Mr Teskey and the telex. (document 39)

In dealing with Mr Teskey, it was clear to you wasn't it that he had to go to ScanCarriers in Wellington for approval of what he agreed to?

40

I believe we were quoted a freight rate of \$125. He did stipulate the ship would only be half full. That was a point that was our major concern.

But it is clear he worked for East Asiatic Co? He did yes.

Did you know from your dealings he had to refer to someone else for approval of what he did? Yes.

50

Did you know he had to refer to ScanCarriers in Wellington? Yes, this is why we were waiting for the telex.

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Did you know that in turn ScanCarriers had to refer overseas? I presume so.

That is the normal course of events in dealing with shipping arrangements in New Zealand? That is right.

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So what you received at the end of the day was the telex of 3rd February 1982? Correct.

You refer to a discussion with Mr Teskey, when do you say that took place? On or about the 29th.

Cross-
Examination.
- continued

That is January 1982? That is right.

And do you say you had at that meeting you had discussion about space in the ship? Yes.

Put again what Mr Teskey said? The vessel was going northbound approximately half full.

Was that in response to a general enquiry from you as to how much space might be committed for New Zealand cargo? We needed confirmation that there was sufficient space to carry out cargo to India, and ...

Was that in response to a general enquiry from you as to how much space was available for New Zealand? No, specific enquiry.

But it was directed to the total amount of space that might be available from New Zealand? That was available from New Zealand.

You said that discussion related to vessels, which vessels were you talking about? There were no vessels scheduled at that time, it was only a discussion. It was not arranged for sure which vessel or to my knowledge at least.

This was the first enquiry from you about space? Well we had started towards the end of 1981. Scans had approached me and asked if I had cargo. I indicated approximately 800 to 900 tons

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Examination
- continued

a month. Was this the first occasion though on which you asked them on how much space was likely to be available on the ships in service? I never had indication or otherwise that 1,000 tons space would be available. That is why it was a specific request at the meeting to Teskey.

What is the use of getting a freight rate if you have no space.

Was the meeting with Teskey at the end of January the first occasion on which you enquired how much space was likely to be available on the ships in the service? As far as I know, yes.

10

In the period December 1981 to January 1982, was ScanCarriers the only company with which you were conducting enquiries? No.

Who else was involved? We were enquiring with Dalgety Shipping, Agents for shipping company in India, and also various tramp steamers, or the steamer agents.

20

Which shipping companies were you dealing with? Quite a number, I can't remember all. One was Gilfoyle shipping. 3 or 4.

Were there a number of them? Yes.

Apart from the tramp tonnage, was Dalgety shipping the only agency with which you were dealing on regular liner service? No, only to India.

30

Did you have dealings with other agencies in relation to shipment to other places? Yes, in relation to shipment to Bangkok.

Turning to your experience, is it fair to say that you have traded in number of commodities during your business experience? As far as Aotearoa is concerned, I was only involved in waste paper.

40

Before I was employed by a company of produce exporters.

As far as Aotearoa is concerned that was only waste paper and fish? Yes, and I think there was one other a few years ago.

Were you involved in a transaction involving horseshoe nails? No. We were enquiring but

50

nothing ever eventuated.

And that was for Aotearoa was it? That is correct.

What about Pearlite? We were negotiating with the Indian market for Pearlite, but nothing ever eventuated.

10 And wood chip involving the United States? The same thing, nothing ever eventuated.

Abalone? That is fish.

Wood pulp? That is the same as wood chips or in the paper field. Nothing ever eventuated.

20 But Aotearoa had negotiations involving wood pulp? Aotearoa had negotiations but nothing was ever traded.

There is a telex call back sign Wintrade, what commodity was involved there? Over-issued newspapers.

Were there enquiries for the export of dairy products to Indonesia and India? Being in business we get many enquiries but nothing was ever traded.

30 Has you trading been solely from New Zealand? No.

From what other countries have you traded? Australia, Fiji.

Have you also been involved in cross-trading in countries outside New Zealand? In America.

40 Is America another country to which you have traded from New Zealand? Cross-traded from to my markets.

I asked you about the countries to which you have traded from New Zealand. Fiji, Samoa, Tonga, Singapore, Indonesia, Phillipines, Mauritius. Are there a number of others? India, Pakistan. We did actually get an order from Kenya for supply of waste paper, the country wanted us to ship the waste paper but Kenya had a bit of a crisis.

50 Apart from that experience of trading from New Zealand, have you also had experience of cross

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trading between countries outside New Zealand?
Yes. Australia, Fiji, and America.

In your experience would you describe this present transaction as a large one? Definitely.

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In fact it was probably the largest thing you had ever attempted? Yes, except for unsuccessful sales like woodchips and woodpulp.

Prior to this would it be fair to say you dealt with generally small quantities? We had orders to Thailand for between 200 and 250 ton a month, plus perhaps up to 400 ton a month between all the other countries.

10

Cross-
Examination
- continued

So in term of present transaction you regard those as smaller quantities? Yes.

How did you hear about the new service ScanCarriers was offering? They approached us.

20

Did you see any of the advertising of the new service? I may have but I wouldn't have taken any notice of it as I feel sure they had approached us before that.

Were you on a mailing list from ScanCarriers? Yes, from East Asiatic. Do you remember receiving a copy of the northbound schedule prepared by ScanCarriers? Yes.

30

Schedule No. 5 dealt with the period we are concerned about, but look at document No. 6 which is No. 165, that schedule No. 6 is in a form you recognise from receiving the previous schedule? Yes.

Would you look at the righthand side of the page underneath the dates for the schedule? Yes.

40

Read out what is there? (read).

Prior to this transaction had you shipped with ScanCarriers? We had done one shipment quite some time ago.

But for that transaction as you would expect with transaction we are talking about, bills of lading would be issued? That is correct. And from your

50

shipping experience it would be fair to say you know broadly what bills of lading provided for? That is correct. Look at document 83A, recognise that as the standard form of bill of lading used by ScanCarriers? Yes.

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You have seen it before? Yes.

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10 I want to come back to the original arrangements that were made, if ScanCarriers had said to you at the outset that they weren't prepared to carry wastepaper at all what would you have done about shipping?

Cross-
Examination
- continued

There is probably not much we could have done except keep looking. We thought we had a contract with ScanCarriers.

20 Where would you be looking? At other markets as well as other shipping possibilities.

We have discussed some of the shipping possibilities, that you were investigating, but there were services direct to India? Only the one - Shipping Corporation of India.

30 What about Acta and Blue Star? They ship via the Gulf. They do take cargo direct to India, but they go via the Gulf and their freight rates were ridiculous to say the least, and the space was very short. When you say the freight rate was ridiculous did you obtain a freight rate for that service? Yes.

What was it? In excess of \$3,000 per container. Well in excess of \$300 a ton. That is as as I can recall.

40 What other lines would be available? I can only go on what happened after the breach of contract. We tried to get transshipment to Nepal. The freight rate quoted was US\$250.

That was with transshipment at Singapore. Of course the Shipping Corporation of India no longer calls in to New Zealand.

If we were to tranship with them at Australia the freight there is \$2,400 per container.

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We did do one to two further shipments to India, one was on a transshipment basis at Singapore. The shipping Company concerned and the on-carrying vessel did not have the same arrangements with container operators and our containers had to be offloaded in Singapore, unstacked and then re-stacked and shipped to India. Consequently our documents were a real mess as they went forward on two separate vessels and the tonnage reshipped in containers not the same tonnage as supplied at the other end.

10

Cross-
Examination
- continued

There was one extra container I think, I am not sure.

So there were problems with shipping to India whichever way one looks at it? There has always been problems with waste paper anyway. Shipping companies don't like it.

20

When it came time to negotiate with ScanCarriers, you had two alternatives available to you did you, the first was to accept the ordinary liner arrangements, or alternatively to enter into a formal contract of affreightment? The third alternative was to try and find another market.

Coming back to the question you were looking at the India market weren't you? Correct.

30

When it came time to negotiate with ScanCarriers you had the two alternatives I mentioned? Yes, we could have transhipped, or we could have used the Blueport ACT service.

When you started negotiating with ScanCarriers, you had two alternative ways of dealing with them didn't you, one was accepting ordinary liner terms, the 2nd was to enter into a formal contract of affreightment, were they not the two alternatives? What eventuated - its very difficult to sell waste paper to India. We were given a further alternative.

40

It is normal for a shipping to have a freight tariff. This tariff can be increased as they decide. We were given specific freight rates for a specific period. We were never given by the

Shipping company any written contract that we would ship 1,000 tons.

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10 The first thing you did was to negotiate a freight rate? Correct. But when it came time to deal with space, it was emphasised to you you would have to make a firm booking for space? We were asked how many ton we were likely to ship and we told them 800 to 1,000 tons. It was us who requested a specific time period at that meeting. Prior to the first shipment on the Barranduna, did you make a formal booking for space of 1,000 tons? We advised we would be shipping 1000 tons, yes.

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20 Prior to your making that booking, did the East Asiatic representative emphasise that a formal booking for space would have to be made for the Barranduna? No.

In a discussion about formal booking, did you not ask the East Asiatic people how long you could leave it before you made a firm booking? Yes, how long I could leave it before I made a firm booking. They had already waitlisted 1,000 or pencil booked 1,000 following our meeting with Mr Teskey.

30 That is the first meeting you are talking about on 29th January? That is when we indicated we would ship approximately 1,000 tons yes.

Do you say a pencil booking was made at that time? No. I don't. I say he well knew we would ship about 1000 tons on that first vessel and thereafter on every vessel.

40 You were asked to firm that up later on and make a firm booking for the Barranduna? We were asked exactly what tonnage we were going to send on the Barranduna.

And you were asked to commit yourself to that tonnage so that a booking could be made? No they specified 1,000 tons space for us.

We didn't make the booking until about two weeks before the vessel was due to arrive in New Zealand.

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At that time you'd committed yourself to 1000 tons? At that time I think I committed myself to 800 to 900 tons, the amount we had letters of credit for. At that time I was in India and I had to write to my staff.

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So after the negotiation of freight rate and the discussion about space there then had to be a formal booking of the space required in the Barranduna? We were asked what space we were going to take up. When you were asked to firm up on space you can firm up at 1000? I firmed up on the exact tonnage that we shipped.

10

Cross-
Examination
- continued

LUNCHEON ADJOURNMENT 12.45 P.M.

RESUMED 2.15 P.M.

You mentioned a price per container for transshipment on SCI Vessels and the figure was \$2,400? Yes.

20

Is that New Zealand dollars? I am not sure.

The other figures referred to in papers dealing with SCI shipments are New Zealand figures? \$124 a ton is US. I am presuming the quotations for containers were as well but I am not sure.

Do you know meaning of term dead freight? Not specifically no. Do you understand from dead freight that it is space that you pay for whether you ship in it or not. I have heard the term used in that way yes.

30

Are you aware if you have a formal contract of affreightment you pay for amount of space under contract whether you ship in it or not? MR CLARK OBJECTS TO THIS QUESTION.

40

Do you know whether it is customary under a contract of affreightment for space to be paid for whether it is used or not? I don't know.

On your recollection was there any discussions prior to the sailing of the Barranduna about payment of space not taken up on shipment? No there was not.

Are you quite sure about that? Absolutely positive.

Are you aware that under a contract of affreightment there is a guarantee in relation to space each way, the ship owners...

MR CLARK OBJECTS.

10 Are you aware that it is customary in contract of affreightment for there to be a guarantee of space on each side, by shipping company one side and the shipper on the other? No.

20 In the course of all your dealings have you ever entered into a formal contract of affreightment? We have had an agreement a freight agreement from the European Shipping Association, but never any specific tonnages, guaranteed tonnages of an amount.

Have you ever seen a contract of affreightment other parties have entered into? No, the only agreement we have seen is the agreement sent to us by the shipping company.

30 Are you aware as a matter of ordinary shipping practice the making of a firm booking is not a guarantee of space on the ship? I am aware of that.

And the key to the contract to carry on that ship is when the cargo is accepted for loading? Or alternative agreement.

40 As a - are you aware as a matter of shipping practice a contract to carry arises on loading of cargo in cases except where there is a contract of affreightment? Would you say that again.

Put to one side contracts of affreightment; in the other cases are you aware that as a matter of shipping practice the contract to carry arises on acceptance of cargo for loading? Acceptance of a cargo at the wharf.

On the ship? No I would say acceptance at the wharf.

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From the analysis that we have been going through, do you see the distinction depends on liability to pay for space whether or not you ship between ordinary contracts and contracts for affreightment. Probably under normal contract of affreightment yes where both sides have specific tonnages.

I want to come to the arrangements which you say were in force; the first point is that on your claim you were not restricted to an upper limit in terms of tonnage? We indicated we would be shipping about 1,000 tons. 10

But there was no firm limit above 1,000 tons was there? There was an indication from me that we would not be shipping any more than 1,000 tons.

And similarly there was no restriction on your shipping less than 1,000 tons on your analysis? That is correct. 20

And you could vary the tonnages basically to suit yourself? That is correct.

And in fact if it came to a point you could ship with someone else if you wanted to? That is correct.

Staying with the question of booking for a moment, I want to go to some of the documents: turn to document 43, a telex dated 16th February 1982, between East Asiatic in Auckland and ScanCarriers in Wellington? I want to just check the tonnage that is mentioned there and to know whether you agree total was 1155 tons including 650 for mixed waste. I won't disagree with that. 30

And although that is a telex between East Asiatic and ScanCarriers do you accept that information came from your company? Yes it would appear so. Subject to acceptance it would appear we would ship this quantity. Turn to document 57, first page, does that show 1070 tonnes waste paper for loading at Auckland? That is right. 40

That as at 5th March showed 1070 in Auckland, in Napier it shows 60 tonnes on the next page? That is correct.

And Timaru at bottom of page it shows 25, and you accept that total is 1155? That is correct.

So at 5th March you were still talking of 1155 tons waste paper? Yes. Turn to document 61, the last paragraph at foot of telex, "For your guidance... only", do you accept that was the position as at 9th March? Yes.

10 Turning to document 72, does that show that you had Letter of Credit for a total of 815 tons including 550 mixed? Yes - I can't read the copy but I say yes. Yes, that is correct.

Coming back to document 71, is that the formal booking list on Barranduna? Yes.

20 And does that show waste paper as a total of 880 tons as the amount booked? I can't read it. It shows various 770 and I can't read the 2nd line.

Look at my copy? I still can't understand it. It seems to be 110, yes.

Are you happy to accept that as 110? Yes.

30 Then by the time it came to delivery at the wharf 910 tons were delivered according to your claim? 919.399. We did say in previous documentation that it was expected at Timaru, document 72, at the bottom of the page.

Look at document 65, is that a letter from Seatrans Consolidated dated 11th March 1982? Yes.

Is that correspondence with one of the brokers you were dealing with in relation to tramp tonnage? Yes.

40 Would you read the third paragraph? Yes.

Did that really put you on notice that regular liner services will take higher paying cargo in preference to waste paper? Yes, I already knew that.

Is this the reason you were trying to negotiate for tramp tonnage? We were trying to negotiate for tramp tonnage when we were looking at that

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stage at supplying southern India.

But was the preference for other cargo at least one of the reasons you were trying to negotiate for tramp tonnage? Yes. In March and April - in about March were you trying to negotiate a freight rate to Europe? I don't know about March but I was trying to negotiate a freight rate to Europe yes.

Did you make a formal application for a freight rate because that service was under control on the Conference? That is correct. 10

Look at document 54, and the document behind it. The formal application is the document behind the letter No. 54 - the formal application which you made for a freight rate? That is correct.

Did you follow that up later on with East Asiatic? This was the application we had. 20

Did you chase it up later on? I did say to them what has happened to the freight rate.

Look at documents 74 and 75 - now go to document 108 - do documents look to you the respects in which your application was chased up? Yes.

Coming to document 108, does that show that you were notified of an agreed special rate of \$100 US, per weight tonne subject to w.m. 14.6%? Yes. 30

So that at this point you had a freight rate also for shipment to Europe? That is correct.

And I understood you to say that you didn't ever take advantage of having negotiated that freight rate? Yes.

But you could have had you wanted to? We never had enquiries around that time. 40

Can we go back for a moment to document 54, and the application behind it, how much did you expect to ship Europe at the time of your application to the Conference? I can't recall. I have indicated 2,400 to 9,000. I don't know if that was a specific enquiry or whether how much they could get to Europe and I think freight rates would have

been given.

Coming to the question of packaging of mixed waste, do you recall anyone from East Asiatic or ScanCarriers looking at the mixed waste prior to delivery at the wharf? Certainly.

When was that? That was before delivery to the wharf, I wouldn't know the date.

10 Remember whereabouts it was? It was in both Paper Reclaim store and Trade Union Binding. Remember who was there? Yes it was Dave Teskey and Brett Freer. I can't recall if they had anyone else with them. While they were there did they not express concern at manner of packaging of mixed waste? They did not.

20 Did you make any comment to them that that was the normal or usual way in which it was shipped? It was only the 2nd time we had shipped it.

Did you make any comment about the usual or normal way of shipping. I said it had been shipped once before, yes.

30 In the form in which it was baled at the store you were standing in at the time? Both stores. But did you say to them that it was shipped in that form before? Yes.

Does that apply to the method of strapping in particular? Yes.

Isn't it correct that they expressed some concern about untidiness of the mixed waste? No that is not true.

40 Didn't you re-assure them that that would be all right, that was the usual way of putting both bales together? They asked me what I thought of the pack and whether it would stand shipment to India and I said whether I thought it would stand shipment to India.

Didn't you take that as an expression of concern by them as to whether it would stand up to shipment? No.

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Why would they ask the question? May be because they weren't used to shipping waste paper.

And they were looking to you weren't they for some comment to reassure them it was properly packed? Correct.

Where was the previous shipment to? Calcutta.

Did you have any problems with the packaging of that, the stowage shipment or #?outturn? In the #?ATL, yes, we had problems. Did you tell Teskey and Freer about those? At the stage they inspected I don't think we had a vessel that had #?outturn.

10

What was the name of the other vessel? I cannot recall.

With whom did you ship? The Shipping Corporation of India.

20

Coming back to the early negotiations about the size of bales, did you have a discussion with Mr John Robinson about size of bales? I had advised Scans of the measurements.

In the result there was a stipulation the bales were not to exceed 8.5ft? That is correct, to allow double stacking.

That is because there was a 17ft. - that is because in order to stack in the space the cargo could go to a maximum of 17 ft? That is correct. It was 17 foot holds they were going to put them in.

30

And was not the figure of 8.5ft stipulated because you wanted to pack into 10ft bales? No.

Did Robinson not tell you that they were looking for bales in multiples of 4, that is 8 x 4 x 4, or at least multiples of 4? No, that would have been a new pack.

40

At all events the 8.5 was on the basis that there would be two bales of 8.5 which would be double stacked? Yes, we could not load in excess of 8.5, that was a condition of that telex.

When the bales were delivered they were 5.5 bales? That is correct.

Regarding a discussion you had with Mr Anvin, you told us there was some discussion about change in deck space for stowage of waste paper? That is right.

10 And you said that it related to shipment of cargo of onions to Australia? That is correct.

Look at document 57, does not that show on the front page that your waste paper was to be stowed on deck 3 in 3 spaces? Yes.

I accept that those numbers were there.

20 What do those numbers indicate to you in fact? Well I have to take your word for it that they are the deck numbers I really do not know.

Do you know which deck space the waste paper was put in? I do not know.

The discussion you had with Mr Anvin revolved around why the mixed waste would not be shipped, did it not? Why part of your cargo would not be shipped? Why it was not being shipped.

30 Did you not put it to Mr Anvin it could be shipped in another space on the vessel? Mr Anvin told me that because of the late order of the onions the space they were going to be putting the waste paper was being taken up with onions.

40 But is it correct that the space that had been allocated for your cargo was sufficient until the problem about stacking 3 high arose? They must not have allowed enough space for my cargo, or alternatively they received late bookings. They had all measurements of bales, they knew the weights; they had the exact measurements of my cargo.

The evidence will be there was sufficient space to stack your cargo if it had been baled in the manner agreed as 8.5 ft and could have been stacked two high, do you accept that? We were not told to stack at 8.5 we were told not to exceed

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8.5.

Do you accept that if the bales had been 8.5 ft, that there was sufficient space for all your cargo to go in stacked two high? Yes I do accept that.

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And has it been explained to you that because of the problem of stability resulting from size of the mixed waste bales, they could not be stacked three high in that space with the result there was not enough space for your cargo? Yes.

10

Cross-
Examination
- continued

Did Mr Anvin say that the other space was committed and refer to a cargo of onions? Mr Anvin said that because of this order of onions they could not stack my bales on such and such a deck.

I come to the events at the time of shipment, you were asked this morning at page 7, whether there were any complaints about the cargo before it was loaded, you said No? Correct. Before the ship commenced loading.

20

What precisely are you telling us, were there any complaints before the ship commenced loading? No.

Were there any complaints at all? There was at five o'clock just when the ship was to sail.

Was five past five on Friday night the first complaint that was made? Yes.

30

Quite sure of that? Yes.

Did you not receive a message on Thursday night from East Asiatic to come down to the wharf to look at the cargo as there was a problem with it? I cannot recall. I was at the wharf Friday morning.

40

Were you not at the wharf on Friday morning because there was a problem with strapping of mixed waste and you were asked to fix it up? No.

Did you not say you would have some men come down and fix it up? I cannot recall that. That will be the way in which it is put by Mr Robinson? I cannot recall that conversation taking place, only

to be in my office at 11 o'clock for Captain Andersen's phone call. There was only a time problem.

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Did not Mr Robinson make comment on the state of the cargo to you, the mixed waste? No.

Did he describe it as rubbish? It is rubbish. I describe it as rubbish.

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Daniel Cash

In dealing with state of packages and general condition of cargo did he not describe it as rubbish? No.

Cross-
Examination
- continued

Did you have people come down during Friday to re-strap the mixed waste? No.

Did Mr Anvin have a discussion with you about the state of the cargo? Yes.

Did he describe what he thought of it? Yes.

Did he deal particularly with the mixed waste? Yes.

Did he deal separately with the question or the computer printout cargo? He said they were very well packed.

He said words to the effect that he was satisfied with computer printout and the magazine packs? I cannot recall his words but he was satisfied with those two.

But he was rather critical about the mixed waste? He was upset about the packs but he was concerned about the tiers as he could not stack them 3 high in the ship.

Recall the words he used to describe the state of the cargo? Only that the bales were as good as he had seen and the tiers were not the best.

Did he not use some crude language to describe the state of the mixed waste? Not that I can recall.

Is it possible he used it and you cannot recall? I cannot recall.

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In that discussion there was no mention of Mr Anvin's expertise with waste paper? He said he had seen mixed wastepaper in bales before.

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Plaintiff's
Evidence
Paul Arthur
Daniel Cash

But you did not regard him as an expert on wastepaper? He is supposed to be an expert on loading ships.

You did not regard him as an expert in waste paper then? No. What he was concerned about was ability to load it into the ship? His ability to load it 3 high into the ship.

10

Cross-
Examination
- continued

It was more than that was it not, it could not be loaded 3 high as there was a stability problem? That is correct, the bales were too wide and three high would be too wide, and would be 180 inches or more high and it would be unstable. It would be packed too high.

The only problem encountered was with the mixed waste? That is right.

20

Describe the bales of mixed waste, the size? They are about 6 ft. or 6ft. 6 wide, 30 inches - the bales or ties. Each tie? Each tie was 6ft 6 long, but 60 inches high and 30 inches wide.

How were they secured? Secured by two straps.

Along the length? Over the top. The bales were tied separately along the length.

30

Describe how the ties were secured? Secured over the top.

By what? By a steel strap.

How many steel straps on the tie? Two.

Was there any covering over that tie? I think there was.

40

What was that? Kraft paper. A tie is two bales on top of each other tied together.

AFTERNOON ADJOURNMENT 3.30 P.M.

RESUMED 3.45 P.M.

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Zealand

I am trying to get into the record a description of a mixed waste bale: you have been shown some photos which are to be produced later on as part of Defendant's case? Yes.

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Plaintiff's
Evidence
Paul Arthur
Daniel Cash

10

Would it assist a description of bale if you refer to some of the photos? Yes.

I show you 3 photos, which are marked on back F, I and N? Yes.

Cross-
Examination
- continued

Looking first at photo F, does that show part of your cargo stowed on the ship? Yes it does.

And on the extreme right of photo is that the bales of mixed waste? Yes.

20

Photo I, does that show bales of mixed waste in shed 55? It shows mixed waste and pure white. This was from a minor supplier.

Which is the mixed waste? The mixed waste is without the cover.

30

Does the final photo N show mixed waste in another area of storage that was the cargo not shipped? It does, stowed 3 high.

By reference to those photos, are you able to describe how the bale of mixed waste was made up? This is not a bale but which I call a tie - looking at photo F. The tie is made up to two bales. The tie is about 6ft. 6 long, 60 inches high, and 30 inches wide.

40

The two bales are each 30 inches high and they are strapped with two straps lengthwise. The ties are strapped with either two or three steel bands widthwise. The ties are covered with Kraft.

Was the arrangement in relation to packaging that the mixed waste would be supplied on pallets or skids? Yes.

What is your understanding of a skid? A skid as I understand it is anything that keeps the pallet off the ground and a fork hoist can get under.

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Court of New
Zealand

The mixed waste wasn't on pallets? No., it was on skids. Some of it, a small quantity was on pallets.

What sort of skids? Paper cords with a metal end.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Is that a cardboard tube that forms the roller for paper? Yes.

Were you told there was a problem when it came time to lift these ties? Not that I was aware of.

10

Cross-
Examination
- continued

You weren't told of any problem? When they came to lift them 3 high that was the problem.

But did you understand there was a problem with the ties sagging when they were lifted? No.

When you were on the wharf at 5.05 on the Friday night, was there discussion about the short shipment? Yes.

20

Did you tell the ScanCarriers people on the wharf at that time that if all the cargo didn't go you wouldn't get paid for any of it? Remember saying that? No.

Is it possible you said it? It could be possible but I don't remember saying it.

Looking at it now you wanted to put on pressure? I wanted to put on as much pressure as possible for them to take it.

30

But it wasn't correct to put it that way? If we couldn't come to an arrangement with the shipping company then we couldn't uplift the bill of lading and we couldn't get payment for the stuff that was left behind, it might have been.

Wasn't the correct position that you would get paid under those Letters of Credit which you were able to negotiate? There were 5 different varieties of product on the ship. At that stage I would think we would be able to negotiate Letters of Credit for those goods on the ship except for those that were left behind. I knew at that stage I couldn't afford to have all that stuff left

40

behind and that was my position.

If all the cargo relating to a particular Letter of Credit was shipped you would be able to negotiate that Letter of Credit wouldn't you?
Yes.

10 So it was only those Letters of Credit where all cargo was not shipped that you would be concerned about? That is correct. I have said that.

As the discussion continued was there an arrangement as to which cargo would be left behind and which would be shipped? I had asked them to try and put on the small remaining lot of computer paper and hard white shavings, whatever was left behind in those two other grades.

20 So you finished up in the position where it was only mixed waste that left behind? No., they didn't take the others.

There was 6.11 metric ton hard white shavings and 3.380 metric ton ledger.
And the balance of it was 261.63 tonnes as mixed waste? 271.12.

30 Would you look at document 112, is that a copy of the schedule to which you just referred as parts of your notes? No.

What did you refer to to refresh your memory?
[Hands document to counsel]. It was originally on the document but I don't know where the discrepancy has arisen. The discrepancy is in the 271.12.

40 Document 112 shows in relation to hard white shavings and ledger that they are held by Aotearoa and not shipped? That is right.

It indicates they were returned to your company?
Yes, quite a number of days afterwards.

As to the balance of the paper on document 112, there has been an alteration to the original?
Yes.

Is that the short shipped mixed waste that went

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Cross-
Examination
- continued

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later on Tarago? So I believe.

During the course of your evidence you said I think that you didn't receive a bill of lading in relation to the short shipped cargo? That is correct.

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Plaintiff's
Evidence
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Daniel Cash

There was some discussion though about about a received for shipment bill of lading? That is correct.

10

Cross-
Examination
- continued

But in terms of your Letter of Credit you needed a shipped on board bill of lading? We suggested a bill of lading be issued for the full quantity to enable us to get a letter of credit.

But the problem with that was that it couldn't be stamped freight prepaid could it? The shipping company wouldn't stamp it freight prepaid.

20

Because the freight wouldn't have been paid? Yes, had we been able to negotiate the full Letter of Credit the freight would have been paid. The shipping company would have been able to sign for the full quantity.

The other difficulty with that proposal was that you couldn't have got a shipped on board bill of lading? It wasn't required for a letter of credit.

30

Wasn't it a requirement of all of those that shipment be made before 31st March? That is correct.

You needed a shipped on board bill of lading before that date? To negotiate the Letter of Credit we needed evidence the consignment was received for shipment before end of March.

40

The position was that the shipment had to be made? Receiving for shipment MR CLARK OBJECTS.

As far as we were concerned we required a bill of lading for total quantity in order to negotiate the Letter of Credit. Whether it was signed received on board or received for shipment was not strictly a requirement for Letter of Credit. If

we had it marked shipped on board for bill of lading.

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Later there was a bill of lading issued in relation to some of the short shipped cargo wasn't there? I don't know. I have never seen it.

I want to come to aspects of the accounting arrangements in your company, first, pricing: the first supply, did you receive most of your paper from suppliers? Correct.

10

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
Daniel Cash

What were the arrangements concerning transport of that paper to places of shipment? They paid for the cartage, delivered to wharf.

Cross-
Examination
- continued

Apart from the paper supplied, did you get some of your own paper as well and bale that? Yes. Can I just correct my last statement.

20

We did buy from Central Trading under a special arrangement ex their store as we had to have it delivered by rail to Napier.

Every supplier except Central Trading was delivered to wharf? Yes.

And Central Trading was delivered rail Petone? I think so yes.

30

What costs did you have in relation to paper delivered to wharf? Freight rate.

Did delivery to wharf include into store on wharf? Yes.

And your freight rate takes it from wharf shed? Yes.

40

With Central Trading you had cartage to Napier and discharge into wharf shed or unloading at wharf shed? I don't know what the Railway did, sometimes they unload direct from railway to ship. Once it is at the ship's side it is the responsibility of the shipping company.

Are you able to give us some indication of the percentage of your supply from Central Trading? I have bought 60 ton for Napier, but some of that

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was from our own store, including computer paper. Was that in Wellington? Yes.

That 60 tons was just for the Barranduna? Yes, I don't know the exact figures.

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Plaintiff's
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Would you regard Central Trading as one of your major suppliers? For certain types of waste paper. They did not supply any mixed.

What did he supply, what did you look to him for generally?

He supplied computer printout, white ledger, and hard white shavings. He would have also supplied us in previous shipments of prime kraft.

10

Cross-
Examination
- continued

Coming to your own paper where did that come from? All the computer bureaux and shipping companies in Wellington.

Did you only acquire paper in Wellington? No there was a small tonnage that we collected as I said before.

20

Most or all the magazines loaded in Auckland came from our store. You told us you had a store in Auckland, did you collect paper in Auckland as well? Definitely.

Did you collect paper anywhere else apart from Auckland and Wellington? No.

30

What types of paper did you collect in Auckland and Wellington? Wellington was purely printout. Auckland was white ledger and computer printout smaller quantities. Big tonnages of old newspapers and magazines. At one stage we sold to Bangkok shavings. Various other bags. And at times we stored quantities we may have had to get up from Wellington, or if I wanted to buy a particular line of paper.

40

Was this paper supplied on basis you had to bale and package it? I didn't have to do anything. Some of it came in bales, others we bundled and baled.

Can you run through the process of dealing with paper you acquired yourself, that is from the

moment you had an order for it until it was ready for delivery out of your store? Some grades we used to collect. We get our own truck. We used to bring it into store, unload the truck, bale and palletise it, store it and then ship it out. Others came in already baled into store and we shipped it out. Others we just received for storage.

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Daniel Cash

10 So did you have to do things like sorting the paper at the store? Yes. Some types.

Was it weighed in and out? It was weighed by either Weighbridge coming in or when we received it in store we used to weigh it. It was weighed out, yes.

Cross-
Examination
- continued.

20 Where paper had to be baled did you have facilities in your store for doing that? Only a store for bundling.

Did you have a baler? I had a baler but it wasn't on my premises.

Did you do your own baling? Someone did it for us. We did our own bundling, but the baling we relied on people for that. And one supplier had my baler.

30 What did you do, pay that supplier to bale for you? Correct.

What was involved in bundling? A man can do that at $1\frac{1}{2}$ to 2 tons a day. That is 25 kilo bundles.

Is that putting the bundles together manually and using some kind of device to strap them? Correct.

40 Was all of this paper palletised or shrink wrapped or what? Generally it was palletised.

Was it covered in any way where you did packaging? It all depends on the market.

Are you saying some of it was packaged by shrink wrapping and some of it wasn't? Correct.

I want to come to your buying prices:
Describe what shrink wrapping is? Shrink wrapping

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is putting plastic cover over the pallet and taking all the air out of it and it goes in and is shrink wrapped. We don't do that. We just overwrap.

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Evidence
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Daniel Cash

That is the photo marked F, is that cargo stacked on lefthand side of photo shrink wrapped? That is stretched wrap and is done by Data waste or another supplier.

Is that a somewhat similar covering that gives much the same appearance as shrink wrap? Yes.

10

Cross-
Examination
- continued

I was asking you about the buying prices of the various grades of waste, are you able to summarise those for us? I think so.

This is the maximum prices we pay for this particular shipment.

20

You have to understand anything we bring to the store, from Wellington or that, computer printout, the prices we pay I refer to now is on prices we have paid delivered into wharf shed. Computer printout \$212; hardwhite shaving was either \$250 or \$280. Mixed waste was \$70, white ledger was \$148; magazines we get into store and are covered by other costs.

Quite a lot of waste paper is done on collection basis by charity organisations, are you involved in things like that? Yes.

30

Was that - into which category did that fall? That was mainly old newspapers.

Did you make any allocation for buying price on those? Old newspapers buying price fluctuates, depending on the source. We pay as low as $2\frac{1}{2}$ cents a kilo or \$25 a ton. If it comes in loose we have to bundle it. Up to \$50 a ton if it comes in bundled.

40

Is that the sort of payment you make to charity groups at present? Yes.

Was all the paper you brought in yourself stored in your own store? Not the paper from Wellington no. That was rented.

Was all the paper held in Wellington in rental facility? Yes. When I said rented, we paid storage per week. On a tonnage basis that was insured.

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For all those that supplied you was there any cost to you for storage? No.

No. 5.1

Irrespective of delay between placing of order with your supplier and delivery out there was no charge for storage to you? No.

Plaintiff's
Evidence
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Daniel Cash

Did you have to pay commissions to your agent in India? Yes.

Cross-
Examination
- continued

Look at two documents, No. 168, 2nd page, para 5, does that set out the commission payable to Chopra at \$10 a metric ton for mixed waste and 3% of all other grades? I am not exactly sure. I do know that after the problems we had on the Barranduna I had to go to India again and while I was in India I might have had to increase the commissions to Chopra. I can say that there is a cheque in the discovered documents which is Chopra's commission.

There is another document I will come back to, but for present purposes there was a commission payable to Chopra? There was. What was the basis of payment of Mr Wilson for Fairhill Enterprises Limited? There was commission payable to him yes.

Was that in addition to any commission which you paid in India? Correct.

How much was that commission? \$10 a ton for all grades except mixed waste, and mixed waste was \$5 a ton.

Is it correct that a number of the Letters of Credit which you negotiated were payable after 180 days? That is correct.

So in order to get immediate payment from the bank did you have to take a discounted price on those Letters of Credit? Yes they have 180 days.

And as you understand it is that discounted buying

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rate placed on the current overdraft rate for the bank as far as the business is concerned? No.

Do you know the basis of the buying price? Based on international money, about 6%. It is based on some international situation.

No. 5.1.
Plaintiff's
Evidence
Paul Arthur
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You say there is a special rate the bank uses and that relates to overseas interest rates? It relates to some form the bank has for working out these rates.

10

Cross-
Examination
- continued

Would you look at documents 58A to E, are they contract notes negotiated by Chopra on your behalf? That is correct.

And they are all dated between 6 and 17 March 1982? One is dated 6th, the others between 13th and 17th. I think I was in India at that stage - in fact I was. They were negotiated by me.

20

They left a very tight timetable for setting up Letters of Credit? I have already explained the situations. Other buyers didn't want to establish any Letters of Credit in March because of the Indian Government Regulations and import restrictions. If an Indian sets up a Letter of Credit in March and it is not shipped that will expire and the Indian customer will lose a lot of money. So when I received a message no Letters of Credit will be established I immediately went to India and sat across desk of Mr Rajgahia and we immediately set a price for April shipments or the March shipments that were deferred.

30

I put it you left a very short timetable for establishing letters of credit on those contracts? That is correct. I don't know when the Letters of Credit arrived but they did arrive before shipment. I don't know if I picked up the applications before I went overseas and instructed my office.

40

Similarly according to each of those documents shipping was to be completed before 31 March 1982, if shipment was permitted? That was correct.

Was it on the basis of those contract notes the Letters of Credit were established? That is

correct.

Do you have a convenient record of all of the customers with whom you had orders or from whom you had orders in India? Previous orders.

All of the orders you say are relevant to this present case?

10 I have copies of the contracts referred to and my schedule of actual profits from Barranduna. They have been extracted and the Letters of Credit have been extracted.

Document 191, the actual profit from Barranduna, contains all of the Indian orders and refers to all of the Letters of Credit? All that I held at that time yes.

20 When you say at that stage, what stage are you referring to? The shipments got away on the Barranduna would be repeated. I don't think anyone would commit themselves for shipments so far ahead, any client that is.

30 Is the position that document 191 records all of the contracts and all of the Letters of Credit relating to Barranduna? No, they relate to contracts and Letters of Credit we had besides Barranduna.

Of the contracts relating to this case, you have the Barranduna contracts and Barranduna Letters of Credit? Correct.

And contracts and Letters of Credit referred to on p.2 of document 191? Correct.

40 And beyond that you expected to have further orders repeated as time went by? Correct. I would have gone to India if everything had gone all right on the Barranduna, in April, and got Letters of Credit for any of the cargo I could have shipped and didn't hold contracts for.

Dealing with the freight rate, did you or can you give me some indication what the impact would have been on your business of wastepaper to India, of increase in freight rate of US\$180 per ton from

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Daniel Cash

Cross-
Examination
- continued

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July? Very little impact. I explained before, with shipping 1,000 tonnes per shipment approximately on Scan's contract we would have enough reserves to stockpile for 2 or 3 months.

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Plaintiff's
Evidence
Paul Arthur
Daniel Cash

Where would you be stockpiling? My suppliers have fairly large premises. At that stage I had fairly large premises in Auckland and if necessary we would have paid storage. I estimated my store could have held about 1,000 tons.

10

Cross-
Examination
- continued

What I am talking about is if the ocean freight rate increased from US\$120 to US\$180 a ton from July? If that had been the case with Scans freight rate we would have stockpiled. If we can get 3,000 ton shipment now we can get a freight rate of \$100 a ton for a 3,000 ton shipment. For 6,000 ton shipment we would get a freight rate of \$80 a ton.

You would negotiate another freight rate? We would negotiate a tramp steamer.

20

But if you had to pay \$180 a ton what effect would that have on your business? It would be quite vast wouldn't it.

And you wouldn't know precisely when or if the freight rate was going to be increased? I wouldn't know but I would presume it would. Most freight rates are for 6 months.

30

So in using your business skill you would stockpile against increase in freight rate? No.

Looking at it quite realistically if you were paying your suppliers by postdating your cheques how would you finance the stockpile? By the money we would have made, we would have made about \$480 to \$500,000 in a six month period and we would have paid for the stockpile out of that as it was stockpiled in the stores.

40

Was this a proposal that you had put in hand at the time of the Barranduna shipment? At the time of the Barranduna I was only thinking about it.

ADJOURNED 5 P.M.

RESUMED THURSDAY 9TH JUNE 1983 AT 10A.M.
PAUL ARTHUR DANIEL CASH (Sworn): Cross-
 examination continuing.

INTERPOLATED BY LEAVE AND CONSENT:

MR BROADMORE CALLS:

BENGT HARALD ANVIN (Sworn):

I live in Sydney. I am one of four cargo
 superintendents employed by Wilhelmsen Agencies.
 They are the agents for ScanCarriers.

10 You are a Swedish citizen but have lived in
 Australia for 5 years? Yes.

You went to sea with Swedish shipping company
 Transatlantic? Yes that is correct.

And you finished up with them in 1978 having been
 chief officer of the vessel Barranduna for about 6
 years? That is correct.

20 You went from there to your present job in
 Sydney? Yes.

As cargo superintendent is it your job to plan and
 supervise the working of cargo and port operations
 of Scan vessels in Australia and New Zealand by a
 port by port basis? Yes.

30 You travel ahead of the vessel to each port and
 plan the loading with stevedores and agents and
 supervise the operations when the vessel
 arrives? Yes.

The Barranduna and other vessels operated by
 ScanCarriers are all roll-on roll-off vessels?
 Yes

40 Is that a plan of a typical vessel of the same
 type as the Barranduna? Yes, this is a plan of
 what we call a Generation 1 vessel which is one of
 the vessels used.

Does that show there is a stern door at the after
 deck of the vessel with ramps serving a number of
 decks? Yes. In the top picture you can see where
 the ramp is raised up in a forward position. When
 the ship comes into port that part is lowered on
 wharf and then there is a closed hatch which opens
 up. Then you have the traffic flow in deck 3

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 No. 5.2

Defendant's
 Evidence
 Bengt Harald
 Anvin

Examination

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which is shown. You can also see internal ramps
in the picture.

Deck 3 is level with the access ramp? Yes it is.

No. 5.2

Decks 1 and 4 have a height of 8ft. 6"? 2.9
metres.

Defendant's
Evidence
Bengt Harald
Anvin

And the other decks are 17 ft or what? 5.4
metres.

Examination
- continued

Indicate where deck 1 and 4 are? On the top
picture it is the one at the bottom and on top of
the fuel tanks. Deck 4 is just underneath the
weather deck. They are the two low decks of 2.9
metres.

10

Is there some fundamental difference between
loading low decks such as this and conventional
ships with hatches at the top? Yes, with a normal
vessel it is like a floating warehouse where you
load at the bottom and on, and on a conventional
ship you load from top down, it is the reverse.
Also on a roll on vessel you move cargo much
quicker and the tonnage is much higher.

20

In New Zealand the cargo is taken from the shed
and put on trailer and the trailers go into ship
where other forklifts take them off and put them
into store.

With other vessels the cargo is lowered into
ships? Yes that is right.

30

You were the cargo superintendent responsible for
working of the Barranduna on its voyage No. 72 on
Australia and New Zealand coastal routes? Yes I
was. Would you refer to document 57 in volume
1: Is that a telex which was sent to the Sydney
office concerning cargoes to be loaded on the
Barranduna at New Zealand ports on a voyage? Yes
that is what we call a unit list which is sent to
me as cargo superintendent and we get it about ten
days before the vessel arrives in New Zealand.

40

Is it your job to allot the spaces on the vessel
where the cargo is to be loaded? Yes it is. I
send a telex back or else I phone New Zealand and
tell them what to do with it.

On that telex there is some handwriting at the righthand side, is that writing referring to the deck and pad or area on the deck where the cargo is to be loaded? Yes that is right. It is not my handwriting.

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—
No. 5.2

Are the positions shown there the positions you decided on and indicated to New Zealand? Yes they are.

Defendant's
Evidence
Bengt Harald
Arvin

10 Looking at the telex there is the port Auckland and discharge port Dubai, and there is some handwriting which indicates wastepaper is intended to be put on deck 3, pads 7, 9 and 11? Yes, here is deck 3, pads 7, 9 and 11.

Examination
- continued

That is on the starboard side or the forward end working back? Yes.

20 Had you earlier allocated other space for waste paper? This was the first telex where the waste paper appeared. That is the first indication of what cargoes come out of New Zealand.

And the unit list No. 57 refers to some onions to be loaded in Auckland on deck 4, Yes.

30 Is that the place where the onions would always be stowed? Yes we have had a lot of research where we can stow onions and we have found that is the only place in the ship where we can stow onions.

That is the topmost deck and is ventilated? Yes the whole ship is ventilated but we have agreed with the shippers of the onions that they get the maximum.

40 Were there onions to be loaded on this voyage? Yes we had a booking for 2,200 tons of onions for Europe.

Were they to be loaded on deck 4 also? Yes.

How long had that cargo been arranged? That is a long contract for the whole onion season. The agents have promised to ship off something like 10,000 tons for the season and the booking was made long ahead. That is while we hold all the vessels for the onions to be shipped.

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—
No. 5.2

After the vessel arrived in Auckland and worked cargo on 25th and 26th March, did you later prepare a report dealing with problems experienced with waste paper? Yes I did, when the ship left coast of Australia I did a memo to my boss Captain [?] in Sydney.

Defendant's
Evidence
Bengt Harald
Anvin

Would you look at item 122 of Volume 2, there is a reference in report to stowage factor, is that a formula which relates the space taken up by cargo to its actual weight? Yes it is.

10

Examination
- continued

The stowage factor is 2.53 tonnes per sq. metre mentioned in report was that a stowage factor you did on basis of experience with paper products? Yes, I tried to get the stowage factor from New Zealand but I didn't get any so I used the average which is used for other paper products.

Did you allow yourself any leeway? Yes because there was a new product on roll on vessels and I didn't know exactly how the paper looked like and I left more space than I needed for it.

20

Did you make any other plans to deal with the waste paper cargo? I don't understand.

Did time prevent any problems with movement? Yes in that report in Sydney we were to stow containers in the centre line to make a wall and stow the paper behind it to stop it shifting sideways in the ship.

30

When you arrived in Auckland did you inspect the wastepaper? No I didn't see the wastepaper until the same day as the ship came in when we went down on the wharf. That was inspected by our people.

You said in your report that the magazines looked OK and also the computer printout waste, was that packed on pallets? Yes it was, in colours.

40

Was there also a quantity of mixed waste not palletised? Yes they were left, they were banded on the cores in the centre of a paper reel. That is something like a cardboard tube.

Did you form an opinion about the standard of

that? Yes, it was very poor standard and the units were very loose and as soon as they were lifted up the cores were flapping at the sides and we lost a few of them.

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10 Was any action taken before loading to try and correct that? Not before loading, but when we started loading, on the first night we had Brett Freer come down and John Robinson at the wharf and I spoke to them and said this is no good, we have to do something about it, and we tried to get contact with Paul Cash to have him do something about it.

No. 5.2

Defendant's
Evidence
Bengt Harald
Anvin

And on the Friday did you see any of Mr Cash's men? Yes, two men came down and presented themselves and said they were sent down to do something about the strapping on the pallets.

Examination
- continued

20 In what sequence did you approach the loading? We started with the magazine paper which was no problem at all. We stowed them 3 high and the stowage seemed very good. Then we had some of the computer printout and we stowed them two high and then we tried to put one of the waste ones, the bad ones, on top of them, that is the mixed waste. That didn't work out very well. The top pallet was lesser width than the others and every time we try to get the hoist under it fell over.

30 You mean by the top pallet the bale? Yes.

So that had to be put to the back of the pallet? Yes, but it still kept falling over so we took it down again and tried to put walking boards in between. That is plywood, to stabilise the whole stow.

40 By between do you mean underneath? Yes, underneath the top unit. Did that help? It helped but again they fell over at the top but they didn't fall down. But then we ran out of the good units and we only had the bad units left and we tried the same thing there to put walking boards in between the layers.

Did you put bales of mixed waste on the deck and then a walking board on top and then repeat that? Yes, but that didn't help as the stow still

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Court of New
Zealand

fell over and I decided it was too dangerous as we had stevedores in and around the stow and if the pallets hit them.

No. 5.2

Defendant's
Evidence
Bengt Harald
Anvin

Did you ascertain what the problem was with the mixed bales? First of all the strapping was very bad, and these tubes underneath sank into the next pallets or disappeared into the unit itself, so they didn't do the purpose they were there for to stabilise the unit.

10

Examination
- continued

Were they also there for handling with fork lifts? Yes, that was the purpose of them.

Was it the purpose to enable the forklifts to get underneath? Yes, but they were not good enough for that.

Look at photo F, to be produced later, can you explain by reference to that photo the problems you described? There is not very much here, there are some on the lefthand side and only four on the righthand side, the waste mix.

20

Look at extreme righthand side of photo, the background is the computer waste on pallets? Yes it is.

And in front the bales of mixed waste? Yes.

Did you find you could not stow a third bale on top of the two? Yes.

30

They are also very narrow, the width is not or the base is small compared to the height. They are 4ft. wide, and when we put walking boards in between they were sticking out in between and we couldn't get another pallet underneath.

So if you had a tier of three bales with walkingboards between the weight would press them down? Yes.

40

So that you couldn't get another one in the bottom underneath? That is right.

Did you then decide to stow the bales of mixed waste two units high? Yes.

Did you have any other space available on the vessel to put them? No, those pads 7, 9 and 11 had some spare space in, plus 13, which I used.

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Court of New
Zealand

Could you have put them down in deck 1? No, that area was also booked out for timber from Australia and other heavy cargo. We need the heavy cargo in the bottom of the ship to get enough stability.

No. 5.2

Defendant's
Evidence
Bengt Harald
Anvin

10 At about 5p.m. on the evening of Friday, 26th March, Mr Paul Cash came down to the ship and saw you? Yes.

Examination
- continued

20 Tell us what took place? I was upstairs having my dinner when I got the phone call from my office on the wharf that Mr Paul Cash wanted to see me. I went down and met a rather angry gentleman who said he wanted his cargo to be shipped. I tried to explain to him why it wasn't possible to take more cargo and at that stage we were not sure how much we had to leave behind. So he mentioned something if you don't take all my cargo I will go broke. I said I don't know anything about the commercial side of it but this is all I can do for you because of the way the paper looks like.

30 Did you point out to him the problems you had had? Yes, I pointed out the units weren't very good. I said there was nothing wrong with the computer paper or the magazine paper but the other things I was not satisfied at all with. I probably used a swear word.

Look at document 89 in Volume 1, that is a telex from Mr Cash to Captain Andersen at ScanCarriers, read paragraph 8 of that telex? Yes (read).

40 Did you tell them the units were basically sound? I said the computer paper was OK and the magazine paper was OK but never said the mixed waste was OK.

Mr Cash says there that you had told him you had a lot to do with waste paper, recall saying that? No I don't recall having said that.

Have you in fact had any experience with waste paper? Yes I have had some experience with papers on conventional ships and also containerised in

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Court of New
Zealand

Australia and the United States.

Was that in comparatively small quantities? Small quantities yes.

No. 5.2

Might you have referred to receiving waste paper in the past? I am not sure about that.

Defendant's
Evidence
Bengt Harald
Anvin

Did you tell Mr Cash his bales were amongst the best mixed waste you had ever seen? No. I said something the opposite of that.

10

Examination
- continued

You said you used rather curt language? Yes.

You mentioned earlier the Roro ships were like a warehouse at sea. Is there any difference between the way goods behave in warehouse on dry land and in a ship at sea? Definitely, a warehouse on the shore should stand still, but a ship is moving all the time. The ship itself moves and also there are movements in the ship.

20

Is that the case even when you are working cargo at the wharf? Yes, a ship moves all the time because we are running a lot of machinery on the ramps, and they come in at different sides and it is impossible to keep a ship absolutely still all the time.

Is this a problem you have encountered before, with cargo being difficult to handle on a ship? Yes in the early stages we had to have the pallets stowed two high. And we had problem with that stacking up even in port.

30

You mentioned earlier that you had a wall of containers along centre line of ship? Yes.

Did you take any other steps after loading for the cargo? Yes, we lashed the stern end of the cargo so that it couldn't be changed or fall down.

40

Did you inspect those lashings at the port of Tauranga? Yes we found the lashings were loose as the paper was sagging down and we had to tighten the lashings more or less at every port.

Cross-
Examination

Cross-Examined Mr Clark:

You are attached to Central planning at Sydney? I am one of the superintendents.

Are you attached to Central planning and you know what is allocated on ships? I get the information in the telex, and also if it is carrying contract like the onion contract.

10 The agents for Scans do promise to pick up good quantities of cargo from time to time? Yes, but they have to be through the main agent.

I am interested in these onions at Tasmania isn't it? yes it is.

When had the Barranduna been scheduled into Tasmania? After the last port in New Zealand.

20 When would the schedule involving the call at Burnie have been settled? I would say a year beforehand. They promised to bring in so many ships, but that....
You - could be wrong on that? Yes.

And the Arabian gulf service wasn't finalised till very close to the end of 1981? Yes I think so. But the onions were not for the middle east but for Europe.

30 How much space was allocated to New Zealand on these 3 vessels that we have heard tell about? So far we have only talked about the Barranduna. Did you not hear that there was the Barranduna, Tombarra and Tarago? Yes.

Was the same allocation of space made to New Zealand for those 3 ships? I don't know.

40 Do you know if the space allocated to New Zealand for Barranduna? The tonnage was if I remember right 7,000 tons, but that is not my part at all.

Confirmation of space is done in Sydney isn't it? When the cargo is booked we plan the cargo, we lay it out.

Captain Andersen is a senior man in the company, much senior to you? Yes.

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Court of New
Zealand

—
No. 5.2

Defendant's
Evidence
Bengt Harald
Anvin

Cross-
Examination
- continued

In the High
Court of New
Zealand

Would you expect him to know whether the cargo had been booked or not, I presume he would know that as he is the boss of the New Zealand ports.

No. 5.2

Defendant's
Evidence
Bengt Harald
Anvin
Cross-
Examination
- continued

Would you expect the biggest bosses in Oslo to know where the cargo had been booked? I don't know on that sort of thing, I am not sure about that.

Look at the bottom of document 103 in the 2nd volume, it reads "I must say... heavy pressure": is that the same sort of thing you were talking about as the onions from Tasmania? I have never been involved in negotiations for contracts.

10

Is it the same as the onions from Tasmania? Yes, as that is the Australian scene.

Is the position then that you know about Australia but you don't know about New Zealand? Yes.

20

In the memo you referred to, you say Mr Cash referred to stacking of his cargo supposed to be double stacked or two high? I can't remember that.

Would you look at document 122, at the bottom of the page, last 5 lines:
"He said ScanCarriers.... comment on that"? Yes.

You did have a discussion then about them being 2 high? Yes. On the 26th March at 5 o'clock? Yes.

30

I want you to look at telex No. 59 in volume 1: looking at the last 5 lines again, have you read those? Yes.

This was a direction long before the ship reached Auckland? Yes. Were you not told about that? Yes I have seen that letter.

40

At the time? Yes I think I looked at this on the date.

It does refer to double stacking doesn't it? Yes.

So that now your thoughts are all collected, when Mr Cash asked as he did about double stacking

being intended, it was really inaccurate to say you couldn't comment on that as you could have commented and said yes, that is true? Well if you look at the height of what I mentioned in the telex, 8 1/2 ft, it means you utilise the height of the deck, but the pallets we were talking about of the mixed paper was not even close to that height.

I agree with what you say but the question is that it was intended to stack two high by the shipping company, your company? Yes, if 8ft 6.

You can't put 3 lots of 8ft 6 into 17ft, that is impossible? Yes.

Would you look at the small photo Exhibit 3, does that look OK to you? Yes. It is 3 high and supported by itself? Yes.

A good sort of pack for a 17ft stud? I can't comment on that.

I am not suggesting that was put on the Barranduna, I am asking questions to help with the rest of the case: You said in your evidence that you didn't even see the cargo until it was being loaded aboard the ship? No I didn't say that, I said I saw the cargo the same morning.

It was on the morning of the 25th that you first saw Mr Cash's cargo? Yes, that was the morning and it left the Friday night.

If I understood what you had to say in evidence, you unfortunately hadn't received a proper stowage factor from NZ? That is correct.

Its a hard world I know, but, even with people in court is it a fact that NZ let you down in that regard? That is right, yes.

But the wastepaper had been inspected by other people before you arrived? Yes, so I understand.

And accepted as being fit for carriage? I presume so.

This may not be your sphere, but if I put it to you that at no time did Scans reject or give a

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Zealand

No. 5.2

Defendant's
Evidence
Bengt Harald
Anvin

Cross-
Examination
- continued

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Zealand

claused bill of lading in respect of any of Mr Cash's cargo, would you accept that? I don't know that as that is not my side of it. I was purely there to load the ship in a safe way.

No. 5.2

Defendant's
Evidence
Bengt Harald
Anvin

In the olden days a mate's receipt was often given before we had a computer putting out bills of lading? Yes.

Nowadays even though you don't travel on the ship very much is not your function similar to that of the old mate? Yes it is.

10

Cross-
Examination
- continued

And if there is to be some exception taken and perish the thought a claused bill of lading, wouldn't that be your decision? I would have commented on the mate's receipt.

And you did? We didn't have any mate's receipt.

But you didn't ask for anything to be recorded on the bills of lading? I told these people what I thought about the paper, but then its not my side of it for the claused bills of lading.

20

Fork hoists can do a lot of damage to cargo if not used well? Yes.

What size were you using to load? I think they are 3¹/₂ to 4 tons, but I am not 100% sure about that. Between 3¹/₂ ton and 4 ton fork lift.

30

Did they all have tilting devices? Yes.

If a bale of waste paper falls from a distance and a strap should break, you agree it makes a great deal of mess? It does.

Almost unique in the quantity of mess that it will make in comparison with a hard cargo or even a soft cargo like wool? Yes.

40

And if you drop it once are you likely to have an even bigger mess if you start moving it at transshipment port on a number of occasions and at the destination port? Yes, it can be big.

Looking at this shipment with the wisdom of hindsight it would have been better to have had

bigger packed units for a 17ft. stud deck?
Definitely with the mixed waste paper. The other
units were all right. At least the wider units.

In the High
Court of New
Zealand

You have said that you might have used bad
language on the 26th March? Yes.

No. 5.2

10 Mr Cash hasn't made any criticism of your
language, in fact the impression I received in
evidence was that you were helpful to him. Would
that be right that you helped him fix up grades to
get some of the allotments completed? Yes.

Defendant's
Evidence
Bengt Harald
Anvin

You tried to be decent? Yes. First we started a
heated discussion and then he told me some of it
he has to have in the shipment so we went to the
shed and tried to take the lines.

Cross-
Examination
- continued

20 You were co-operating with him were you not to
help with the lines? That is the co-operation we
try to get all the time.

But you hadn't heard of it being suggested that
stuff would be taken overland to your next port of
call? I heard that only from Mr Cash.

30 From what you told us that wasn't a practical
suggestion at any time? No we didn't have any
more space at the next port either so it wouldn't
help.

So if Captain Robinson was suggesting that you
can't understand why? No.

Re-examined Mr Broadmore:

Re-
Examination

Are you involved at all on the commercial side of
ScanCarriers operations? No.

40 Do you negotiate with shippers over contracts?
No.

Is that true of both Australia and New Zealand
that you are not involved in those matters? I am
not involved in bookings at all.

You simply come in when the cargo is booked and
you are told what it is? More or less yes. If
they have a long contract they ususally tell us,

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Court of New
Zealand

—
No. 5.2

Defendant's
Evidence
Bengt Harald
Anvin

Re-
Examination
- continued

or with specialised cargo they tell us before hand what is to be on the vessel.

Did you deal with the working of the Tarago on voyage 68 or on the Tombarra on voyage 64? I can't remember if I had the ship Tombarra. I would have to look back.

You have colleagues who might well have had those ships? Yes.

Can you say by looking at the photo whether or not the unit is likely to be satisfactory? No you can't say that. All I said was that it looked nice.

At what time would you be able to say whether or not it was satisfactory? First you would have to try them on the forklifts and travel around and shake them. It is not a safe surface you are running on the ship and you would have to get movements similar to what you get on a ship. But I would prefer a trial shipment before I say anything about them.

In calculating stowage factor for cargo do you need to know anything other than the dimensions? Yes, you need to know the weight also.

A representative individual unit would have to be weighed? No that you can't do. You do an average when counting on some loss of space when you have a stowage factor.

For a stowage factor you need to know the number of units? Yes, and the approximate tonnage and the sizes to be counted on.

So all the weight of the goods is important? Yes it is.

Do you have any knowledge at all of the dealings with this waste paper prior to your arrival in Auckland on 24th? The first I know about the waste is when the unit list was sent to me in Sydney. I can't remember the date, but that was the first I knew about it. I rang NZ and asked for the stowage factors.

10

20

30

40

Dealing with loading this cargo, when would you expect any problem to emerge? We didn't expect any problem at all to start with.

In the High
Court of New
Zealand

So it just came to light as you were dealing with the cargo? Yes.

No. 5.2

When did you first realise that you were likely to run short of space?, That was when we had to go down from 3 units to 2 units in the loading.

Defendant's
Evidence
Bengt Harald
Anvin

10

At what time of the day would that have been? I can't remember exactly, It would be late afternoon I think on Thursday. We had only started with the good units then.

Re-
Examination
- continued

Remember whether you continued with the good units on Friday morning? No I can't remember the exact time when we started on the running out of the units.

20

Do you know when Captain Robinson and Mr Cash might have spoken about the overland transport? No I don't know that.

Is it an unusual thing for cargo to be transported overland? Not if we have a time factor where we can't finish cargo and we already have expensive labour in next port. Sometimes it is much cheaper to transport the cargo which is left than to stay another day in port, which happens quite regularly.

30

My friend put to you the question about mates receipts? Yes.

Recall when the last time was that you saw a mate's receipt? No I can't say. I have seen mates receipts still in Australia but you don't sign then any more.

40

COURT: I take it from what you said to Mr Broadmore that you are not aware of the type of contract under which the onions from Tasmania were carried? Not the details no.

Court

Would you for example know whether they were ordinary liner agreements or a contract? I think it was exclusive to ScanCarriers that year, I

Re-
Examination
- continue

In the High
Court of New
Zealand

understand there was a contract with ScanCarriers,
but I don't really know.

MORNING ADJOURNMENT 11.30 A.M.

RESUMED 11.45 A.M.

No. 5.3.

Plaintiff's
evidence Paul
Arthur Daniel
Cash

Cross-
Examination
- continued

PAUL ARTHUR DANIEL CASH - Cross-examination
continuing:

One of the topics dealt with yesterday was
commissions payable to agents of Aotearoa and we
discussed Mr Wilson's position. Were the figures
of \$10 and \$5 you gave me in US Dollars? Yes.

10

Do you remember I asked about one document in a
bundle dealing with commissions for Chopra and I
was about to move on to another one I couldn't
find? I remember the first one yes.

Look at this document now shown to you, is that a
telex to Chopra from you concerning commissions?
Correct.

20

Do you produce this as an exhibit? Yes. (Exhibit
"B")

What I am trying to establish is rate of
commission you were paying to Chopra, does the
telex set out the rate? More or less. 3% was paid
on hard white shavings, CPO, and ledger. With
regard to the other we had to take a lower rate on
Barranduna and I am not sure if the commission was
kept at \$9.50 or \$5 per ton.

30

Whatever it was we are talking of US dollars?
Correct.

So we have the position about payment quite clear,
is that a country where to do business you have to
make other payments of an incentive kind to get a
deal? Yes.

40

And in relation to the business that you are
telling us about would those payment have to be
made? Correct.

Is there a formula that you can give us to give us
some idea as to how much those payments would

be? It is normal practice for my agent to share his commission, or agents to share their commission either for waste paper or whatever he deals with.

In the High
Court of New
Zealand

So that comes out of the commission that you pay? Correct.

No. 5.3.

10 In your experience is there any additional sum over and above commission you might be called on to pay? Yes.

Plaintiff's
evidence Paul
Arthur Daniel
Cash

Returning to Exhibit "B", on mixed waste was that a percentage of the sum plus a further payment of either \$9.50 or \$5? It states here mixed waste 3% of - yes it is.

Cross-
Examination
- continued

20 Dealing with preparation of the company's accounts, whose responsibility is that? The accountants, White and Watson.

Who in that firm deals with them? Mr Watson.

30 As between your company and Mr Watson what is the arrangement for keeping records and supply of records? It is done at the end of the financial year. All bank statements are forwarded to Mr Watson along with cheque butts. A list of all exports along with copies of all export entries and summary of creditors and debtors and so forth.

Summarising, do you provide all the prime information and he puts together the accounts from your information? Correct.

40 Coming to shipments on other ships, the "Sun Opal" question arose before the negotiations with ScanCarriers? Correct.

You told us that ship was withdrawn? Correct, it got cargo somewhere else and sailed from Australia at the time with that cargo.

Did you have contracts for shipment on that ship? We had letters of credit. It wasn't for a specific ship but we had advised we had hoped to ship on the "Sun Opal".

In the High
Court of New
Zealand

And presumably your letters of credit were supported by contracts? I don't know what my agents arrangements were. I only know I took orders and provided Letters of Credit.

No. 5.3.

Do you know happened to the orders as result of withdrawal of ship? Yes the Letters of Credit expired.

Plaintiff's
evidence Paul
Arthur Daniel
Cash

The shippers were irate about that? I told my agents not to let it happen again.

10

Cross-
Examination
- continued

The "Sun Opal" was one of the problems you had with India? Correct.

After the Barranduna shipment did you ship on an SCI vessel Vishva Asha? Yes we did.

When was that? I can't recall the exact date.

Are you able to give us a period? I remember at the time it was when I was in India. I think we arranged that as a credit for that vessel. That would be late May or early June, I am not sure.

20

How much did you ship on that ship? I can't recall.

Are you able to give us some indication of the amount? Roughly 100 to 200 ton, I am not sure.

30

Was that shipment or did that shipment relate in any way to the cargo short shipped on Barranduna or any of the other contracts mentioned in document 191? No. That shipment was to Calcutta as I recall, and shipment to Bombay. A big difference in mileage.

If the bills of lading on the Vishva Asha showed a total of 234 tons, would that be consistent with your recollection of the amount that was going? I would say if you had that, that would be right.

40

After the Barranduna shipment did you also ship on a vessel called the George? We did.

How much was shipped on that? I think it was about 5 containers, possibly 60 ton. I wouldn't be held to those figures.

When was that? That was a fair time after, I think.

In the High
Court of New
Zealand

Can you give us a month? I know there was a shipment to India about October, I don't know if that was the vessel you refer to.

No. 5.3.

This is quite a few months ago.

10 Did the shipment on the George relate in any way to the short shipment or the goods referred to in document 191? I don't know where they were sold to. I can't recall.

Plaintiff's
evidence: Paul
Arthur Daniel
Cash

Would you look at document 181, look at that, has the name been highlighted? No it hasn't on this copy.

Cross-
Examination
- continued

20 Is that consistent with it being a shipment on the George? I can't read my copy I am sorry. That is correct.

Is the date of shipment at the end of June, beginning of July? Correct.

Does that also show the amount shipped? Correct.

Did you also ship on the Xin Hua Long? Correct.

30 Turn to document 173, does that show details on the shipment on Xin Hua Long about June 1982? Correct.

Does that relate in any way to the Barranduna contracts in December 1981? Not to my recollection.

40 Were there other shipments made with different lines after that period March 1982? There were other shipments made to India - there was one shipment sold to a Singapore buyer and he received the goods from the shipment in Singapore and he sold himself to India.

But all those sources of shipping were available to you in the period from March 1982 weren't they? Not correct. After the Xin Hua Long the shipping company went into receivership or

In the High
Court of New
Zealand

liquidation.

In the period after March and before the liquidation as you call it, that shipping service was available to you? Two shipments yes.

No. 5.3.

Plaintiff's
evidence Paul
Arthur Daniel
Cash

The Shipping Corporation of India was available to you? The Shipping Corporation after the next vessel decided not to come to NZ direct and they only accepted cargo for transshipment to Australia. The freight rate was uneconomic.

10

When was that? I can't recall the exact date, I am sorry.

Cross-
Examination
- continued

Are you able to give us an approximate date on recollection? No.

Nedlloyd was the other service you used later in 1982? Not in India but to Singapore and it could be transhipped to India? I stated I sold two to a Singaporean customer who sold it to India.

20

That continued to be available to you as a source? Correct.

You told us yesterday that the house you now occupy had been an asset of the company? Correct.

Is it fair to say that you have put all your assets into the company to support it? Correct.

30

And does that include things like a beach section as well as the house itself? The beach section was bought years before the house and was bought specifically to support our overdraft facility at the bank.

Would it be fair to put it that you really have no other personal assets to pay your debts as you put everything into the company? It wouldn't be correct. I had to sell a number of personal assets during the last year because of the position Scans put us into.

40

But even prior to March 1982 the house and beach section were already in the company? Correct.

Was your policy to do everything you could

personally to prop up the Company financially?
Correct.

In the High
Court of New
Zealand

10 Coming back to the position at the time of
shipment on the Barranduna, as far as the mixed
waste was concerned is the position that unless
you could be assured that it would all be shipped
in due course and a bill of lading issued for the
loaded cargo you wouldn't be paid for the mixed
waste? The position was unless all mixed waste
was shipped before end of March the Letters of
credit would expire. Therefore if we could not
get a bill of lading from the shipping company we
would not have been paid for the mixed waste.

No. 5.3

Plaintiff's
evidence Paul
Arthur Daniel
Cash

Cross-
Examination
- continued

We dealt with that yesterday? Correct.

20 Did you reach the position where you agreed to pay
the freight on the mixed waste after you received
the proceeds on the following ship? We were put
in a position by ScanCarriers

Do you agree or not? No.

30 You didn't agree to pay the freight? No. We were
put in a position by ScanCarriers where we had no
practical alternative and had to sign a couple of
documents agreeing to agree to a form similar to
one sent up by Scans to my lawyers. It had been
corrected a number of times both with the bank's
wishes and ScanCarriers'. We did sign these
agreement to agree because we had no
alternative. I considered it blackmail. Scans
well knew at that time the financial position my
company was in. In fact I had told Mr Anvin at
time of loading and also Captain Andersen on the
Friday.

40 Look now at document 115, is that a letter from
your company to ScanCarriers and East Asiatic?
Yes.

Is that signed by you at the bottom of the page?
It is.

Look at document 116, is that in the same category
as the previous one? It is.

At that time was there any question of a claim by

In the High
Court of New
Zealand

you in relation to shipments which you thought you would be making subsequent to the Barranduna? I don't quite understand.

Did these negotiations relate only to the short shipment on the Barranduna? Correct. We were still trying to negotiate for further space on further vessels.

So at the time of these negotiations there was no question of a claim in relation to a further vessel? No because we didn't have it confirmed that they wouldn't accept space. I think I had a meeting with Mr Andersen after this was signed.

10

Look at clause 5 of the draft;

Do you agree that the object of that clause was to put an end to claims on each side on performance of the agreements? MR CLARK OBJECTS

20

When you signed the letters 115 and 116, you were aware of the existence of the clause abandoning claim weren't you? Yes.

Coming back to clause 2 of the draft agreement, whatever else was involved it was clear wasn't it you were agreeing to pay the freight? MR CLARK OBJECTS

30

It was part of the negotiations wasn't it that you for your part would pay the freight? It was a requirement of the draft agreement as proposed by the shipping company.

Did you have legal advice? I did.

Were you advised about the agreement? I was.

Was it explained to you that part of what was proposed was that you would pay the freight? The draft agreement was explained, yes.

40

Did the explanation include your payment of the freight? Yes, we had to or this was all done because we were not going to get released bill of lading and it was done on last day of negotiation otherwise my company would lose between \$130,000 and \$150,000 US, there and then. Therefore we had

No. 5.3.

Plaintiff's
evidence Paul
Arthur Daniel
Cash

Cross-
Examination
- continued

no other alternative other than to go into receivership or liquidation or whatever. We needed the documents for shipment.

In the High Court of New Zealand

Were you also advised to sign the agreement by your advisers? We had no alternative.

No. 5.3.

Were you advised to sign the agreement by your advisers? I am not too sure, I don't know if they advised me or I advised them that ...

Plaintiff's evidence Paul Arthur Daniel Cash

At all events at the end of the day you signed the agreement? No.

You signed the letters? I signed the letters yes.

Cross-Examination
- continued

Look now at document 135, are you able to identify that as the correspondence sending the formal security proposed by the documents 115 and 166? I see it is addressed to my solicitors. I was never shown this document.

Did you know of its existence? My solicitor telephoned me and said he had received a rather long involved lot of papers from ScanCarriers and for me to sign.

Having now looked at the letter 135 does it appear to be the security document that followed from letters 115 and 116? It appears to be yes.

Do you know if there was any response from your solicitors? I don't know.

As a matter of shipping practice it is the shipper's obligation to prepare bills of lading? The shipper's yes.

And is it the practice to prepare the release? Yes.

And the negotiations in documents 115 and 116 were another arrangement.

This was an intended arrangement.

In relation to short shipment on Barranduna with shipment on Tarago, did you present a bill of lading for that? I did not.

In the High
Court of New
Zealand

Look at document 140, does that seem to be a proforma bill of lading for that shipment? It must have been. It certainly wasn't typed at our office or advised to us

No. 5.3.

But you knew in accordance with arrangements made you knew it would be shipped on Tarago? We were advised yes.

Plaintiff's
evidence Paul
Arthur Daniel
Cash

And you didn't pay the freight for that did you? We didn't.

10

Cross-
Examination
- continued

And you are aware as a matter of history a lien was claimed and the goods sold under the lien? I am aware of that yes.

MR CLARK OBJECTS

The other aspect of documentation was for the or related to bills of lading for the mixed waste that was shipped? Correct.

20

And after the tonnages had been calculated did you present a bill of lading for that? We did.

There was then some debate as to how that was to be treated as the freight wasn't paid? That is correct.

In the end was that the bill that had the freight not paid typed on it so that it could be negotiated under the Letters of credit? We had to accept the freight not paid bill of lading in order to get the bill of lading. This resulted many months afterwards and the Indian client refusing to take delivery of the goods and the bank debiting our bank account.

30

But coming back to my question, that was the bill of lading that had typed freight not paid so you could get paid under your letters of credit? Yes.

40

Were you paid under the Letters of credit? Initially yes.

When you received payment under that the freight wasn't paid was it? No.

And freight on that part of the shipment remains

unpaid? That is correct.

I want to come now to trade with Indonesia, when did you trade waste paper into Indonesia? We started the company trading waste paper into Indonesia.

When was that? From 1976.

10 Until when? Can I refer to my notes. Probably till 1979. Then perhaps once or twice after that.

At the time you started did you see that as the best potential market for waste paper? No, when I started the company we bought and sold old newspapers to Indonesia for wrapping purposes. We were not involved in supplying waste paper for pulp.

20 Did you run into problems shipping to Indonesia? We had problems yes. We have always had problems with space.

Did you run into problems with payment by your customers there? Yes we did.

30 Was it really because of difficulties in that market you ultimately dropped out? No because the Indonesia Government banned the import of newspapers for wrapping.

That question of Government policy is one that must concern you in every market you go to? It concerns everyone in every market.

40 Coming to claims arising from the Barranduna shipment, are you facing any court proceedings from your suppliers in New Zealand or buyers in India as a result of that shipment? No.

And is the position there are no claims arising out of those at all? No, the bank agreed to put the \$77,000 into my bank account. That was the claim. All suppliers have been paid.

But the matter with the bank is a claim as claim between the Bank in NZ and your company? At the moment, yes.

In the High Court of New Zealand

No. 5.3.

Plaintiff's evidence Paul Arthur Daniel Cash

Cross-Examination
- continued

In the High
Court of New
Zealand

No. 5.3.

Plaintiff's
evidence Paul
Arthur Daniel
Cash

Cross-
Examination
- continued

Looking at the contracts in document 191, are there any claims arising out of those? In dealing with the contracts that are or that you have for supply to India, you told us of Barranduna shipment and the other in document 191, are there any claims by the suppliers against your company arising out of those documents? Not that I am aware of.

I want to take you to the documents again, look at document 81, is that communication from East Asiatic to ScanCarriers on your wish to book further space? Correct.

10

Does document 82 look to be the passage of that request from ScanCarriers Wellington to head office? Yes. A carbon copy.

And document 86, is the reply from head office to ScanCarriers in Wellington? Correct.

20

Do you recall being advised by East Asiatic about the date of that telex that the space wasn't going to be available? I can't recall, I am not saying I haven't been advised.

Did you receive a response to your request? I am not sure if it was a request for booking on Tarago or the Tombarra, but I kept in touch with East Asiatic every day. It was one of those two shipments.

30

In relation to the Tarago on the documents we have seen isn't it likely you would have been told about the date of the last telex, document 86, that the space was declined? It is possible, I said I can't recall as one shipment wasn't advised.

The one on which you weren't advised there were a lot of requests by telex? A lot of requests by phone to East Asiatic and they may have put in on telex to ScanCarriers in the documents somewhere.

40

And after the 26th March were you continuing with negotiations in India in an effort to obtain orders? After the shipment we could not really afford to go anywhere.

10 You told us about subsequent shipments, so presumably at some stage you tried to get orders again? Correct. I did have to go to India again to try and sort out the problems and get the customer to pay freight up as we were told the shipping company wouldn't release the cargo. So I went to India to try to get the company who we sold to to pay the freight on the particular consignment in India and to set up a Letter of Credit for the balance on the Tarago for the amount of the difference.

When did you get the orders we were discussing in relation to the other shipments? I got the order for Vishva Asha when I was up there yes. That was when my agent was still talking to me.

20 Is the position that between the end of March and the end of May you made no attempt to get orders out of India? We made attempts to get orders for the short shipment.

So is the position that at the day of shipment you didn't have an order for that? We had an order for the full quantity but the letters of credit expired at end of March.

30 Did you leave it till May to try to get another order for it? My clients were very upset at not having the stuff when I had promised two weeks earlier it would be on the ship and they were not prepared to give me any further letters of credit at that particular time.

Did you leave it until May before trying to get another order? No I tried straight away.

40 While trying to get orders for the short shipment of mixed waste were you trying to get other orders out of India too? I can't recall. My concern was with regard to the mixed waste. I don't think so.

Do we take it that it was the end of May before you were in market for orders apart from dealing with short shipment? We were advised by Captain Andersen on 8th April or a day or two after that we were not allowed any space for the contract period.

In the High Court of New Zealand

No. 5.3.

Plaintiff's evidence Paul Arthur Daniel Cash

Cross-Examination
- continued

In the High
Court of New
Zealand

You got other shipments to India later in 1982 about the middle 1982, when did you try and get orders for further supplies to India? We may have been holding those letters of credit in February.

No. 5.3.

Is the position you can't tell us with accuracy what was going on? Yes, my company was in a shambles, that is an accurate description.

Plaintiff's
evidence Paul
Arthur Daniel
Cash

Prior to the incident involving the Barranduna, would it be fair to say there were a number of problems with the company in relation to financial matters? Yes we have always had growing pains.

10

Cross-
Examination
- continued

I refer you to some bank diary notes, but I want to know first whether you agree this is a fair summary of your problem: Dealing with that, the first problem with the bank was with liquidity and one of the reasons was undercapitalisation? One was undercapitalisation yes. The main reason was shortage of cargo space.

20

And there were others having regard to the size and nature of the business? Probably, but none that I can recall.

Secondly at least as far as bank is concerned, were there problems resulting from expectation as to when money was to come into the bank account? Yes there were certain payments from Inland Revenue for different export programmes that took months and months to come through.

30

And the third area of problem which appears from the bank is one of cheques not being met or cheques being bounced? That is correct.

I want to refer you to a number of documents containing bank diary notes, and ask if they are a fair reflection of events:

40

LUNCHEON ADJOURNMENT 1 P.M.
RESUMED 2.15 P.M.

Have you had an opportunity to look at bank diary notes to which I referred prior to adjournment? Yes.

Broadly do you agree they reflect the position

between your company and the bank? Yes.
Unfortunately the bank also thinks waste paper is
rubbish and not a valuable commodity.

In the High
Court of New
Zealand

I refer to documents Nos. 13, 14, 50, 64, 84, 113,
132 and 137? Yes.

No. 5.3.

10 I want to come to the point which His Honour
raised about the relationship between bill of
lading and letters of credit:

Plaintiff's
evidence Paul
Arthur Daniel
Cash

As far as the waste paper on the Barranduna is
concerned, do you say you had letters of credit
for all of that cargo? Correct.

Cross-
Examination
- continued

20 Did we discuss at the close last night an issue
about whether copies of all of the letters of
credit were available? All letters of credit for
Aotearoa that were available at the time were
discovered yes.

So if all the letters of credit you made available
were put into that agreed bundle they should be
put there? I don't think all the letters of
credit formed part of the agreed bundle.

30 As fas as all of the waste paper booked for
shipment on Barranduna you had letters of
credit? We had letter of credit for 550 ton. We
only shipped 200 ton, something like that.

Coming to the short shipment, of mixed waste, did
you have a letter of credit for about 250 tons
mixed waste which was in fact shipped on
Barranduna? Correct.

40 And the bill of lading that was ultimately issued
for that was the bill that was noted freight not
paid? Correct.

And for some reason that isn't entirely clear the
documents were rejected at some stage of
negotiation after you had been paid out by your
bank? Correct.

In relation to the mixed waste booked for shipment
on Barranduna but not shipped, did any letters of
credit which you had expire as at 31st March?
Yes. The shipping date expired 31st March we were

In the High
Court of New
Zealand

No. 5.3

Plaintiff's
Evidence
Paul Arthur
Daniel Cash
Court

Cross-
Examination
- continued

negotiating for 15 days after.

And was the mixed waste which was not shipped on Barranduna subsequently shipped on Tarago? We know so now.

Did you have a Letter of Credit for that cargo?
No. It was never paid for.

COURT: Did you originally have a Letter of Credit for that cargo and it expired? yes. 10

COUNSEL: Is that a Letter of Credit which has now become available as a result of discussions we had at close yesterday? Yes.
Did you have the Letter of Credit with you? It is in my box.

Is the document now shown to you a letter of credit relating to part of the cargo booked for shipment on Barranduna but not shipped? 20
Correct. I produce that as Exhibit 7

Would you turn to document 44, does that letter reflect some of the problems you had with cheques bouncing? Yes.

Is it correct that in late 1981 there was a cheque on an SCI shipment for about \$11,000 which bounced? That is correct. 30

Did you have a similar problem with cheque for Nedlloyd? That is correct.

In fact the first shipment was the one that bounced there too. That is on record.

Dealing with the market in India, would you agree there were 3 main factors that were in the difficult market, first Government policy, 2nd in competition for among freight rates for various destinations for the year, and finally a fluctuating market prices there? I don't agree with any of those. 40

Do you say that there were no competitive freight rates? There were competitive freight rates from Singapore, Hong Kong. But there was no competitive freight rates from the main supplier

in the United States.

But there was competition for the market? There was competition all markets. We had enquiries from Singaporean party, one Hong Kong party, all wanting us to supply clients in India.

10 One of the facts that determine competition is ability to provide a freight rate? Yes, and tonnage.

Are you aware that in bundle of agreed documents there are a number of documents from what you call your Indian file? Yes.

And are you aware of correspondence from your Indian agents of various freight rates amongst those documents? I can't recall.

20 Would you look at document 3, 3rd paragraph, that is a complaint about the freight rate isn't it? That is correct.

That suggests it was too high to be competitive? We are talking of freight rates from Hong Kong. They were getting supplies from Hong Kong. At that stage freight rates were high but they were coming down.

30 Document 34, talks about a freight rate of \$100 US being unworkable? The Shipping Corporation of India would not accept a freight rate of \$100 US at that time free in, which means the shipper here pays the costs.

That was because there was severe congestion in the port of Madras. We were asking for space for southern India and we had negotiated for the Sun Opal which had been established.

40 Look at document 205, that refers to an old cardboard carton price which is criticised as being very high because the US shipping directly \$170 from India, and from Hong Kong at \$155? Yes.

That signifies a low freight rate? Have you seen the quality of OCC from Hong Kong. This telex would have been sent towards the end of 1982 I would say. It talks of a lot of CPO coming from New Zealand via Singapore. That was in fact our

In the High
Court of New
Zealand

No. 5.3.

Plaintiff's
evidence Paul
Arthur Daniel
Cash

Cross-
Examination
- continued

In the High
Court of New
Zealand

shipment.

Doesn't the price indicate a low freight rate?
No.

No. 5.3.

Does it depend on what the cost price of the goods was? That is correct. It could also signify the Americans were getting charter vessels into India.

Plaintiff's
evidence Paul
Arthur Daniel
Cash

Aren't the indications the freight rate was low? The freight rate was to have been about \$100 to \$120 US for USA. Hong Kong I don't know about.

10

Cross-
Examination
- continued

The other area of difficulty in India was the market price you would obtain? No problem during the contract period.

Did the market price drop away after March 1982? Not to any great extent, no. Not during the contract period that is.

20

Didn't you tell us you had to accept some lower prices? That is correct.

Court

[?Court] Counsel has just said when you went in March you had to accept lower prices? That is correct. The contracts we still held were at a higher price. One of the contracts was for 400 ton pure white which would have taken us up to the end of the agreed period.

30

Cross-
Examination
- continued

Among documents in your Indian file are you aware of correspondence about market prices that would be obtained in period after March 1982? This is quite normal trading practice for a seller to quote a higher price, a buyer quotes a lower price, and meets somewhere in between. This is what we have done with ScanCarriers in the freight.

On the face of the correspondence in Indian file it seems there was quite some competition in market price? I wouldn't say that no.

40

On the basis of what you said in previous answer, wasn't it a matter of negotiation to get the price down? As a matter of direct negotiation both down or up. As previously stated the prices we had to negotiate down for the Barranduna.

Were your Indian customers telling you there was a higher price available - that they could obtain a better price elsewhere? Correct, that is standard procedure.

In the High
Court of New
Zealand

You disagreed also on the question of Government policy, but in fact if the Government policy changed that would seriously affect your competitiveness? If it had changed, but it didn't.

No. 5.3.

Plaintiff's
evidence Paul
Arthur Daniel
Cash

Yesterday I asked about previous problems in waste paper in India, and in particular as to the packaging of waste paper, and you told me there had been no problem, is that right? I can't recall saying that.

Cross-
Examination
- continued

Do you remember any problems arising in connection with packaging of waste paper to India prior to shipment on Barranduna? We had a problem, yes.

Look at document 69, did you send that telex as a result of the problem that had occurred? I sent that telex to Ron Taylor yes.

Was that as a result of the problem that had occurred you told me about in the previous answer? I am not sure.

At all events at that stage you were aware of the problem with loose strapping? I realised from deliveries to the Dalgety Shipping agents for Shipping Corporation of India that the bales or ties of mixed waste paper or the straps couldn't be tightened for leaving the paper in store.

Look at document 110, the 2nd last paragraph, is Chopra reporting to you about a problem with bales? Yes.

Was that the problem shipment to which you referred earlier? Yes it was, in respect of the wharf.

That is the same problem as referred in the telex today, 17th April 1982? Yes.

Is it correct that the letter of credit issued for

In the High
Court of New
Zealand

No. 5.3.

Plaintiff's
evidence Paul
Arthur Daniel
Cash

Cross-
Examination
- continued

the Barranduna all provided that transshipment was not allowed or alternatively that transshipment was prohibited? When we negotiated I am pretty sure all letters of credit on the Barranduna would have allowed transshipment. If they had had transshipment prohibited we would have requested through the bank to have that clause amended.

Was there subsequent correspondence or documentation in relation to letters of credit? If the transshipment was not allowed, yes there would be by the bank. I am not too sure.

10

Look at document 51, towards bottom is a box headed "special conditions documents"? Yes.

Above that what does it say? Transshipment not allowed.

Was that a Barranduna letter of credit? Not for Calcutta. Initially when set up it was going to be used as shipment on Barranduna and would be amended, but when it was first established it was for SCI for Calcutta. Barranduna wasn't accepting shipment for Calcutta.

20

Look at document 70 paragraph 7, six lines down, does that provide partial shipment permitted and transshipment prohibited? Yes.

And that is in the letter of credit? Yes.

30

Document 79, paragraph 8, the position re transshipment is the same? Yes. And it is a Barranduna Letter of Credit? Yes.

Document 80, is that another of the Barranduna Letters of Credit? Yes I would say so.

And under paragraph 8 transshipment is prohibited? That is correct.

40

Do you say that there is some further documentation? I had been advised by the opening bank that the Letters of Credit had been amended. Prior to when I established the Letter of Credit the bank was aware it was for transshipment.

And wanted to prohibit transshipment? The Barranduna was going to Dubai first.

In the High Court of New Zealand

These Letters of Credit related to contracts entered into at beginning and middle of March 1982? Correct.

No. 5.3.

They required shipment by 31st March didn't they? Yes.

Plaintiff's evidence Paul Arthur Daniel Cash

And when you negotiated the contracts you knew shipment was to be on the Barranduna? Correct.

And you realised that transshipment would be required? Correct.

Cross-Examination
- continued

Did you tell your agent or your customer about shipment on the Barranduna? Yes.

With transshipment? Yes.

How do you explain then all those Letters of Credit prohibiting transshipment? It might have been the Union Bank insisting on standard practice.

I saw one Letter of Credit didn't require prepaid freight bill of lading. That was most strange. Clarify the position regarding export to Thailand, did you tell us the value was a million dollars? About that yes.

That was on what - about 3,000 tonnes? Yes.

Did that value include the freight? It did.

And the f.o.b. value would have been much less than that - a million dollars? No. Freight rate at the time we were dealing with Bangkok was about \$75 to \$80. It is now \$85 a ton. When I said about, I mean about.

You refer to some \$40,000 travelling expenses, is that the visit to India at end of May? No it is not - it is all my visits I made to India, and there were about 4 or 5 of them in total, plus a visit to the United States.

When did they all take place? The first visit

In the High
Court of New
Zealand

took place in 1980, the 2nd visit was in July 1981, I don't know if there was a visit after that until mid March. Then there was another visit late May early June. And the visit to the States I think was about September 1981.

No. 5.3.

Is that figure of \$40,000 an estimate of what was involved by way of expenses? A very rough estimate.

Plaintiff's
evidence Paul
Arthur Daniel
Cash

And there would of course be an expense of the business which was tax deductible? Yes.

10

Cross-
Examination
- continued

So the net cost is significantly less? That is correct, yes.

Re-examination

Re-examined Mr Clark:

My friend asked you yesterday whether it was fair to say you would provide bills of lading, and he said look at document 83A: if you look at 83A, and then turn it over, tell me if you have ever read the 23 clauses set out thereon? No I would need a magnifying glass.

20

My friend asked you about what he suggested were alternatives between liner arrangements by which I thought he meant bills of lading, and something which is Contracts of affreightment, I would like to know whether or not you have ever been offered a contract of affreightment? No.

30

Have you ever seen one? No.

Have you ever heard of the usual terms in regard to deadfreight? I do now.

Had you in February 1982 heard of any requirement as to payment or not of dead freight? No.

40

You were cross-examined at page 25 etc. in regard to Mr Anvin, did he swear at you or about you when you met? He probably used a bit of bad language but the conversation was very amicable.

Did he give you some assistance before the ship sailed that night? Yes he did. There were still all other grades of paper on the wharf and he saw his way clear to try and attempt to get as much

tonnage of that on as possible as it had a higher value.

In the High Court of New Zealand

You have now strangely had benefit of hearing his evidence this morning, do you wish to alter the evidence you gave when I was speaking to you or my learned friend was speaking to you? No.

No. 5.3

10 COURT: Who physically prepares the bill of lading? Myself or my staff. Although you say you have never read conditions on back of Scans. bill were you aware there were conditions there? Oh yes.

Court

COUNSEL: You produce as Exhibit 8 advice as to Letter of Credit which in contrast to some discussed has no prohibition against transshipment but expressed difficulties in transshipment? Yes.

Re-Examination - continued

20 GORDON HALL LEWIS (Sworn)
I live at 14 Talavera Terrace, Kelburn, Wellington.

No. 5.4

You are at present a director in the trading department ;of World Investment Co. Pty. Ltd in Wellington? Yes.

Plaintiff's Evidence Gordon Hall Lewis

30 But for some 22 years you served in the Royal NZ Navy having earlier obtained from Victoria University a Master of Arts degree? Yes.

Examination

You concluded your service in the Navy with rank of Commander, having been training commander on the ship Philomel? Yes.

You became associated with the International Section of our Government firstly in 1968 where you served for some 4 years in Japan? That is right.

40 You then served with our High Commissioner in New Delhi between 1974 and 1975? Yes.

And then posted for a short term to Teheran? Three years.

You weren't there when trouble started? For a little while.

In the High
Court of New
Zealand

No. 5.4.

Plaintiff's
evidence Gordon
Hall Lewis

Examination
- continued

And in relation to this case you were appointed to Bangkok in Thailand in 1978 and served there as First Secretary (Commercial) to the Embassy and Trade Commissioner, which are different responsibilities but one person carries out both responsibilities? Yes.

During your term you had some dealings with Mr Paul Cash? That is right yes.

I think that you are aware - I show to you a plaque indicating High Priority Status to Aotearoa in period from 29th October 1979 to 29th October 1980, with signature which purports to be that of Secretary of Trades and Industry? Yes.

I ask you now whether or not you had enquiry made by that Government Department of Trade and Industry as to the trading activities of Aotearoa International? Yes I did receive enquiries from Department of Trade and Industries concerning Aotearoa International and whether or not I could recommend that company for this particular high priority status. And I did recommend that they have that privilege.

Did you hear the status was accorded? I eventually discovered that it had been.

In the course of your duties while in Bangkok did you have a number of meetings or enquiries concerning the business that Mr Cash was trying to establish in regard to export of waste paper to Thailand? Yes I did.

I don't expect you follow individual contracts, that is not part of your job? Yes, in some cases I follow particular opportunities that were followed by Mr Cash.

Were you concerned as Trade Commissioner with the shipping services, conference or otherwise, being afforded to low freight paying forestry commodities such as paper? Yes I do recall there was something of that nature arising. Mr Cash I knew had been having trouble with the product.

Did you think the matter sufficiently significant to take up question with shipping division of

10

20

30

40

Trade and Industry Department? Yes I did.

There will be produced at a later stage a letter which at this stage I show to you of 29th October 1979, which in its Xerox form has a signature, that would be yourself would it not? Yes.

10 In that letter you said among other things that Mr Cash had some contacts in Thailand. "We have a high regard for his business ability and believe that given constructive financial assistance to facilitate the purchase of a shredding machine he would be able to export... to Thailand and also other markets", I take it that your regard or you did have a high regard for the business ability then demonstrated to you from your knowledge of the man? That is right, yes.

20 Did you have any observation to form any opinion as to his character? I was aware the whole time Mr Cash was a good solid operator, capable as an ex builder, and a person relative to many of the exporters I dealt with was one of the best and certainly a very worthwhile citizen.

Have you been in court at all before today? No I haven't.

Cross-examined Mr Broadmore:

30 Are you aware of the purpose of the High Status Award? Yes.

40 What is it? It is the object of it, to have a policy implemented by Department of Trade and Industry whereby certain exporters would be given priority so far as assistance by the Trade Commission Service. That priority would be accorded where the Department of Trade and Industry, on recommendation of trade commissions, were given to understand that certain exporters were well worth while assisting, not only for normal export incentives but also by additional assistance in accordance with the status accorded. This special status accords to them.

So that amounts to a direction by the Department to overseas representatives to do their best for the holder of this status? Yes.

In the High Court of New Zealand

No. 5.4

Plaintiff's Evidence
Gordon Hall
Lewis

Examination
- continued

Cross-Examination

In the High
Court of New
Zealand

And the status is held for only one year? I am not too certain of the duration of the status.

You are not in a position to say whether or not the status would be continued for another year or what is done to secure extension? No.

No. 5.4.

In this particular case the status was not brought to my attention again.

Plaintiff's
evidence Gordon
Hall Lewis

So it might not have been renewed as far as you are aware? It may not be.

10

Cross-
Examination
- continued

Are you aware whether there are any financial or taxation advantages? Not to my knowledge.

Do you know whether scheme is still in existence? I believe it is. I enquired in 1981 from the Department and it was still going then.

Do you know to what extent major exporters took advantage of the system? It is very difficult to measure.

20

Do you come across it often? Yes I was very often asked my opinion of firms whether to recommend them or not.

Turning to the letter you wrote on 29th October 1979, that refers to a letter from the DFC dated 4th September 1979, recall what was in that letter? Would you care to recall my memory.

30

You wrote that letter I expect in response to your overall duty in the way of helping an exporter? Yes, that was the primary object one could say although in this particular case I was aware particular items of equipment would assist Mr Cash in his exports. The item of equipment was expensive.

40

Are you aware whether or not he bought it? I don't know if he bought it.

The object was to enable him to get the finance to buy it? Yes.

You said in the 4th paragraph of the letter that you had a high regard for Mr Cash's business

ability, but I take it you never reviewed his financial accounts or anything of that nature?
No.

In the High
Court of New
Zealand

You were unaware in detail of the financial strength or otherwise of his business? Not directly aware of his finances but I was aware he had started a business at that time in a small way and it was very effective, a good business.

No. 5.4

Plaintiff's
evidence Gordon
Hall Lewis

That is a sort of label you get, he was very successful, he had a good product, and he must have been able to impress the people who wanted that product.

Cross-
Examination
- continued

Re-examined Mr Clark:

No questions.

PETER KENNETH SHEPHERD (Sworn)

No. 5.5.

I live at Linden Street, Linden, Wellington
You are the chief man of a firm and proprietor of same firm known as Central Trading Company in Petone? That is true.

Plaintiff's
evidence Peter
Kenneth Shephe

Your business is dealing to a large extent with waste paper, you collect paper from the likes of INL? Yes.

Examination

The largest newspaper proprietor in Wellington?
Yes.

And you collect from other specialised printers such as Alex Cowan & Son, specialising particularly in upper grades of waste, refer to computer printout paper? Our accounts have a higher grade of paper which mainly consists of envelope paper.

There has been a letter dated 4th March, 1982, on high grade paper, the original of which would be addressed to you, and you had in your possession since that time, and is No. 56, in the documents before the court: that letter came to you at that time? Yes.

It started off by writing to confirm the good news in its terms? Yes.

In the High
Court of New
Zealand

Did you regard it in that light? I did.

It had something to do with price being different from other price outlet for business? That is correct.

No. 5.5.

You had some prices set out there, tell us how they compared with Forest Products prices, higher or lower? Much higher.

Plaintiff's
evidence Peter
Kenneth Shepherd

Were you intending at that time and did you in fact make supply of grades of waste paper to Mr Cash's firm? Yes.

10

Examination
- continued

Would you now refer to invoices 995 and 996 of your business?

AFTERNOON ADJOURNMENT 3.32 P.M.

RESUMED 3.47 P.M.

20

I now show you invoices of your firm both bearing date 19th March 1982 addressed to Aotearoa International numbered 0995 and 0996; do both those invoices relate to a waste paper consignment to Bombay for loading on vessel at Barranduna at Napier ex NZ Railways? Yes.

The first invoice refers to 46 pallets with a gross weight of 49940 tonnes, and a tare to take account for pallet weight of 1150, giving a net weight of 48.780 tonnes; can you recall what grade of paper that referred to? Yes that type paper would be white unprinted paper.

30

The 2nd item, 14 pallets of ledger paper, with net weight of 15.040 tonnes, and then finally there was 13 pallets with a further net rate of 13.275 tonnes, that refers to CPO as grade, what does that mean? Computer paper.

40

Both invoices have important word paid on them, and has the obvious meaning you were paid? Yes.

Reverting to the letter Mr Cash wrote and the good news he thought he had, document 56, had you had any discussion of intent to supply more waste paper products over next 2 months or say 6 months

of 1982? Yes.

Tell us what, about what quantity would you propose to supply?

I would say that I would have been able to extend my business by approximately an additional 50 tonnes per month.

10

What do you supply to Whakatane Mills at the present time in the nature of kraft? I would supply approximately 15 to 20 tonnes per month.

In the Wellington part of New Zealand market there is waste paper in under or over supply at this time? In what respect.

Do you collect more if you could find a market for more? Yes. I could get more .

20

You have said that the prices being paid by Mr Cash were better than the competition? That is correct.

It has been suggested that Mr Cash prior to 1982 was not good at trade? My experience was that all his bills were paid.

30

Did any business after the Barranduna transpire of the dimension that you earlier mentioned? No.

Cross-examined Mr Broadmore:

Do you deal in other commodities apart from waste paper products? No.

Does the waste paper business the only context in which you have dealt with Mr Cash? Yes.

40

What sort of premises do you have in Petone? Its a building which consists of square footage of 5,000 sq. ft. The external area is approximately another 6,000 ft.

What sort of quantity of waste paper could you hold in your warehouse? 100 tonne.

Would that be the most you would hold at any partiular time? If I squeezed more in I may be

In the High Court of New Zealand

No. 5.5

Plaintiff's evidence Peter Kenneth Shepher

Examination - continued

Cross-Examination

In the High
Court of New
Zealand

able to get more, I don't know.

How much do you usually have in your store? I think I have had 70 tonne.

No. 5.5

That would be the most you normally have? It could be the most.

Plaintiff's
Evidence
Peter Kenneth
Shepherd

Is it the most you have ever had? No I have had more in store.

Cross-
Examination
- continued

How much do you normally hold? I normally hold up to 40 or 50 tonne per month. it varies.

The shipments that you have made to Mr Cash in past years, have they normally been direct to some boat for shipment? Yes.

You would arrange transport to a wharf shed or ship's store direct from your store? Yes.

You would have the capacity would you to hold in your store pending shipment the quantities of paper mentioned in Mr Cash's letter of 14th March? What quantities are they.

Would you look at document 56 of volume 1 of the documents? Yes.

You couldn't handle anything like the quantities mentioned there, or you couldn't have stored them? I am looking at item 56, but I can't see the quantities. They are not quantities here.

In that letter you received it says that he is holding orders for tonnages of waste paper listed there? Yes.

I asked whether or not you could store in your store anything like those tonnages? No I would not be able to hold them.

Is it the case that you would be able to supply Mr Cash only tonnes of the order of 70 tonnes per month? Yes, most likely.

Court

COURT: What sort of paper would be comprised in those tonnages? The type of paper would mainly consist of pure white computer printout, and white

10

20

30

40

ledger.

In the High
Court of New
Zealand

Re-examined Mr Clark:
No questions.

NIGEL REMINGTON WILSON (Sworn):

I live ordinarily at Forge Farmhouse in the
village of Goudhurst, in Cranbrook, Kent,
England.

No. 5.6

Plaintiff's
evidence Nigel
Remington Wilson

10 Are you a member of the small family firm known as
Fairhill Enterprises? Yes I am.

Examination

Who is the other member of that firm? My wife.

Were you previously employed by the firm known as
H.D. Hackett International? I was.

20 That firm included in its business being a
merchant in paper board paper bulk, some waste
paper as well? yes.

Were you previous to that with a firm known as
Limehouse Paper Mill in the wastepaper division of
those mills? Yes, the correct name is Limehouse
Paper Board Mills.

30 With one brief interlude you have been in the
paper industry for some 25 years? That is
correct.

How long have you known Mr Cash? I have known Mr
Cash for about four years.

Was that when you were still with H.D. Hackett
International and came to Australia and New
Zealand about some time when you came? Yes.

40 When did you come to NZ and Australia? I can only
be approximate as I haven't got my passport with
me, but it was during 1980 I believe.

How long have you been on your own account in
Fairhill Enterprises? I have just been on my own
for just over 2 years.

About what is your firm's monthly turnover or
annual turnover, what sort of business do you do
now? Are you talking in terms of value dollars or

In the High
Court of New
Zealand

pounds? I would say, I must give it in US dollars as I so conduct my business. It is approximately \$90,000 US per month.

No. 5.6.

When did you first visit India? I had a very brief visit during I think it was February 1978.

Plaintiff's
evidence Nigel
Remington
Wilson

Had you ever done any business with India before then? I had only corresponded in telex but not actually delivered any tonnage to India before that year.

10

Examination
- continued

How many times have you been to India in totality? 9 times in all.

You were in the court at the time when the case was opened by myself as counsel and heard me say something of the potential of the Indian market in relation to the exportation from this part of the world of waste paper? Yes.

20

What are your views, fairly shortly, as to the potential of the Indian market for the importation from Australia and NZ of waste paper at the end of 1981 and for the six months thereafter? I would say that at the time the possibilities of placing tonnage from Australasia were extremely good. Why? Really for two reasons. Firstly, because the quality of the wastepaper having seen it myself was probably better, certainly than the American and probably better than the European quality, and secondly

30

Was there any reason for the quality being better? Primarily because most of the paper and board - most of the paper produced in New Zealand is from a virgin fibre.

And more so than from the other producers of waste in western world? Yes, without going into long discussion over quality that is correct.

40

And the 2nd reason for the potential that you saw? The second reason I thought at the time lay in relation of Australasia to India in terms of distance, in other words, being not so far away.

In india do you know whether in the 70's at any rate there was any restriction on duty on

mechanical pulp and whether there is still as a matter of Government policy? As far as I know the only restrictions in force before 1978 and after was one of the cost of the material and therefore they were not able to import greater quantities especially since 1978.

In the High Court of New Zealand

No. 5.6

10 Pursuing that, about what in 1980 would have been the cost of a virgin waste pulp e.g. ex Putaruru or Kinleith? I cannot give an exact figure because I don't know the prices in pulp.

Plaintiff's evidence Nigel Remington Wilson

About what would be the price in Europe of white bleached pulp of or suitable for making stationery, envelopes, that sort of thing? At the present time the price is around \$400, maybe up to \$450, in Europe. That is US dollars.

Examination - continued

20 Did that price which is of a commodity that still has to go through manufacture process? yes.

Any significance in the content of India price structure in that situation? If you mean its a question of being too expensive for the Indian market, that is correct. It is an expensive raw material for paper making in India.

30 Can you tell us what indians use for their small paper mills and medium size paper mills of their home grown products? yes, their main usage of raw materials consists of rice straw, bagasse, and waste paper.

Did you send a telex on 20th Jan 1982, to Mr Paul Cash speaking of your coming to NZ with e.t.a. for 29th Jan? Yes.

40 Had you previous to that formed an association with Mr Cash especially when he visited you on a couple of occasions in the UK? Yes.

What was the principal matter at end of 1981 the 31st December 1981 of the business that you were discussing? The basis was one of supplying India through my own contact of significant tonnage and I had already at that time indicated to Mr Cash the sort of tonnage figure that India would be prepared to accept having first verified from Mr Cash that the tonnage was available here.

In the High
Court of New
Zealand

Would you please go from that to document 18 which is headed Wander G, and concludes Nigel, and confirm that was your telex with the original still in your possession? Yes.

No. 5.6.

Plaintiff's
evidence Nigel
Remington
Wilson

Chopra we heard was your agent and became associated with the firm of Aotearoa on the commission basis for the two of you? That is right.

I ask you to read papragraph 6, and then to comment beriefly? (read).

10

Examination
- continued

Did you, turning over the page, only a few days later have to advise Paul Cash that the ship the Sun Opal had been withdrawn from service? Yes.

Can you tell us whether Mr Chopra came to NZ with you in January 1982. No unfortunately Mr Chopra could not get a visa and had to stay in Singapore.

20

Did you come out by yourself? Yes I did.

Tell us when did you arrive in NZ? I think it was on the evening of 28th January.

Did you go with Mr Cash shortly after your arrival to a shipping agency East Asiatic Co and have discussion there as to shipping? Yes we did.

30

Would you tell us who were present at such a discussion? I went with Mr Cash into the office and saw Mr Teskey. As far as I can recollect he was the only gentleman from that company present.

Did you have in your mind what you were looking for in the nature of time and volume of waste paper to be carried forward to India? Yes.

Did you or Mr Cash in that discussion tell Mr Teskey what it was you were looking for in both time and volume? Yes we did.

40

Mr Cash and I knew in advance or more correctly I brought with me indications of the tonnage that could be accepted by India from NZ.

This was a figure of about 5 to 6,000 tonnes of

shipment in the period February or March through to July 1982.

In the High Court of New Zealand

Did you ascertain or try to ascertain from Mr Teskey the space available for such shipments? Yes we did.

No. 5.6

10 Did he tell you anything about the capacity of ScanCarriers vessels going to Arabian gulf for transshipment from Dubai to India and Pakistan? Yes he did and he showed us a diagram of the ship and explained and because of my interest in ships how the cargo was loaded on different decks, but I cannot at this moment recall the exact capacity but I think it is somewhere in the region of 6,000 tonnes.

Plaintiff's evidence Nigel Remington Wilson

Examination - continued

20 Can you remember what time of the day you went to see Mr Teskey? I can't recall the exact time of day although I believe it was late morning. Mr Cash and I went there after a telephone appointment to try and find out whether ScanCarriers would be able to offer us space on their ships for the tonnage we had in mind and at which freight rate. I think we discussed the freight rate first and we told him that we needed a very good competitive rate and at that time I believe a figure of \$140 US was mentioned. As for space, he told us that there was no problem at all, that the service was only beginning, and that there would be no difficulty in carrying our projected monthly tonnage of around 1,000 metric tons. In fact I do recall him suggesting that the vessel were only likely to be half full. After a little while we got back to the question of the freight rate and we asked Mr Teskey if it was possible to reduce the rate to \$120 US per metric tonne. He told us that he thought this would be possible on a promotional basis as it would help not only ourselves but it would help to fill the ships on that run. I recall that he agreed to this rate and would confirm to us by telex. I think in a nutshell that is what happened.

40 Were you still in Auckland on 3rd February? Yes I was.

Were you apprised of the receipt of a telex document 39 in the volume of documents? Yes

In the High
Court of New
Zealand

indeed.

Did you think enough of it to take a copy for yourself with you back to India? Yes we were delighted and I did take a copy with me.

No. 5.6.
Plaintiff's
evidence Nigel
Remington
Wilson

I don't think you had any further dealings with ScanCarriers either before or since the time that you described in evidence, direct personal dealings that is? No. I had no further discussions.

10

Examination
- continued

Had you intended to go back to India when you arrived here at the end of January? Immediately that is? It was my intention but it was not fixed right at that time.

Did you in fact proceed to New Delhi having regard to the information in that telex document 39? Yes I told Mr Cash that I must go back directly to New Delhi as soon as possible so as to conclude the contracts.

20

Did you have a measure of success in India while you were there in February 1982? Yes, Mr Chopra was pleased with the result of my visit and after the first shipment Mr Chopra promised me further letters of credit to follow, directly to Aotearoa.

Aotearoa was dealing with Mr Chopra by your courtesy as your agent initially? Yes I think you can say that.

30

Did Mr Cash provide the funds with which to finance your trip to NZ in January 1982? No.

Who did? I financed my own trip to India and Australasia and back.

Has Mr Cash financed your trip to NZ in June 1983, this trip?

40

Court

COURT INTERPOSED

Examination
- continued

Turning to a different topic, how long did you stay in India, a few days or less than that in February 1982? I had proposed to stay I think one day and I ended up staying three days.

By the time you left about how many tonnes of

orders had been arranged? I would think - a firm order was Letter of Credit - I think the tonnage was about 1200 tonnes, with a further monthly tonnage of somewhere around 900 to 1,000 tonnes, up until shipment before the end of July 1982, which was the limit date upon which we had a freight agreement.

In the High Court of New Zealand

No. 5.6

10 Can you tell us anything of the prices that you were attempting to get or did get yourself as Fairhill Enterprises in India in 1982? Yes.

Plaintiff's evidence Nigel Remington Wilson

20 In general terms how was the market in the year 1982, did it vary very much? I think my first big contract on my own Fairhill account was arranged in May of that year at a price of \$375 US c.&f. Bombay, and that was for 300 tonnes of a grade that we call NCR white. In June I had a repeat order for the same quality at the same price and also another grade called currency cuttings, and that was at a price of I think \$250 US tonne c.&f.

Examination - continued

Have you sent mixed waste or old cardboard boxes yourself in the last year or ever? Not on my own account, no.

30 You have taken us to June, are you able to describe the market in comparison with your European base as being steady, dropping or rising? Yes, up until June/July, the market was very steady but from August/September I had indications that the Indian market was dropping slightly.

40 Are you able to tell us a bit more as to why you say you had indications say in relation to computer printout? It was the higher grades of waste paper, such as white shaving, which were beginning to wobble and the indications were the prices were being reduced somewhat and the same applied in European market.

COURT: Can you tell us precisely what your relationship was with Mr Cash? Yes sir. I met Mr Cash very briefly on my first visit to NZ and he had travelled in other parts of the world and I met him again in London where I invited him to call on me. And since we both have a common interest in the exporting of wastepaper and other

Court

In the High
Court of New
Zealand

interests, we started a friendly co-operation in terms of information as to what each of us were doing and the various international markets. So we had a cordial understanding. On my 2nd trip to NZ also a considerable friendship.

No. 5.6.

CLARK:

Plaintiff's
evidence Nigel
Remington
Wilson

What were you to be paid by Mr Cash by way of commission or otherwise? At our first meeting of course we had no arrangement but on the Indian business I had placed for him during 1982 he or we immediately agreed a commission would be paid.

10

Examination
- continued

Cross-examined Mr Broadmore:

Cross-
Examination

Are you in precisely the same business as Mr Cash? Yes.

And so in a sense you were both geared with the Indian market and competitors in it? Yes you could describe it like that.

20

And your source of supply was Europe? At that time in fact my source of supply we are talking about February was in fact Australia, but I was building up to a supply from Europe as soon as I could agree the necessary freight rates and the market would stand these new prices.

Which market? The European market. I couldn't buy at that date from Europe and sell to India.

30

You gave my friend some prices of virgin pulp and mentioned a price of US\$400 to \$450 a tonne at that time? Yes.

That was put to you as a NZ price expressed in US dollars? I expressed it in US dollars.

40

That is the sort of spectrum of price that was prevailing in Europe a that time? Yes I believe so. I am not in fact a prime pulp merchant and therefore the exact prices I can't quote you. You have to keep in touch with the prices to compare the levels. The price of waste paper has a direct relationship to the price of virgin pulp. If virgin pulp price comes down so does the price of waste paper. It doesn't necessarily follow. It

is complicated. It is a very wide guide but it doesn't work like that.

In the High
Court of New
Zealand

Isn't it the case that during latter part of 1981 and 1982 there was a general weakening of world-wide prices both for virgin pulp for waste paper products of various grades? As a generalisation yes.

No. 5.6

10 Can you tell me what the price in US dollars f.o.b. Europe for example CPO would have been in February 1982? I would like another paper with which I am more familiar. NCR white for instance. You might describe it as somewhat similar in some respects. The price f.o.b. European port would have been US\$250 per metric tonne.

Plaintiff's
evidence Nigel
Remington Wilsc

Cross-
Examination
- continued

20 Is that a grade which is roughly comparable with computer printout or pure white? It is not pure white, it has a chemical coating which to many paper mills creates nasty problems. However, in price it normally about \$40 or so below computer printout.

30 If you were contemplating shipping that to Inida are you able to tell us what was the freight rate you might pay from Europe for that product at that time? Yes. The freight rates on a break bulk basis were approximately US\$113 per metric tonne.

40 Can you tell me whether that was for Conference trading or some other shipping circles? I think if I remember correctly that was not with a conference Line vessel to India, but I believe the ships at that time were member of the Far Eastern Conference. Have you heard of a freight rate for that in US dollars of \$71? Not \$71 but \$75.

From Europe? Yes.

When would that freight rate be in force? Now.

Is it right that freight rate came into force some time in 1982. I would imagine so.

You wouldn't be able to give us a date? The \$71

In the High
Court of New
Zealand

No. 5.6.

Plaintiff's
evidence Nigel
Remington
Wilson

Cross-
Examination
- continued

or \$75 I would not be able to tell you.

A freight rate of that level would make you very competitive? Indeed. In fact at that level you would in fact be able to land waste paper in India cheaper than it could be landed from NZ? On the freight rate indications I have heard from NZ certainly we could land it cheaper, but you must remember you are talking about \$71 from Europe.

I have only been quoted that rate this year, and it was \$75 and not \$71.

10

ADJOURNED 5 P.M.

RESUMED FRIDAY, 10TH JUNE, 1983 AT 10 AM

NIGEL WILSON - Cross-examination by Mr Broadmore continued:

20

Have you any acquaintance for prices of mixed waste in Europe in 1982? Yes. The price for example in the UK was approximately 28 pounds sterling per metric tonne.

Would you express that in US dollars? At that time perhaps US\$55.

Would you agree that that would be a high price by European standards and that prices for mixed waste might have gone as low as US\$30 in other European markets in say July 1982? I wouldn't agree entirely. I would have thought the price of \$50 but perhaps as low as \$45.

30

Do you have any knowledge of market in Norway or Sweden in July 1982? Not very much.

Is it the position that the market for waste paper in Europe is organised on basis that there are long term contracts between suppliers of waste paper for a large proportion of the market? Yes.

40

And the balance is taken up by spot sales? Yes.

In a time of over supply spot sales would be likely to take place at rather less than ruling list prices would they not? Yes indeed.

And that would have been the case in July 1982
wouldn't it? I would think so.

In the High
Court of New
Zealand

So you would expect spot sales of mixed waste to
be transacted at rather less than the \$45 to \$50
US you referred to? Yes.

No. 5.6

10 And a forced sale you would expect to be at below
the level of the spot sales as well? It could be
construed like that but it depends on the quality
to a large extent of that grade.

Plaintiff's
evidence Nigel
Remington Wilson

You may know that the paper that was carried on
the Tarago was sold in Sweden for 100 Swedish
Kroner a tonne, about \$17 US per tonne? Yes.

Cross-
Examination
- continued

20 And I suggest that in the light of what you told
us about spot and forced sales that price is not
too far wide of the price you would expect for a
sale in those circumstances? Yes, but I qualify
that because of the quality of the material. I
think the price is rather low nevertheless.

Would you look at document 180A of bundle of
documents? Yes. That appears to be a telex from
people called Cornelder? Yes.

Reporting on some waste paper? Yes.

30 There will be evidence later, but assume that
relates to the waste paper on the Tarago, what can
you say about the quality as recorded there?
Knowing that this was mixed paper the comments
that cardboard, newspaper and all kinds of packing
material were present is the very description of
mixed paper. Most sorters do not put computer
printout intentionally into mixed paper. I would
say this constitutes a normal mixed paper quality.

40 That price of Dutch florins 85 per tonne, is that
something between \$35 and \$40 US or is it less?
Without a calculator I find it hard to answer.

Would you agree that that price of Dutch florins
85 is approximatly \$22 US? It would sound about
right.

And that involves the expense of taking it from

In the High
Court of New
Zealand

the vessel and putting it on to land transport?
Yes.

So that price is rather less than the price of
US\$45 to \$50 you spoke of earlier? Yes.

No. 5.6.

Do you think that price is an acceptable one? I
would have thought that it was a fair price.

Plaintiff's
evidence Nigel
Remington
Wilson

You told us of an incident Mr Cash had with Mr
Teskey and I suggested that meeting took place on
1st February, a Monday rather than a Friday,
could that have been so? No sir. I am sure the
date was the 29th January.

10

Cross-
Examination
- continued

At that meeting...

Court

COURT: Have you a reason for being sure? Yes as
far as I can recollect, it was my first engagement
with Mr Cash and I believe it was the Friday.

20

Cross-
Examination
- continued

COUNSEL: Yesterday you couldn't remember, have
you refreshed your memory? I arrived on the 28th
January.

Is it the position that you are not certain but
that is the best of your recollection that the
meeting took place on the 29th? Yes.

Is it the case that at that meeting you discussed
prospects of selling waste paper from New Zealand
in Europe? I believe it was mentioned because
ScanCarriers were interested in a service to
Europe but to me it wasn't the subject of
discussion.

30

Were you not aware that Scancarriers had operated
a service to Europe with these Ro-Ro ships for
some years? No.

Mr Teskey told you that the vessels had capacity
to carry cargo to Europe as well, is that right?
Yes.

40

And you had a discussion about the effect of the
NZ European Shipping Conference on such matters as
rates and cargo pooling arrangements, would that
be right? I am afraid I can't recollect any
discussion about Conference.

Is that because you are certain that didn't take place or you can't recall? I am afraid I just can't recall.

In the High
Court of New
Zealand

Remember Mr Teskey saying or discussing freight rates to Europe at all? Possibly in general terms but I don't remember any specific rates being quoted.

No. 5.6

Plaintiff's
evidence Nigel
Remington Wilson

Cross-
Examination
- continued

10 I suggest that you or Mr Cash told Mr Teskey you were looking for a rate or US\$80 per tonne for shipments to Europe, recall that? I am afraid I can't recall as my main interest was on rate to India and not Europe.

It also follows you don't recall Mr Teskey saying that because of Conference rules Mr Cash would have to apply for freight rates to Europe and discuss it with ScanCarriers? No I can't recall.

20 You spoke yesterday of a promotional rate, what do you understand by promotional rate? Having experienced for myself receipt of a promotional rate from Europe I understand that I was meaning a freight rate which is probably rather lower than usual to help the exporter establish a market overseas. And this is usually only agreed upon for a limited period.

30 At the end of the period it is likely to rise to a rate comparable to other commodities? I think it very much depends on the discussions and agreement between shipping lines and the exporter. Especially in relation to how badly a shipping line might require cargo.

But when the rate is quoted initially there are no promises about the end of the period? No.

40 Would you look at document 158 of volume 2 of the documents? Yes.

Can you identify that as a telex message which you sent to Mr Cash quoting a telex you had sent to Mr Chopra in India on the 27th May 1982? Yes that is right.

Re-examined Mr Clark:

Re-examination

In the High Court of New Zealand
—
No. 5.6
Plaintiff's evidence Nigel Remington Wilson
Re-examination
- continued

My friend asked you about rates into India; and you told me it had been potential of Indian market as you saw it, I don't think my friend in his discussion with you asked as to what would be the cost to Indians of international paper from any source having regard to the customs duty if any levied in India, can you assist in that regard?
MR BROADMORE OBJECTS

Do you know what the customs situation would be in regard to waste paper? Yes. Up until 1981 February there was a customs duty of 100% on all waste paper imported into India. From that date entry of waste paper was duty free under open general licence. And from that moment the whole Indian market opened up simply because the prices of waste paper on a c.&f. basis were affordable by the Indian market. Whereas before it was impossible for them to import because of the high price.

COURT: When you gave evidence about discussion which you and Mr Cash had with Mr Teskey you said "as for space he, Mr Teskey, told us there was no problem at all as service was only just beginning and that there would be no difficulty in carrying out our projected monthly quota of about 1,000 tonnes; and I do recall him suggesting the vessels were only likely to be half full". Did you consider or was anything said about Aotearoa being obliged to ship something like 1,000 metric tonnes per month or was that all that was said? I don't think Mr Teskey said that Aotearoa were obliged for that tonnage, but we were pressing him to confirm that he could carry up to 1,000 metric tonnes per month because we had orders in hand and we wanted to know that we could rely on the shipping space.

Do you say the arrangement was that Aotearoa wasn't committed to ship any particular quantity but that Scan was committed to take something like 1,000 metric tonnes on every shipment up to end of July? No I don't say that. We at that time had firm orders for that space, about 900 to 1,000 tonnes on the first ship. And after this news about the space availability for the following five months, I made the decision to return to

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India quickly to firm up the promised contracts so that I could tell Mr Cash that we had definite orders for those months to be shipped at about the agreed tonnage per sailing.

In the High Court of New Zealand

JOHN DOUGLAS HUTCHINGS (Sworn)

I live at 78 Marlborough Ave, Glenfield.

No. 5.7.

10 You are a shipping clerk experienced in shipping documentation employed by Russell & Somers Ltd, one of the largest shipping agents in this city and this country? Yes.

Plaintiff's evidence John Douglas Hutchi

They are agents for a number of Conference Line ships more especially what is known as the Nedlloyd Lines? yes.

Examination

20 You are appearing before this court under subpoena? Yes.

Have you personally been aware of cargo being shipped by the Plaintiff Company to the Far East? Yes.

Is the destination of Bangkok in Thailand one of the ports the ships did go to? Yes they did.

You know Mr Cash sitting in court? Yes I do.

30 Has he been an exporter using ships for which your employers are the agents of considerable quantities of waste paper especially to Thailand? yes.

When he has indicated a space requirement to you - has he from time to time? Yes.

40 Has he fulfilled his indications? He has always shipped the quantity he has arranged for.

Have you ever charged him anything on invoice called deafreight? No.

Have you ever charged anyone? We have not done so in the past.

Did he seek 200 tonnes per month in about 1981 but the line you were representing felt unable to give him the allocation he so sought? Yes, at one

In the High
Court of New
Zealand

stage a couple of years ago he was after a larger quantity than would be allowed under the licence.

Cross-examined Mr Carruthers:

No. 5.7.

Plaintiff's
evidence John
Douglas
Hutchings

I have been in my present employment for last 10¹/₂ years and I have done shipping previous to that, probably 20 years all told.

Broadly what has been your area of experience in shipping matters in that time? I have done all areas of shipping from claims, inward freight, manifesting, and since I have been at Russell & Somers I have been involved with bookings of space on these vessels and in connection with all these vessels.

10

Cross-
Examination

Dealing with the procedure that you follow on booking of space, do you first obtain some indication from the shipper as to what space is likely to be required for a particular ship? Yes that is correct.

20

At the time the indication is given, that is the first discussion about it, there wouldn't be any commitment on either side? We are in the practice with larger than normal shippers.

Dealing with usual practice that applies to everyone, when you are discussing preliminaries there is no commitment either side? Usually we agree there is space available.

30

But later on when you want to firm up your plans for ship don't you ask for a formal booking? Yes that is correct.

So until that time there is probably no commitment on either side? No, apart from as I said before the cover bookings.

40

The next step that occurred is the delivery of the goods to the wharf? Yes.

And at the point of acceptance of cargo for shipment do you agree there is an obligation to carry cargo? Yes, once cargo is delivered to wharf and there is a delivery docket signed by us on behalf of the company we are obliged to ship

it.

Is it correct that it then becomes subject to contract of carriage evidenced by bill of lading? What do you mean exactly by that.

10 In the form of bill of lading which is issued by the ship owners your company represents, when do they assume responsibility for the cargo under the bill of lading? As I mentioned, once we sign the receipt at wharf. On the odd occasion when the ship has to sail and we sign the cargo and it has not all been put on ship before e.t.d then we have taken it another port for loading there.

20 You mentioned cover bookings, explain those? Some of our larger shippers while establishing their Letters of credit overseas ask us for cover bookings. We allow these cover bookings and the shipping company goes back to the shipper prior to the ships arrival at NZ Coast and firms up what space they actually require under cover booking.

Is there a formal record made of the cover booking? On firm bookings we enter them on our list in ink, on cover bookings we enter them in pencil.

30 Are you familiar with term contract of affreightment? Yes.

Would you describe what a contract of affreightment is? A signed document covering the carriage of goods in the aspect I am used to, between shipping company, the vessel's owner, and the shipper and sometimes the consignee.

40 Is that a firm commitment of space to the shipper and carriage by ship owner from the moment the contract is entered into? Yes and it usually states the freight rate for the party.

Does it usually make provision for deadfreight? Not as far as I am aware. There may be a clause in the contract but I am not sure on that point.

Where you had made a formal contract of affreightment and set aside space, would you expect the shipper to be liable to pay for that

In the High Court of New Zealand

No. 5.7

Plaintiff's Evidence
John Douglas Hutchings

Cross-Examination
- continued

In the High
Court of New
Zealand

space if he didn't use it? We as shipping company do not make contracts for affreightment with shippers. We only do it with bulk liquid or something of that kind.

No. 5.7.

Plaintiff's
evidence John
Douglas
Hutchings

Am I trying to discuss something outside your normal experience? I am familiar with it but not with the carriage of normal cargoes but with liquids.

Do you know Mr Hobbs? The name doesn't ring a bell, no.

10

Cross-
Examination
- continued

In making the request or making his request did Mr Cash request space on a vessel by vessel basis? In the interim that was how the booking was made and he did request a monthly allotment. We have two vessels running a month up to the Far East. Only one goes to Bangkok so the request was made for monthly allocation of space to Bangkok.

20

What you finished up with was a request for space to Bangkok? Mainly to Bangkok but other ports and Bangkok was the main port.

Did you make a cover booking for that? In consultation with Nedlloyd NZ who wanted it, yes.

Are you able to tell us the amount which Mr Cash usually shipped with Nedlloyd? Due to space problems it varied between 50 to 200 tonne.

30

So the cover booking for space depended on what space was available? That is correct.

Did you ever inspect the cargo which he shipped? Yes we did, we made sure it was properly palletised for shipping.

On what sort of base was the cargo presented for shipment? In the initial shipments it was presented mainly on pieces of timber mainly what we call gluts, but later shipments the majority of it was on a pallet base.

40

Was mixed waste shipped with your company? Yes.

Did that come forward on pallets? Yes.

Do you recall any mixed waste being presented for shipment which was simply strapped and had two cores from reels of waste paper, cardboard, underneath it? I don't remember seeing that no. Anything that arrived at the wharf not properly palletised is rejected by our tally clerks who have firm instructions from our office.

In the High Court of New Zealand

No. 5.7

Plaintiff's Evidence
John Douglas Hutchings

Cross-Examination
- continued

10

So if a bale was presented just with strapping and with the support I described would you regard that as satisfactory for shipment? Only if it could be handled with a forklift.

And if it sagged and strapping became loose so that it couldn't be stowed would you regard that as satisfactory? No we would put it aside and ask the shipper to attend to it.

20

Would you ask him to come to the wharf and fix it up? No the shipper would have to remove it from the wharf, it cannot be done at the wharf.

Re-examined Mr Clark:

Re-examination

Has Nedlloyd ever carried Aotearoa cargo across to Tauranga at it's own expense? Yes we have done that once.

30

As I understood you in answer to my friend you said that Aotearoa had been given a cover booking for monthly shipping to Bangkok? Did that entail any special promotional freight rate or not? Not as far as I am aware.

Do you give special rates to customers, or the lines you represent.

MR CARRUTHERS OBJECTS

40

COURT: When you accepted cover bookings was any charge made for that? No it is an indication from the shipper to us that he may require the space or some part of it.

Court

And if he doesn't require it no charge is made to him? That is right.

NIGEL GEOFFREY LEDGARD BURTON (sworn)

In the High
Court of New
Zealand

I live at 65 Pattersen Ave, Mission Bay.
Solicitor. I have been a member of the firm now
called Wilson Henry Martin & Co as a partner since
1974.

No. 5.8.

Your firm formerly acted for Aotearoa
International Ltd and Mr Cash personally? Yes.

Plaintiff's
evidence Nigel
Geoffrey
Ledgard Burton

Did you or were you responsible for forming the
Company? I think I was . It was a long time ago.

10

Examination

Have you been the main solicitor to Aotearoa over
the last five years up until unhappy recent
events? My firm has yes.

And prior to 1982 you personally attended to the
firm's problems? Yes.

Last night at my request did you refer to your
file papers in regard to a series of consultations
by Mr Cash? Yes I did.

20

And they touched upon his relations with the
Defendent company ScanCarriers? They did.

Can you tell us when you first saw Mr Cash in that
regard, and the company waives any legal privilege
that may refrain you from answering any
question? Mr Cash first came to see me concerning
ScanCarriers on 30th March 1982.

30

What was his immediate problem if he had one at
that time? His immediate problem was that he had
suffered a short shipment of goods to India and at
that time the ship was apparently accordingly to
Mr Cash sitting in dock at Timaru and I was
instructed by him that Scan had threatened to take
off the cargo or his cargo and leave it on the
wharf at Timaru unless he came to a suitable
arrangement for payment of freight.

40

Did you on that same day telephone a Captain
Andersen in Wellington and speak with him for some
time on the telephone? I did.

Would you tell us what transpired in relation to
what Captain Andersen told you in regard to taking
off cargo at Timaru? I asked Captain Andersen
from memory whether that was a possibility and he

denied it. I then pointed out my then client company's disadvantage in the circumstances and in particular sought to find out how a bill of lading could be released to enable a letter of credit to be established. His reply to me at that time was not very helpful. He did tend to sympathise with the company's problems. He implied that it wasn't his fault, that directions had come from Australia which had used up the space. He then indicated that he would contact his masters if you like, overseas, to obtain their attitude to the matter.

In the High
Court of New
Zealand

No. 5.8.

Plaintiff's
evidence Nigel
Geoffrey
Ledgard Burton

Did you speak to Captain Andersen again either on that day or subsequently? On the day subsequent I spoke with him, the 31st March.

Examination
- continued

He pointed out to me he was putting the matter in the hands of solicitors, that the ship was going to take the goods that were on the board at the time.

Did he make any enquiry of you as to what you had done? yes, at the end of our telephone conversation he asked me whether we would have considered arresting the ship if the consignment had not left.

Did you thereafter receive a communication from Chapman Tripp & Co, Wellington Solicitors? I did.

Do you produce as Exhibit 9 a letter addressed to yourself from Chapman Tripp? Yes.

And on or about 8th April I think you probably had this letter in your possession and you consulted with Mr Cash having previously had some direct communication with Chapman Tripp? Yes.

Who was it? I was dealing with two people, Mr Broadmore and Mr Franks, predominantly Mr Franks

I would like you to look to the documents in the folder, No's. 115 and 116, I ask whether or not those papers were, especially the arrangement headed "draft", in your possession and looked at by you on or about 8th April last year? That is correct.

In the High
Court of New
Zealand

I ask you in particular to read to yourself in the draft the recital under paragraph 2(4) if you would? Yes.

There is reference to the consent of the Bank to some sort of charge, see that? Yes.

No. 5.8.

Plaintiff's
evidence Nigel
Geoffrey
Ledgard Burton

Have you ever received any advice from the Commercial Bank as to giving its consent to any security in favour of ScanCarriers? No.

10

Do you know whether or not this draft or any subsequent draft have ever been executed in first instance by Aotearoa? Not to my knowledge.

Examination
- continued

Has it been executed by ScanCarriers? Not to my knowledge.

I ask you to turn in the same volume of exhibits to document No. 135? Yes.

20

That is another letter marked for your attention and it enclosed a lengthy deed extending to at least 13 pages; was that the only document Chapman Tripp sent to you? No.

I hand to you a document headed Waiver of Priority by Chargeholder (Exhibit 10) Would you tell us whether or not to your knowledge it has ever been executed by anyone? Not to my knowledge.

30

Cross-
Examination

Cross-examined Mr Carruthers:

Did it start with discussions between solicitors early in April 1982 as to a basis for release of the bills of lading? After my original discussions with Captain Andersen and his reference to the matter to Scan's solicitors, yes.

Was the problem at that point that your client required release of the bills without payment of the freight? Yes. A certain amount of the freight I think he had paid or was about to pay. In original discussions it covered the quantified amount - the name [sum] escapes me - he was prepared to pay that, but the balance for mixed waste he didn't know how much was on board and how much on the wharf so it was needed to be

40

quantitified before payment.

Was the release of the bill of lading we are discussing the bill relating to mixed waste on board and it referred to freight not paid? That is initially yes. The whole arrangement was to ensure that the whole consignment went.

10 Would it be fair to say that the discussions centred on the giving of security for the unpaid freight? Yes.

20 And did you know that Scan wanted security for that unpaid freight? No not at that time. In my original discussions with Captain Andersen because Aotearoa were in a desperate position I had offered to Captain Andersen we would provide some security as best we could. We had made arrangements for some post-dated cheques and I had made arrangement for that security. I did make it clear that we were unable to be certain as to the type of security to be provided because the matter was with the bank.

30 Coming now to initial discussions which you had with Scan's solicitors was it clear to you at that time that Scan would require security for the unpaid freight? Yes.

Was your first discussion with Scan solicitors with Mr Broadmore? Yes as I recall.

Was the question of security discussed in a telephone conversation with him? I am sure it must have been. That was the whole purpose of the two of us speaking together.

40 Do you remember what the basis of security was in that conversation? No not particularly except to say we were offering whatever we could by way of security. There was mention of a third mortgage over the company's house at Marine Terrace, and we did talk about two other possible security possibilities, firstly, Scan's charge on the unshipped paper, secondly I made reference to the possibility that they had anyway a lien on the goods on the water.

Did you subsequently speak to Mr Franks on the 6th

In the High Court of New Zealand

No. 5.8.

Plaintiff's evidence Nigel Geoffrey Ledgard Burton

Cross-Examination - continued

In the High
Court of New
Zealand

April 1982? I spoke to him on that day yes.

And did that discussion involve a number of technical matters concerning form of security that might be available? From memory yes.

No. 5.8.

Plaintiff's
evidence Nigel
Geoffrey
Ledgard Burton

By that time had you reached the point between yourselves of agreement to the plaintiff giving a debenture which would be registered? There was some discussion about that. As I remember it it was subject naturally to the Bank agreeing to the debenture. The upshot was that Scan and Mr franks suggested that the debenture would only be taken if required at some stage in the proceedings.

10

Cross-
Examination
- continued

May I suggest that last comment referred to registration of the debenture and that came later in the negotiations? That may well be the case.

20

Staying with the conversation of 6th April, apart from the debenture which involved priority and registration, was there to be an irrevocable letter of instruction to the Bank from the Plaintiff? An instruction - what about?

How was the position concerning negotiation of the MR CLARK OBJECTS. OBJECTION WITHDRAWN.

Do you recall a discussion concerning payment of the proceeds of letters of credit to satisfy the unpaid broker? Yes.

30

Did that not require some irrevocable instruction to the Bank from the Plaintiff company? Yes. I might say that that arose because the bank wasn't prepared to grant any waiver as I understood it or allow the debenture or specific charge over letters of credit to be maintained. So we were in a desperate state and we had to put a letter to the Bank instructing them about the proceeds of freight costs.

40

Was there also in that 6th April discussion an arrangement concerning a chattel security over the unshipped paper? Yes.

Similarly was there to be an undated cheque with letter of instruction to the Bank? That was the

general intention Yes.

Finally Scan was to retain custody of th unshipped paper? Yes.

In the High
Court of New
Zealand

At the end of that conversation as between yourself and Mr Franks it was agreed the transaction would proceed on that basis and Mr Franks was to get the documents in? I seem to think there has been a little mix up there. The original intention as fas as I recall was to provide a post dated cheque and security, it then came down to post dated cheque and suggestion of third mortgage over the house, a charge over unshipped paper, and a charge if we could arrange it against the payment due under letter of credit to meet the freight. Then the Bank would not allow the mortgage possibly as the Bank had filed a third Mortgage itself over Marine Parade property and it was at that point we looked at providing a debenture security. It then went along to the last day prior to Easter, that we still had to convince the bank somehow or other to agree to pay the proceeds of a letter of credit. That is as far as I can take it I don't know what happened after that. But as far as I am aware - I am not aware of any finality of agreement between Scans and Aotearoa involving the Bank which resulted in signed documents or the basis of the release of bill of lading. Mr Cash left my office at that point with the letters for the Bank.

No. 5.8.

Plaintiff's
evidence Nigel
Geoffrey
Ledgard Burton

Cross-
Examination
- continued

By the time you received Exhibit 9 had you and Mr Franks reached agreement between yourselves? I think not. No, there had been no firm agreement as to the basis of security at that point.

But surely there must have been some agreement between yourself and Mr Franks for him to go ahead with preparing documentation? At that point there was no intention of giving a debenture over the Company as I recall. At that time it was talk of specific assets and the mortgage and I think I conveyed to him it was no longer possible at that time but we would certainly give a specific instrument over goods not shipped. The debenture came really as a result of dealing by Chapman Tripp, that this was a better way of dealing. I

In the High
Court of New
Zealand

confess I didn't have objection to that as we were offering security all the way along in order to get bill of lading released, but it wasn't originally proposed.

No. 5.8.

Plaintiff's
evidence Nigel
Geoffrey
Ledgard Burton

But to get the sequence quite clear, the debenture was discussed by Mr Franks in your telephone conversation on 6th April? Yes as far as I recall. And then the drafts came forward under cover of letter of 6th April? Yes. Yes, the first of the second drafts.

10

Cross-
Examination
- continued

Would you look at documents 115 and 116 again:

MORNING ADJOURNMENT 11.30 A.M.

RESUMED 11.45 A.M.

I ask you to look at documents 115 and 116, who prepared those? I don't recall.

20

Are they documents you have seen before? I haven't got copies on my file of those documents, no.

On the face of them do you recognise them as documents signed by Mr Cash on behalf of the Plaintiff? Yes.

Is it likely that they are typed up copies of drafts submitted by Scan's solicitors? Looking at the wording I would say probably yes.

30

Looking at document 115, para. (b), do you say that what was sent to you was inconsistent in any way with the arrangement you had with Mr Franks? This is where I have some difficulty, there were a number of drafts submitted on an agreement and as to the basis of security. I am not sure which that relates to.

40

You received drafts under cover of a letter dated 6th April? Yes.

Did you discuss those with Mr Cash? Yes

And presumably advised him about them? Yes.

As between yourself and Mr Cash then what was the

next step? Well this is where my memory does fail me a little bit, we had another set of documents that came through from Chapman Tripp. I am unsure now which lot came in the first set of correspondence and which lot came with the second correspondence.

In the High
Court of New
Zealand

No. 5.8.

Plaintiff's
evidence Nigel
Geoffrey
Ledgard Burton

Cross-
Examination
- continued

10 Could we identify the second lot of
correspondence, turn to document 139 is that the
second lot of correspondence you referred to
enclosing a re-draft of the debenture? That I am
not sure. I had a feeling there was another set
in between which coincided with about the 8th
April. I presume there was a covering letter with
that. If I could look at my file to see if that
is the case. I don't have it here it may well be
with counsel. My memory tells me, there was an
original draft forwarded under cover of letter of
20 6th April. I am thinking that there was an
amended draft sent about the 7th or 8th April. I
cannot recall what that was about. I can only say
that there were some modifications to be made to
the original proposal which purported to be set
out in that draft forwarded on 6th April, e.g. one
of the matters that needed to be changed was the
obligation to provide freight prepaid bills of
lading to one original draft. Whether the type of
amendment came in a separate draft or whether it
came by letter advice or telephone advice I don't
30 have the information on my file.

Looking at document 115 and 116, does it seem that
any amendment required on either side had been
dealt with by that time? By what time?

40 By the 8th April? I think those amendments were
made by me on the 8th April. The amendments that
there has been some typing over on that draft
116. Certainly the points amended in 1.1 came as
a result I believe of advice from Chapman Tripp.
The other amendment I certainly recall having made
after discussions with Mr Cash.

COURT: Was that before document 115? Yes.

Court

And the letter attached to document 116? I would
believe so. My knowledge of the letters there of
8th April, I had no real knowledge of those. But
I certainly did peruse the draft 116. And made

In the High
Court of New
Zealand

those amendments to it after discussions with Mr Cash. On 8th April? Yes.

And you didn't see the two letters dated 8th April? I cannot recall seeing them. I certainly don't have copies of those letters on my file.

No. 5.8.

Plaintiff's
evidence Nigel
Geoffrey
Ledgard Burton

COUNSEL: Looking at the debenture attached to document 135, is security on that form inconsistent with the arrangement which you made by the time document 115 and 116 had been signed? All I can say is that we were looking to give a debenture subject to the Bank going along with that proposal.

10

Cross-
Examination
- continued

May we summarise it in this way, that the parties were agreed that the bills of lading were to be released, that payment of the freight was to be made in due course, and that security in some appropriate form was to be given? Certainly, both parties were working together with that objective, to get the bills of lading released.

20

But it had gone further than that hadn't it because all that was outstanding was part of the security that had to be given, namely the debenture? I cannot answer that. The Bank's agreement to the whole proposal when Mr Cash left my office on the 8th was essential to the whole formation of the agreement. I had been telephoned on 8th April by the Bank who had indicated that they were not prepared to assist. That was earlier in the day. I don't know what happened at the end of the day.

30

What happened to the transaction as far as you were concerned after 8th April? I was no longer personally involved in the matter. Was your firm still involved? I believe so yes.

Who in your firm was acting in relation to these negotiations after 8th April? Mr Beattie I believe took over the file as a result of Mr Cash coming back once again to say the Letter of Credit arrangement was at risk.

40

In terms of the arrangement which you had negotiated with Mr Franks, could the bills of lading be released until there was agreement in

relation to payment of freight? It was the intention that the bills of lading could be released once all parties had made up their minds on how the freight could be met, yes. My understanding of it went further than that, it was subject also to the balance of the paper being shipped.

In the High
Court of New
Zealand

No. 5.8.

10 Would you agree the transaction was in several stages, that there were two important parts, first release of bills, secondly agreement for payment of freight? Yes.

Plaintiff's
evidence Nigel
Geoffrey
Ledgard Burton

20 Was it intended that the security would be provided before the bills were released? The giving of the security, that I am unsure of at this stage. I was under the impression that the security did not have to be executed until afterwards but there was to be an agreement or undertaking to provide that security, but once again subject to the bank's agreeing to nature of the security and the whole arrangement really.

Cross-
Examination
- continued

Do we get to the point where the form of security had yet to be agreed but there was agreement to give security? Yes, there is no doubt about that.

30 Was it the intention of the negotiations to resolve really all outstanding issues between the parties at the time of the Barranduna shipment?
MR CLARK OBJECTS.

At the time of your negotiations with Mr Franks, were there any other possible claims that were discussed with you by the Plaintiff? Claims?

40 When you were consulted concerning this short shipment, was there any question of a claim by the Plaintiff against the Defendant? Yes.

What was the nature of the claim proposed? It hadn't been formulated at that point but there was a suggestion of a breach of contract arising out of the short shipment.

In dealing with that claim were the negotiations with Mr Franks intended to settle everything outstanding between Plaintiff and Scans? Yes the intention was to come to an arrangement whereby

In the High
Court of New
Zealand

the Plaintiff would not suffer loss.

Is any part of your legal practice in the shipping field? No sir.

No. 5.8.

Plaintiff's
evidence Nigel
Geoffrey
Ledgard Burton

Re-examined Mr Clark:

Did your instructions or retainer in any way premise what might happen for the future of material as yet not delivered to ScanCarriers? MR CARRUTHERS OBJECTS

10

Re-
Examination

You have told us that there was a short shipment, did you receive any other complaint by your client? Not me personally but I am aware that our office was instructed in relation to the matter of future shipments.

At what time? That I don't know, but obviously after 8th April.

20

No. 5.9.

Plaintiff's
evidence
Bernard
Atkinson

BERNARD ATKINSON (Sworn):

I am a Management Counsellor employed in the Small Business Agency division of Development Corporation. I am here under subpoena.

Are you familiar with affairs of Aotearoa as a result of your business with Small Business Agency? Yes.

30

Examination

You have qualifications at University of Glasgow? Yes.

You give advice to small businesses? Yes.

Does the Small Business Agency operate a loan guarantee system within approved cases to secure trading bank term lending usually? Yes.

40

How long have you known Mr Paul Cash? I believe he came to us seeking assistance in March 1980 I think. That was my first introduction to him.

Did the agency approve a loan guarantee under which facility \$20,000 was able to be borrowed by Aotearoa in June 1980? That is correct.

Was that loan guarantee cleared in the course of

its term? Yes I think it was cleared in December 1980.

In the High Court of New Zealand

Were all the conditions complied with? Yes.

Was it renewed in a similar amount in December 1980? I think the renewal went through in January 1981.

No. 5.9.

10

Was a further guarantee approved in increased amount of \$30,000 in October 1981? Yes.

Plaintiff's evidence
Bernard Atkinson

In addition to those dealings can you confirm that the Corporation in June 1981 granted an export suspensory loan of \$6,000 together with a term loan of \$9,000? I can confirm that, yes.

Examination
- continued

20

Had you been provided with cash flow projections by Mr Cash? Yes on each occasion.

There was a matter of a prospective advance to enable some sort of machinery to be purchased at an early stage? I think that was in 1979 but I have no knowledge of that, it was the Finance Corporation.

30

There is a letter from a Mr G. H. Lewis, a copy of which I ask you to look at, is that a copy of a letter (Exhibit 11)? Yes this is a copy of a letter on file.

And another letter of the same time from Indonesia (Exhibit 11B)? Yes from the Trade Commissioner.

Did you personally see - did the Corporation or you look at a cash flow projection for the five months from 31st July 1982? Yes certainly.

40

From your experience of the Company did you form any opinion as to the current viability of that cashflow projection? Yes on the evidence supplied to us it was considered the turnover of Aotearoa would be increasing quite considerably during that financial year.

Cross-examined Mr Broadmore:

Cross-
Examination

Have you known Mr Cash apart from the waste paper business? No I had not met him at all before.

In the High
Court of New
Zealand

That was 1980? Yes.

No. 5.9.

Is it correct to say that his business had given your agency concern as to its viability since at least 1981? No sir, not since 1981. We were fairly confident at that time that his business was a viable business.

Plaintiff's
evidence
Bernard
Atkinson

And you reached that conclusion on the basis of accounts furnished to you by the Company and on the basis of particular cashflows furnished by the Company? Partly so, also on other evidence sent to us.

10

Cross-
Examination
- continued

Dealing with the accounts, they hadn't been audited had they? No sir, I believe they had not.

And the information of accounting nature put to you wasn't supported by any information by way of independent comment from accountants or anything like that? Independent, no sir.

20

And the other evidence as to the Company's prospects was of the category just put in in evidence, letters from New Zealand Representatives and from customers obtained by the Company? Yes, that is correct, direct from customers.

Your division of the Corporation, this Small Business Agency, its whole function is to assist small businesses? That is correct.

30

And you risk business, they might succeed and they might not? Yes but all businesses are a risk.

And your agency knows that it is venturing capital where more traditional financial sources might hesitate to tread? To a certain extent may I say sir.

40

Is it fair say you are a lender of last resort for small businesses? No this may not always be so, but in some cases yes. In the majority of cases I had dealings with it is not.

And the Small Business Agency would have a higher lending rate than the bank? No sir, most definitely not. That is not so. In all the

guarantees that I have had I have not lost one.

In the High
Court of New
Zealand

Is the Aotearoa indebted to the agency? The DFC,
not the Small Business Agency.

You are not involved in the DFC? No, but I do
know of the affairs of the DFC as I work closely
with the analysts.

No. 5.9.

10 Re-examined Mr Clark:

No questions.

Plaintiff's
evidence
Bernard
Atkinson

ANTHONY WATSON (Sworn):

Re-
Examination

I live at 6A, Tuhiaere Street, Orakei. Auckland.

You are a chartered accountant by profession?
Yes.

No. 5.10.

20 You are qualified with the degree of Batchelor of
Commerce as well as being an Associate of the
Institute of Chartered Accountants? Yes.

Plaintiff's
evidence
Anthony Watson

You have been qualified for some 27 years? Yes.

Examination

And a member of firm of accountants Ryder,
Copeland Watson & Co? That is correct.

30 You have prepared balance sheets and profit and
loss accounts and taxation returns and export
incentive matters, for the Plaintiff for some
time? That is correct.

You have acted for the Company since its
incorporation? That is correct.

40 You are accordingly familiar with the accounts
prepared most recently for the year ended 31st
March 1983? Yes.

Would you look at the documents, volume 2,
document No. 224, is that a copy of the balance
sheet for the Plaintiff Company, or the profit and
loss account actually, for the year ended 31st
March 1983, prepared by you personally in your
firm? Yes.

Similarly, a few pages forward, item 223, is that

In the High
Court of New
Zealand

a balance sheet that is prepared by yourself also for the Company for the same year? Yes.

No. 5.10.

We have heard in this case and the documents referred to confirm the financial difficulties of the Plaintiff Company, and you confirm that that been the case? That the Company has had financial difficulties yes.

Plaintiff's
evidence
Anthony Watson

And you have not rendered accounts for your services for the firm? Yes.

10

Examination
- continued

On the basis of sale projections supplied by Mr Cash early in 1982, for the months March to July 1982, and having regard to a shipment to India in March 1982, did you prepare a calculation on 28th April this year, for the solicitors for the Plaintiff, Earl Kent & Co? I did yes.

In its original form you had a consideration of overhead costs or extra overhead costs, and on advice however your schedule which you now produce was discovered, and you produce it as Exhibit 12? Yes.

20

That sets out two categories of loss on the premise stated in the first sentence of that document, that is your work I think? Yes.

Can you tell us when you look at that document Exhibit 12 the grand total of \$480,000 ought because of the omission of any overhead costs factor be reduced by the sum of \$66,000 to an amended amount? Yes, to \$414,000.

30

Only this morning you were shown a document that was put in to court a few days ago by the Plaintiff, Exhibit 6, would you look at that document? You were shown that this morning and told of it being produced by Mr Cash? Yes.

40

I do not ask you to vouch for the accuracy of all the figures therein but I do ask of you whether it appears consistent with the material that we have been discussing so far this afternoon? The figures regarding turnover and expenses. With the extractions appear to be for the years concerned. I have not had the opportunity to form any opinion about them. The trading results of

the Company has not been shown over the years until that year.

In the High Court of New Zealand

Accountants know something about --- In your profession you have some expertise in considering the relationship of overhead costs to gross and net profitability? Yes I am trained as all accountants are to endeavour to accurately do so.

No. 5.10

Plaintiff's Evidence
Anthony Watson

10 Your analysis dated 28th April, was that intended to give assistance to all those interested in the extent of loss during the period mentioned at the top by the Plaintiff Company? Yes, it was a genuine effort to try to as accurately as possible portray the result based on the first premise in the analysis.

Examination
- continued

20 You are aware that in the financial accounting period ending 31st March, the previous balance date, there has been a lot of plant and equipment that disappeared from the books or assets of the Company? Yes they were required to be released and sold.

Some of those items would have been disposed of at losses? Yes.

30 COURT: As against their book value? Yes, or involving interest and financial charges because of leases, that sort of thing.

Court

COUNSEL: And the items of losses would be referable to what sort of stuff, vehicles and plant had to be realised? Yes.

Examination
- continued

Vehicles and equipment too? Yes.

Leased vehicles specifically? Yes.

40 Since the balance date the main real property of the Company had also had to be realised? yes.

It would be of assistance to the court if you told us a little about the tax rebates available on f.o.b. sales that are made or have been made in the past by Aotearoa? The original export incentive legislation enabled exporters to obtain a credit of 25% of increased export sales to overseas markets. That part of the incentive

In the High
Court of New
Zealand

No. 5.10.

Plaintiff's
evidence
Anthony Watson

Examination
- continued

legislation has been modified since but it was the form of legislation which in effect has continued to apply to Aotearoa into the last trading year. There has been a form of incentive gain credit for promotional export expenses such as travelling, accommodation, etc. and for an exporter like Aotearoa has been confined to overseas business. In addition there was until this last trading year a further incentive being 15% of new market export business, the term new market requiring to file an agreement from Trade & Industry Department. All these incentives were being built up by Aotearoa International. And because of its trading loss, because of the pricing arrangements by Mr Cash, I gather as a matter of market strategy these incentives have been available as a form of cash rebate to the Taxation Department to Aotearoa and in substantial sums.

10

LUNCHEON ADJOURNMENT - 1 P.M.

20

RESUMED 2.15 P.M.

Cross-
Examination

Cross-examined Mr Carruthers:

To what extent did you prepare the prime records of the Company? The records from which accounts are prepared? The basic concerning trading assets of the company was given to me by Mr Cash which is normal for clients, plus the continuation of information regarding opening accounts based on our existing records.

30

Was this a case where the client kept very much his own records and came to you for preparation of annual accounts? Yes.

And on that basis did you rely generally on information given by the client? Yes. I forgot to mention the Bank records of the Company which I rely very much on from private companies as confirmatory evidence of the basic liability situation of the Company.

40

Would those records comprise bank statements, deposit books and cheque books? Yes.

Dealing with the years 1982 and 1983, do you recall making any specific enquiries into the

conduct of the business in order to prepare annual accounts? No more than would be usual in that in this case because of the need to make up a case for Inland Revenue for tax rebate as quickly as possible every effort was made each year to do the analysis and the accounts and tax return for the Company as quickly as possible after 31st March.

In the High
Court of New
Zealand

No. 5.10.

10 Were you put under some pressure to do that? Well not put under but naturally it requires quick application to the records immediately after 31st March to produce the accounts and tax return quickly.

Plaintiff's
evidence
Anthony Watson

Cross-
Examination
- continued

20 Is that because there is a significant time lag between the date of making application for export incentives and date of payment? So much depends on processing methods and to some extent goodwill of the taxation office in processing applications. I believe they endeavour to process for Aotearoa, but no doubt they get similar requests for anybody in that situation.

30 Are you able to give some indication of likely time lag between end of financial year and date of payment of export incentive? As said I think it would be dangerous to generalise as to how long it would normally take I can only say in Aotearoa's case for 1982 application to my memory it would have been lodged in May and the first response from Inland Revenue would have been June, but they usually require further applications which require further discussion. The settlement of claims could proceed over some months and it did in Aotearoa's case.

40 Did you recall when payment finally made for 1982 year? The last one I think was two or three weeks ago.

The reason I ask this is because it was important that the incentives were got in in the case of a company with a trading loss position? Yes.

Look at Exhibit 12, the calculation you produced this morning? Yes. Does that schedule proceed on the basis that there was a total of five shipments? Yes. That there would have been five shipments. Was that information which Mr Cash

In the High
Court of New
Zealand

passed on to you? The sales projections were,
yes.

No. 5.10.

So if there were to be a total of only four
shipments in the period, that would seriously
affect the calculation which you made? Yes,
possibly, depending on the value of the shipment
that wasn't made.

Plaintiff's
evidence
Anthony Watson

If it were the last shipment that would have the
greatest impact? Yes.

10

Cross-
Examination
- continued

Would you run through the gross profit as
percentage of the f.o.b. values in the April/July
figures? I do know from previous checks the
totalling anyway.

For April 27%. On a mental calculation that would
be so. The gross profit as percentage of the
f.o.b. figures differs significantly from one to
the next? Yes that is right.

20

What is the explanation for that? I don't know,
it would require looking at the original schedule
re each shipment and the amount applied to it.

In calculating the gross profit percentage was any
allowance made for commissions payable to Indian
agents? Both freight and commissions would be
allowed for in arriving at the gross figures.
Shortly the answer is yes, an allowance would be
made.

30

Did you calculate those figures of gross profit?
No, I checked Mr Cash's figures.

What allowance was made for the commission of the
Indian agent? I cannot say specifically. I knew
an allowance was made but as far as my normal
accountancy over the years I regard commission as
cost of sales, of acquiring business, and to an
extent of arriving at the gross profit.

40

As far as you were concerned the expenses had all
been taken into account as part of the cost of
sales? Yes.

Do you have any papers with you in relation to
affairs of the Company? I have some in the

office, but not a very full file.

In the High
Court of New
Zealand

Are you able to give us any analysis from those papers what the allowances were in the costs of sale? No I wouldn't be able to.

10 So once again it comes back to relying on the figures Mr Cash gave you? Not entirely. These figures are not exactly as supplied by Mr Cash. I had a schedule of the expected sales based on his knowledge of his Indian potential arrangements. That schedule quoted f.o.b. and c.i.f. values and it is an extraction of the schedule totals which produce the figures.

No. 5.10.

Plaintiff's
evidence
Anthony Watson

Cross-
Examination
- continued

Would you look at Exhibit 4 is that the schedule you are referring to? I can't tell for certain without going to my file. It may be.

20 Do you have the information in your file? I am sorry. It definitely wouldn't be used for what produced these projections at all. The projection for 1979 to 1983. It doesn't seem to have any relevance to projected sales to July 1982.

30 Coming back to the way in which you treated expenses such as commission, whether they are treated as costs of sale or in some different manner, would other expenses be the interest costs on discounting letters of credit? yes.

The general overheads of the Company, some allowance would be allowed for that? General overheads - not as costs of sale.

So are they dealt with separately in the calculations? COURT INTERPOSED.

Court

40 I turn now to taxation incentive, is that calculated by reference to a base period? Yes.

Cross-
Examination
- continued

And what is the base period that is permitted under the legislation? It is the first 3 years of the 7 years preceding the export.

So it is not a matter as you have done of taking the \$658,000 at 25%? No not at all.

And to do it that way would be to overstate the

In the High
Court of New
Zealand

available rebate wouldn't it? It would depend on what the base figures for the company were for the particular year. I agree that there would be an adjustment to this figure for the year.

No. 5.10.

Are you unable to take that any further without reference to other papers? That is right.

Plaintiff's
evidence
Anthony Watson

Moving on to the promotion costs shown on Exhibit 12? May I interrupt. I was trying to recall my reasoning in using total sales for rebate. Again from memory I would need to refer to my working papers, but I would assume in addition to the sales loss I would assume that the continuing sales situation otherwise of the Company which would have in my opinion would largely have used up the base sales before arriving at the projective. So these sales are extra sales and not total sales of the Company.

10

Cross-
Examination
- continued

But in order to achieve an accurate picture you have to go back to your base period and do calculations year by year? Quite simple calculations. You add the next year of the 3 years of preceding 7 and deduct the first of 3 years. In early year of trading sales are low so your base sales are fairly low, but I think my reasoning should be clear, if there are extra sales then its not unreasonable to use the total incentive for the sales. The trading figures for the 1983 year include a tax rebate expectation for sales expected over the base period for the year. So if these sales were achieved in addition then full rebate would apply.

20

30

But whatever your explanation of it that is not the way in which it will be treated in due time is it? I am not sure what you are asking me.

If these sales had been earned, they would have been dealt with for the purposes of incentive by reference to a base period? Yes.

40

And do you agree that to put it the way you have overstates the credit? No, not now I have been able to remember my reasoning at the time.

You have included in your calculation the incentive on promotion costs, isn't that an

incentive that is payable irrespective of sale?
Yes but it is subject to a more subjective enquiry
by Inland Revenue in relation to export activities
of any Company claiming the rebate.

In the High
Court of New
Zealand

In this case we have evidence from Mr Cash that he
had to go to India in 1982 in May to investigate
the question of further sales. Is that the sort
of evidence the Departments is looking for? Yes.

No. 5.10.

10

Then you can't say that is a loss can you? I was
trying to establish the factual situation which
would result if the sales had been achieved and I
assumed based on past experience that to achieve
those sales further promotional activity would be
involved.

Plaintiff's
evidence
Anthony Watson

Cross-
Examination
- continued

20

There is a degree of estimation required, but in
assuming \$60,000 costs it would follow that those
costs would be subject to promotional rebate for
the Company and it would give the Company further
overhead costs. There would be an element of cost
over income in order to obtain the sales.

And if you lost a market altogether would you save
the expenditure of \$60,000? Yes, but it also
would have lost export promotional rebate on that
\$60,000.

30

But it's quite clear isn't it that the rebate we
are talking about is paid independently of
sales? Yes.

It's a matter of justifying the expenditure on the
criteria that the Department uses? As I said the
department's subjective approach is always subject
to inquiry as to the export promotional activities
of the company concerned. it follows as a matter
of course.

40

You claimed finally on that schedule a new market
incentive of 15%. Has the company ever received a
payment for new market incentive? Yes.

In respect of which year was that? Its a little
difficult for new market incentive. The
legislation requires the incentive to be
calculated on calendar 12 months basis at the time
the shipment is made to new market so that any

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Zealand

No. 5.10.

Plaintiff's
evidence
Anthony Watson

Cross-
Examination
- continued

incentive rebate paid is not referable to financial year necessarily of the Company. So that the incentive payment that was received by Aotearoa would as far as I can recall be for a 12 months sales to a new market and I think it was Japan, in an earlier 12 months probably ending during the financial year ending 31st March 1982.

Isn't it the position that incentive ceased to be operative from 31st March 1981? No, legislation was introduced by the Government to in effect replace that form of incentive with the types that are now operating, but it did not exclude claims for export sales already in issue and new market incentives already achieved with the approval of Trade & Industry Department but it was the 12 calendar month sales ended for the particular client company.

Was there a period for pending claims before that incentive was taken away? Yes, and the current taxation return forms supplied by Inland Revenue Department allowed for that fact.

Apart from that single payment there has been no other incentive paid? No because there is a difficult basis on which to claim. The 12 months sales period was a calendar 12 month but the claim cannot be made until the tax return for the company is put in after 31st March, so the next claim for Aotearoa is not possible until the year ended 31st March 1983 return, and did include a claim for a new market incentive for sales.

Did you make you accounting available to Mr Ross for his inspection? I did.

To your knowledge has he had access to all the papers you have access to for Aotearoa? Yes I showed Mr Ross everything that he asked for.

Following the point about the new market incentive, do you have any documentation that would show the payment of that new market incentive? The payment that was actually received, not with me but in my office.

Have there been any claims made by the company for that incentive which have been declined? No, the

10

20

30

40

1983 tax return of the company with export incentive claims has been lodged with Inland Revenue. As far as the new market incentive part of that is concerned a copy has to be supplied to Trade & Industry Wellington, for their response to Inland Revenue and I have been advised by Trade & Industry to send a copy on to Inland Revenue in Auckland, and a stamped acknowledgement of the claim for new market incentive for the 1983 year, but that is still being processed by the Inland Revenue Department. Trade and Industry have stated that they are...

In the High Court of New Zealand

No. 5.10.

Plaintiff's evidence
Anthony Watson

Cross-Examination
- continued

Court

10

20

COURT: The promotion cost incentive. Is the figure of \$60,000 which you worked on for promotion cost included in your \$66,000 for overheads? No sir, to that extent I thought the costs or losses that were suffered by the Company as a result of not obtaining sales and subsequent financial difficulties in my mind offset, otherwise we would have been putting two lots of costs in or adding unduly to the costs for promotional costs in obtaining this, and also losses shown as a result of losing the business.

The calculations which you made as Exhibit 12 are based on assumption that the sales and profits referred to in the exhibit would have been achieved? Yes Sir.

30

Do you not therefore have to add your \$60,000 promotion costs to your other overheads making total of \$126,000 for all overheads in achieving new business? The total of this revised schedule is \$414,000 by deduction of costs. So the \$60,000 should come off the \$414,000? No. Possibly yes, I am a little lost at the reasoning now.

40

If the sales were received and if promotion costs of this total were involved in obtaining those sales then it should be another cost. Subject to my checking my reasoning later, I cant see any reason to disagree with that logic, and I apologise for my part.

COUNSEL: I want to turn now to the 1982 accounts, they are No. 223 in volume 2 : do they show shareholders funds of \$113,973? Yes.

Cross-Examination
- continued

In the High
Court of New
Zealand

No. 5.10.

Plaintiff's
evidence
Anthony Watson

Cross-
Examination
- continued

Mr Ross after his investigation reported the following; first PAYE of \$12,472, an ACC levy under accrued at \$2,485, bonus issue tax not provided for of \$11,473, and overstated tax credits of \$45,432 and that the liability for freight on the Barranduna of \$71,685 was not taken into account: are you able to deal with any questions in relation to those without reference to books? Yes, most of those subsequent adjustments would be correct. The precise amounts I can not recall exactly but in essence they would be correct except for item of freight, I would not be able to answer if this is correct or not. I was given a figure for total amount owing on trade to 31st March owing to the Company and by the Company.

10

If those figures are totalled they are \$143,547, if that was the position that would show a position of insolvency in the company wouldn't it? Yes.

20

If I understood you correctly apart from the position of freight, the rest of the figures that I gave to you and description of them seemed to you to be correct? In the main, apart from the question possibly of Inland Revenue adjustment for the rebate claim. It is still a matter under negotiation.

In relation to the Barranduna shipment, are you aware that all of the income from that shipment was taken into 1982 accounts? I am not familiar with the details regarding shipment, no.

30

Similarly if I ask whether freight had been excluded are you not in a position to answer that either? No.

However if Mr Ross reported that as a result of his investigation would you accept that that was the position? No with respect to Mr Ross his perusal was necessarily brief and I would not be certain that Mr Ross obtained a completely clear picture of the company situation at 31st March 1982.

40

I am asking you a specific question in relation to taking in the income for the goods sold and making

allowance for freight that was payable? Yes.

In the High
Court of New
Zealand

He will say that was something he was looking for specifically, would he be able to obtain that for the records he looked at? I do not think so clearly, no.

No. 5.10.

10

If he knew the amount for freight, that would show if it had been taken into account in a journal entry? Quite possibly.

Plaintiff's
evidence
Anthony Watson

So if it was not in the journal as an entry it is unlikely to have been taken into account? It would depend on the extent to which, any liability the extent to which payment had been made.

Cross-
Examination
- continued

20

Dealing still with the 1982 accounts, do they show a directors' current account at a level of \$24,133? Yes.

And I expect the value of that asset depends on ability of directors to pay as at a particular date? Yes.

And if the resources were such they could not be paid that is a matter also going to solvency of the company? I think so, yes.

30

Still in 1982 accounts, the first current assets is shown as sundry debtors and deposits and amount \$309,295, how much of that would be represented by tax credits estimated due to come to him? To my knowledge just under half.

40

Do you know how much was paid in relation to - how much the company received in relation to the Barranduna shipment and in at 31st March 1982? Not precisely relating to that particular shipment.

What documentation did you use to calculate the export incentive for the company? A schedule of sales to various markets from Mr Cash supported a little later by some documents relating to shipments.

What were they? Not precisely, I am not trying to be evasive. I produced accounts and the export claim and then called for or from Mr Cash for

In the High
Court of New
Zealand

further support for the export incentive claim and he produced a bulk of what could be customs entries relating to shipment, but in my speed I wasn't too concerned about what precisely what they were except that they were satisfactory for Inland Revenue.

No. 5.10.

Plaintiff's
evidence
Anthony Watson

Is part of your paperwork a record of what they were? I think so yes.

Would you look now at document 191, do you recognise that? I don't recall seeing it before.

10

Cross-
Examination
- continued

Do you recall forwarding to Commercial Bank of Australia a statement of assets and liabilities under cover of letter dated 28th July 1982? I was asked to provide information of that kind for the Bank on several occasions and I think I probably did so also about that time.

Do you remember that document 191 being part of the documentation sent on to the Bank? I don't remember it, no.

20

As far as you are aware at the moment have you not seen it before? As far as I can recall, certainly.

I want to come to the 1983 accounts, document 224, is it correct that the understated liabilities that I referred to earlier were taken up in the 1983 accounts, adjustment made for them? To the best of my knowledge they have been yes.

30

At the bottom of the profit and loss account is a reference to a net taxation figure? Yes.

Can you tell us how that net figure was arrived at? Approximately \$78,000 has been the subject of export rebate claim for the year ended 31st March 1983. From that has been deducted the deletion or reductions the Inland Revenue made in previous year's claim, and the bonus issue tax on increases of capital, to arrive at the net credit shown in the appropriation account.

40

Using the figure you quoted I think a while ago of \$45,000 odd deduction by Inland Revenue, if you add that to bonus issue tax and tax credit shown

here you also achieve the figure of \$78,000 claimed for the past year.

In the High Court of New Zealand

Isn't a more usual way to treat that for accounting purposes is to describe it as a prior year adjustment? Yes it can be so treated. The effect is exactly the same as far as the company net equity position at 31st March 1983 is concerned.

No. 5.10.

Plaintiff's evidence
Anthony Watson

10

But what it does is to distort the trading figure? No I don't agree. The trading account shows a net loss of \$155,000. The profit and loss account shows that it doesn't.

Cross-Examination
- continued

AFTERNOON ADJOURNMENT 3.30 P.M.

RESUMED 3.45 P.M.

20

When I asked about question of distortion of trading result, if there were a prior year adjustment in relation to particular items they would appear in trading account above the profit and loss accounts? Trading items, possibly yes.

30

You said that the net position would be the same but what I in fact put is the trading position would be more accurately recorded in doing it the way I put it? if I understand correctly I think the trading position shown in 1983 accounts are reasonably accurately showing the results.

All of the adjustments have been made in the profit and loss appropriation account? Not relating to trading matters apart only from the possibility of PAYE tax which would be a trading matter but that is not a large amount.

40

Also the insurance? Of that I am not sure.

I am talking of the ACC levy? Yes the bulk of the \$45,000 odd adjustment from Inland Revenue related to tax bonus issue or disallowance of claims for promotion and is not shown in the profit and loss account.

Re-examined Mr Clark:

Re-Examination

My learned friend asked you whether the schedule

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Court of New
Zealand

No. 5.10.

Plaintiff's
evidence
Anthony Watson

Re-
examination
- continued

proceeded on basis of a total of 5 shipments and you answer was yes? Yes....

You have over the break looked for the source of the information that formed the basis of shipments and it is a document I now produce to you as Exhibit 13. Looking at that document was it as Mr Carruthers surmised and you agreed composed on shipment basis or on individual monthly schedules of grades? Yes monthly schedules per grades of shipments.

10

You also said arising directly out of the way in which that was put, that there being only 4 shipments would seriously affect the calculation you made and you answered that yes: you have in point of fact in your Exhibit 12 looked at 4 months have you not? Yes.

His Honour raised a point in regard to you analysis, Exhibit 12 having been prepared in a manner which did not in effect make any allowance for promotional costs not incurred, as I understood the thrust of the question, and you agreed that overheads not incurred was a proper item of credit against the formulation? Yes.

20

And you went so far as to apologise? yes.

But you did with all exceptions and omissions think about that with regard to the physical, the \$66,000 item which you had decided should be deleted from the claim, in your own words can you explain what you think the fair and correct situation is in regard to extra overhead costs incurred and extra overhead costs saved? If the sales projected had been achieved then it is likely that promotional costs would not be incurred and thereby reduce the normal gross profit if they remained at \$200,000 per the exhibit. However, the company did not achieve the sales but did suffer considerable extra overhead costs. And it seems that those extra costs incurred were disregarded to reduce the statement of claim to the \$414,000 now arrived at, then it would seem unreasonable to deduct the further \$60,000.

30

40

As regards overheads saved? Yes that is correct.

My learned friend added up for you matters Mr ROSS investigations had recorded: As errors in the 1982 balance sheet position the following figures, PAYE \$12,472, ACC under accrued \$2,485, bonus issue tax not provided \$11,473, and understated tax credit of \$45,432: my question is, is it correct for Mr Ross to look at those figures cumulatively or do they not have a very considerable overlap? Yes they do certainly overlap. The \$45,000 approximately would be the total of the deletions from rebate payable by Inland Revenue made by Department for all purposes including bonus issue tax and including PAYE tax or ACC levy. That total reduction itself is still subject to adjustment as further tax incentive payment has subsequently been received by [?from] the Inland Revenue. AS regards the question of prior period adjustment I feel it is rather a hypothetical accounting question as virtually regarding the bonus issue tax originally the matter was under negotiation with the Inland Revenue Department and they had themselves not assessed the Company for such bonus issue tax originally. Secondly Acc levy is in reality paid in advance in any case. The only item which could be said to have not ideally been included in the 31st March 1982 accounts was the under - estimation of PAYE tax by the company management.

Was or was not the liability for bonus tax known or assessed as at the 31st March 1982? It had not been assessed by Inland revenue when capital of company was originally made, in my opinion because the reserve funds from which the bonus capitalisation occurred arose from tax rebate credits rather than from normal trading profits.

Subsequent to March 1982 Inland Revenue adopted the attitude that use of tax rebate credits or refunds for bonus issues would be taxable to the Company concerned and on that basis therefore assessed Aotearoa.

Is that amended tax situation taken into account in following year's accounts? Yes.

My friend asked whether or not freight payable had been taken into account for year ending 31st March

In the High Court of New Zealand

No. 5.10.

Plaintiff's evidence
Anthony Watson

Re-examination
- continued

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In the High
Court of New
Zealand

No. 5.11.

Plaintiff's
evidence
Grant William
Taylor

Examination

1982, one must assume he is speaking of freight payable for taking goods to India, would you know whether or not the goods on the Tarago e.g. ever went to India or whether or not the money was due at 31st March? I had no knowledge of individual shipments or liabilities arising therefrom.

GRANT WILLIAM TAYLOR (Sworn)

I live at 89 Peary Rd, Mt Eden. Are you the Managing Director of G. Taylor and K. O'Rourke Limited which trades at Penrose under trade style of Paper Reclaim Group? Yes.

10

You are one of the largest waste paper merchants in the area excluding Forest Products? Yes.

Have you been in that business now for over 7 years? Yes.

Have you done substantial amount of business with Aotearoa? Yes we have.

20

Would you tell me what it would be in round figures that you have received from Aotearoa? Within a year about \$100,000.

Is the waste paper business or purchase of the product dominated very largely by one firm? Yes it is....

30

The name of the firm? NZ Forest Products.

Can you tell us whether or not the prices have been consistently over or under the NZ Forest Products? Very generously over.

At the end of 1981 did you receive certain advices from Forest Products in written form as to what they were prepared to take or could take and did you receive further advices of 7th April 1983, limiting your take? Yes that is correct, they limited the amount of tonnage that we could supply in written advice.

40

At the beginning of last year did you supply paper to Mr Cash which to your knowledge was consigned to India on the Barranduna? That is correct.

Tell us approximately what quantity you were able to supply? We actually supplied about 417 tonnes for shipment.

In the High Court of New Zealand

10 What would you expect your ability to be to supply in the next 5 months to July 1982 had Mr Cash had willingness and ability? At that stage we had a further 200 tonnes in store that month. I discussed with Mr Cash that over a 2 to 3 month period we would build up close to 800 to 1000 tonnes per month and we would be able to consistently supply that.

_____ No. 5.11.

Plaintiff's evidence Grant William Taylor

20 If the international market perchance had gone down and Mr Cash had not been prepared to pay quite as much what would be you attitude. This may have come up but the internal market is so low that the price would have to drop dramatically before we would consider not supplying.

Examination - continued

Cross-examined Mr Broadmore:

Cross-Examination

Your reference to a letter from Forest Products of November 1981 referring to stopping supply of waste; did you sell to Aotearoa? No we haven't.

30 The problem with Forest Products has been one of over supply of Kraft? It was common knowledge that the gross oversupply of waste paper generally over all grades in this country except for few top grade paper, the price difference for those compared to export makes it unworthwhile to go to a lot of trouble to grade it separately from the lower grade paper for sale internally.

40 But it seemed the limitation was consistently applied to kraft and you would be prepared to continue this? Not correct, you will see on some letters, one particular there, they refused to buy waste paper in any shape or form from us and it made it quite obvious that they could stop accepting paper from us at any state. This has been the case over the last 2 to 3 years.

I assume the opening of the new Forest Products processing mill has had some effect on that? To what extent.

I understand Forest Products has a new building

In the High
Court of New
Zealand

for process of waste paper? Yes the process has been removed from Whakatane to Penrose as the finished product has been largely used in the Auckland area and it is easier to have the machinery in Auckland.

No. 5.11.

Plaintiff's
evidence
Grant William
Taylor

I suppose that whatever may be the position in the past they are now prepared to take much higher quantities? No they are still not prepared, even today there is strong indication we may have to face further reductions in the amount of paper we supply.

10

Cross-
Examination
-continued

You mentioned that you trade with Aotearoa amounted to - \$100,000, is that annually or what? I said that it was over approximately a year's trading.

Is that the most recent year or does it go back? We haven't been dealing with Aotearoa for 7 years. That was a recent year, up to the beginning of this financial year.

20

Your financial year ending 31st March 1982, is that right? The year ending 31st March 1983.

Is that higher than previous years? We did not do a great deal of business before then at all.

These proposed purchases in the early part of this financial year were for all practical purposes a new venture for Aotearoa? We concluded a certain amount of business in middle of 1982 which was going to support the business we were arranging. This particular shipment was the first of a continuing business that would go on for at least six months from that first initiating shipment.

30

Apart from Aotearoa and Forest Products what other outlets did you have for sale? Very few. We have supplied to a company in Auckland Recycling Industries, a certain amount of tonnage but that has now been taken over by Forest Products and incorporated into the new Penrose mill.

40

Do you export yourself at all? We have looked into the possibility of exporting ourselves. We are faced with the expertise of finding a customer

and selling material to him, and of course the knowledge that is necessary to arrange shipment and clear it out of the country. But you have done some exporting? Not under Paper Reclaim group.

In the High
Court of New
Zealand

Do you know what grades of paper are currently being exported by others? I know what is in demand to a large extent in the export market.

No. 5.11.

What is that? Well the higher grades of paper, the ones that require less as far as energy and machinery in a pulp mill to reconstitute it back into a good high quality paper are the ones that are in the greatest demand and fetch the best price.

Plaintiff's
evidence
Grant William
Taylor

Cross-
Examination
- continued

They can stand quite high shipping costs can't they? The material that we would ship high quality papers are more expensive purchase in the country. The margins are greater profitability wise, and have been up to recently the only paper that has been profitable to export.

Over the last few months has it been profitable to export waste? We found it very profitable and there has been a very strong increase or interested I should say in all grades including the lower grades for export markets.

But the problem is getting it there? Cost of shipping is always the problem.

Turning to your own facilities at Paper Reclaim I take it you have some sort of warehouse? We at present have a store at Penrose of 2,000 sq. ft. and a further store available to us approximately the same sq. footage. We currently hold the lease on both of them.

What quantity of paper can you store in those premises? As one of the papers used for processing, approximately 8 to 1200 tonnes, the other factory is necessary we haven't had to use it, 2 to 3 times that amount.

Is that other one being used for some other purpose? Yes it is. At the moment it's a business that has been closed down and left in

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Court of New
Zealand

mothballs but the equipment can be condensed into a small area and alleviating the rest of the factory space.

No. 5.11

Plaintiff's
Evidence
Grant William
Taylor

When would that be available to you? It has been available to us half of it for about a year. It is all now available to us, we are able to use all of it now.

Re-examined Mr Clark:

No questions.

CASE FOR THE PLAINTIFF CONCLUDED AT 4.32P.M.

RESUMED MONDAY, 13TH JUNE 1983, AT 9.30A.M.

MR CARRUTHERS OPENS AND CALLS AT 10.18A.M.

No. 5.12

Defendant's
Evidence
David William
Teskey

DAVID WILLIAM TESKEY (Sworn): (To Mr Broadmore)

I live at 18 Dallas Place, Avondale.

In 1981/82 you were the marketing manager employed by East Asiatic Co. NZ Ltd, who are the Auckland agents of ScanCarriers? That is right.

You now hold a similar position with AES Agencies Ltd? That is right.

You have no sea experience but have been employed in shipping agency and import and export business since about 1965? Yes.

Towards the end of 1981 did you hear about ScanCarriers proposal to offer a new service to the Arabian Gulf? Yes I did.

Explain what the basis of that service was? ScanCarriers was proposing to begin a service to the middle east calling at the port of Dubai near the Arabian Gulf and offering carriage opportunities to other destinations, which included Pakistan and India.

As well as other ports in the Arabian Gulf itself? That is right.

There was capacity on the Company's vessels taken

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to Europe which made this a possibility? That is correct.

In the High
Court of New
Zealand

As marketing manager were you asked to evaluate cargo possibilities in the Auckland area? Yes, we were asked in our capacity as agent for the principal to investigate all possibilities of cargo to the Arabian Gulf and the direct ports we were serving at that stage and additional potential cargoes for other areas which could be of interest.

No. 5.12.

Defendant's
evidence
David William
Teskey

Did you speak to Mr Cash of Aotearoa about the proposed service? Yes we did. I already had had some dealings with Mr Cash relevant to another service which ScanCarriers had been operating for some years which was directly to the Red Sea to Jeddah and we had in fact carried some cargo for Mr Cash on that service.

Examination
- continued

As a result of that would Mr Cash have been on your mailing list for this Arabian service? Yes he would.

You had some discussions with Mr Cash in December and after a month's holiday in January, tell us about the initial discussions before Christmas, what was being offered? In proposing the new service ScanCarriers was obviously looking for the most attractive freight paying cargo available but also in launching the service there was obviously some definite advantages to be gained in carrying also relevantly low revenue commodities such as waste paper.

Was Mr Cash talking about waste paper in some quantity? Yes he was. The quantity involved at any particular time varied somewhat, but we were left with the firm impression that we could expect approximately 1,000 tonnes waste paper on each of ScanCarriers sailings to that area. The vast majority which would be destined for Pakistan and India.

Still staying with December, were there any particular destinations and quantities mentioned at that time? Yes Mr Cash was discussing Pakistan, namely Karachi, and approximately 5 other destinations in India.

In the High
Court of New
Zealand

Was that around the western Indian coast? That is correct.

And round as far as Madras on the south eastern coast? Correct. The most likely prospects seemed to be for Madras, Cochin, Tuticorin, Bombay and Karachi.

No. 5.12.

Defendant's
evidence
David William
Teskey

Was there also discussion in December about freight rates? Yes, our initial approach to Mr Cash was I guess you describe exploratory.

10

Examination
- continued

First of all we had to ascertain what volumes and types of cargo he had potential to sell in that area, what freight rates he would expect to pay, and in fact had been paying to other carriers and what interest Mr Cash would have in supporting ScanCarriers new venture on a regular basis.

Mr Cash appeared to be very interested in the service and round about late November through December and again in January and February we engaged in a number of meetings.

20

Were you contacting other shippers about this service as well? Yes we certainly did.

At about the same time? Correct.

We had undertaken a fairly in depth study of the market, particularly middle east investigations, and as a result of that study we as agents for ScanCarriers were contacting a number of shippers of various different types of commodity who were likely to have an interest in the service.

30

Did you obtain early indication of support from other shippers? Yes we did.

At what sort of level? The level varied according to the commodity but there was undoubtedly a lot of interest in a potentially new and regular liner service into that area. And in particular we had good prospects to lift substantial tonnages for amongst others NZ Forest Products, NZ Steel and General Foods.

40

You came back from your holiday on Monday 25th

January 1982? That is correct.

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Court of New
Zealand

Look at volume 1 of the documents, and turn to document 25, this is a telex from you to ScanCarriers in Wellington passing on a request for space for shipment of 1,100 tonnes waste paper for Cochin and Madras including also possibility of a further 1,000 tonnes for Bombay? Yes, That is correct.

No. 5.12.

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Did that result from some discussion you had with Mr Cash? Yes that is correct. I recall that we had originally arranged to meet Mr Cash in the East Asiatic Company's office on the 26th January but that meeting was deferred at Mr Cash's request and this telex resulted from a telephone discussion which I had with Mr Cash on that day.

Defendant's
evidence
David William
Teskey

Examination
- continued

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When you deal with potential shippers do you sometimes come across people who have little apparent knowledge of the procedures to be followed? Yes we do. In respect of Mr Cash we had in fact had previous dealings relative to a substantial shipment of frozen fish to Saudi Arabia. The Saudi Arabian market is a fairly demanding one from the documentary point of view, and the result of our dealings with Mr Cash over that particular consignment led me personally to believe that Mr Cash was an experienced and knowledgeable exporter. And on his own admission he had been dealing with the Indians for the sale of waste paper for some years.

30

You mean the Shipping Corporation of India? I mean the buyers in India as well as of course other shipping lines operating in that area.

40

During your discussions what did Mr Cash say about his prospects of sales? Mr Cash led us to believe that he had already made substantial sales to Indian buyers and had good prospects. For continuing sales.

That means sales, shipped and completed? Correct. And he had considerable prospects for sales to some new clients of his.

The tonnages involved were somewhat unspecific as one may expect at an early stage, but in some

In the High
Court of New
Zealand

No. 5.12.

Defendant's
evidence
David William
Teskey

Examination
- continued

cases Mr Cash was indicating very substantial monthly quantities was far as he could in tonnes. However, we did tend to treat these quantities with some suspicion as again by Mr Cash's own admission he was only talking of prospective sales at that stage and not firm contractual commitments.

At that stage you were talking about January? No I think I was really addressing the period of November/December because in January the tonnages were becoming a little more specific and at that time we were preparing budgets and expecting a figure of around 1,000 tons for monthly sailing.

10

Coming to the telex document 26, that refers to a letter of credit for 1100 tonnes, as at that time were you aware of any other sales?

Not that I can recall in the sense that the contemplated sales were evidenced by letters of credit. The 1100 tonne parcel to the best of my recollection is the only one which was covered by a letter of credit.

20

Did you gain any impression of Mr Cash's previous level of trading with India? Once again it appeared to us that Mr Cash had been dealing with Indian buyers for some time but we understood the level of freight rates offered by another carrier, namely the Shipping Corporation of India, had been at a level which had restricted Mr Cash's trade for this sort of tonnage.

30

These were higher tonnages than he had dealt with before? That appeared to be our impression yes. Notwithstanding that and my earlier comment regarding Mr Cash's sale in the region of 3,000 tonnes, we had little reason to doubt that Mr Cash was able to obtain and sell tonnages of round about 1,000 tonnes per monthly sailing.

40

Did you tell Mr Cash anything about ScanCarriers vessels and the route and type of vessel? Yes we did. In particular I can recall a meeting in Mr Cash's office in the early stages of our negotiations which would have been in December 1981, at which meeting Mr John Robinson from ScanCarriers and Mr Brett Freer of East Asiatic

were both present with myself. And at that and other meetings we discussed in some considerable detail ScanCarriers service, cargo handling ability, the types and configuration of vessels operated, and of course the anticipated service which ScanCarriers was beginning to the Middle East which would allow for the on-carriage of cargo to India and Pakistan as well as other destinations.

In the High
Court of New
Zealand

No. 5.12.

Defendant's
evidence
David William
Teskey

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Accepting cargo for Indian ports involves transshipment at Dubai? That is correct.

Examination
- continued

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Was that told to Mr Cash? Yes it was. And I believe that Mr Cash did have some initial misgivings about a transshipment service as opposed to a direct service and in fact asked us to investigate what minimum inducement ScanCarriers would be prepared to accept for direct calls at Indian ports. We were able to satisfy Mr Cash's misgivings insofar as the transshipment aspect was concerned, particularly in view of the fact that ScanCarriers was offering a through bill of lading. And by pointing out to Mr Cash that other similar services were operating successfully. We naturally also felt considerable very good reputation and longstanding acceptance by shippers in other trades.

30

We talked about tonnages and promotions, but you were also involved in talking with Mr Cash about freights? Yes that is correct. In my capacity as marketing manager for East Asiatic we had some responsibility to discuss freight rates although the final authority as to the decision on what freight rate would be struck was clearly and unquestionably that with ScanCarriers themselves. Mr Cash was made aware of the fact that we had to authorise any freight rates struck through ScanCarriers Wellington.

40

By saying through ScanCarriers Wellington, I am not suggesting that the authority was specifically vested in them, as obviously they would have to refer these sort of matters to ScanCarriers head office in Norway.

Following through the negotiations about rates, you said that you knew Mr Cash's rate from the

In the High
Court of New
Zealand

Shipping Corporation of India earlier - was he trying to get a better deal out of you? Yes he was. His initial offer for one particular grade, namely the mixed waste, was as far as I can recall \$8 [?\$80] per tonne US.

No. 5.12.

Was that quoted in discussion? Yes it was.

Defendant's
evidence
David William
Teskey

And it subsequently became evident that the rate which we finally agreed to of US\$120 was workable, for Mr Cash.

10

Examination
- continued

He would conclude business with you if that was the rate? Correct, which I believe is evidenced by his first shipment.

You have already referred to telex document 26, that refers to a freight rate of US\$121, as having already been quoted by ScanCarriers, do you know the background of that? As I have already said we had protracted discussions with Mr Cash relative to the freight rate and although these discussions had been initiated on a local level that is between East Asiatic Company and Mr Cash obviously during my absence on vacation in early January, ScanCarriers had been having direct discussions with Mr Cash.

20

You don't know of those of your own knowledge? No, not until Mr Cash informed me on 26th January a rate of \$121 had been struck with ScanCarriers in Wellington.

30

The next telex is document 31, dated 27th January, does that constitute a response to your telex of the previous day? Yes I believe it does.

And that quotes a rate of US\$140? That is correct.

For Bombay and Karachi? Correct.

40

With the position for Madras and Cochin to be dealt with later? That is correct.

In accordance with your normal practice did that result in any contact with Mr Cash? Yes it would have done. I can't specifically remember if I contacted Mr Cash on that day 27th January.

You think you spoke to him about that time? Yes I did. I can recall a very negative reaction from Mr Cash in a phone conversation around that date where he informed me that he couldn't understand why the rate had suddenly been increased because he was under the firm understanding that he had had the rate of \$120 confirmed and committed directly by ScanCarriers Wellington.

In the High Court of New Zealand

No. 5.12.

10 Did you report that reaction to anyone in ScanCarriers? Yes I did. I can also remember having one lengthy telephone conversation with John Robinson of ScanCarriers in Wellington, verbally passing on Mr Cash's reaction, and being told by John Robinson that the transshipment expense from Dubai to various Indian and Pakistan destinations was a lot higher than what ScanCarriers had initially expected. I believe a figure of \$70 per freight tonne was being
20 mentioned in that context.

Defendant's evidence
David William Teskey

Examination
- continued

The next telex is at the foot of page 32, which hasn't a number (33A): that confirms a rate of US\$150? Yes it does.

Can you recall discussing that with Mr Cash? Yes once again Mr Cash's reaction as one might expect was very negative.

30 The rate was going higher it obviously was not going down because the rate was going higher than the rate which I believe he sincerely believed ScanCarriers had committed to him, that of \$120.

At this point we have a rate of \$140 for Dubai and a rate of \$150 for Madras? Correct.

40 That takes us to 29th January, did you meet Mr Cash on that day? That was the day I had a meeting in East Asiatic office with Mr Cash and an overseas agent of his who had arrived in Auckland.

There will be evidence that was the day the Tarago was in port, and there will be evidence of a meeting that day with Mr Cash by Mr Robinson, can you recollect the date? I freely admit the dates of specific happenings are a little hazy. I could stand to be corrected on that day. I do recall having that meeting around that date and to the

In the High
Court of New
Zealand

best of my knowledge it was a Friday and it was the date we had a vessel in port, but it is now 18 months ago and I can't recall exactly.

No. 5.12.

Defendant's
evidence
David William
Teskey

This meeting with the overseas agent and Mr Cash, was the arrival of the overseas agent a surprise to you? No Mr Cash had previously mentioned that he wanted to have a joint meeting with this gentleman from the UK who to the best of my recollection was described to me as Mr Cash's London agent. It wasn't clear at that stage whether this gentleman had any involvement in Mr Cash's trade to India and Pakistan.

10

Examination
- continued

What was the subject matter of the discussion? We once again generally discussed the ScanCarrier vessel configurations and capabilities and in particular the question of Mr Cash's possible sales of waste paper to Europe was discussed. This surprised me a little bit and I recall that Mr Cash indicated that he would probably conclude satisfactory sales at a European rate of approximately \$80 per ton.

20

That is a freight rate to Europe? Correct.

Was there any discussion about that freight rate? Yes I informed Mr Cash that unlike the Indian service where ScanCarriers was operating in relative terms as an independent line, the service ScanCarriers was involved in to North Europe was the subject of Conference membership and as such Scancarrier would have a responsibility and a requirement to obtain any freight rates it proposed with the full agreement of all Conference lines.

30

And that it would be necessary to enter into an application form which was to be prepared by Mr Cash and subsequently be submitted to the Conference for consideration. This form was prepared by Mr Cash and submitted to the Conference.

40

Look at document 54, is that a letter from you to ScanCarriers in Wellington? Yes.

Is there an application form attached to that? Yes.

That is the form you are referring to? That is correct.

In the High
Court of New
Zealand

That is about a month after the meeting referred to, can you recall why there was a delay? I am not certain but I have an idea that Mr Cash was out of town for part of the intervening period and I also seem to recall that there was some problem with the original form which Mr Cash submitted. I have an idea that it was an illegible copy.

No. 5.12.

Defendant's
evidence
David William
Teskey

Would you look at documents 74 and 75, is that an exchange of telexes with Wellington chasing up the question of freight? Yes it is. At that stage we were aware that the Conference freight committee meetings were taking place on a weekly frequency and it appeared to me that a reply should have been received, hence my telex asking for information.

Examination
- continued

Look at document 108, is that some advice from Wellington about the result? Yes that is correct. In response to that telex I telephoned Mr Cash and informed him that a rate of US\$100 per weight tonne had been struck and in response to this he appeared to be very happy with that outcome.

Look at document 109, is that your report back to Wellington? Yes it is.

To your knowledge did Mr Cash make a cargo to Europe? Certainly not with ScanCarriers. I can't of course speak for other lines.

Following that European exercise, what were Mr Cash's prospects - what did Mr Cash say about his prospects of shipping these tonnages? Bearing in mind our discussions with Mr Cash did cover a fairly lengthy period from negotiating the meetings to the first shipment, I think in fairness to Mr Cash we had every reason to suppose as I said earlier that we could expect to obtain approximately 1,000 tonnes per month to India and or Pakistan. But around about that period, that is to say February 1982, we were trying to obtain a little more detailed information from Mr Cash as to specific tonnages for specific destinations.

In the High
Court of New
Zealand

No. 5.12.

Defendant's
evidence
David William
Teskey

Examination
- continued

And it was quite apparent to me that Mr Cash was trying to do the best that he could in giving us some idea bearing in mind the relative vagaries of this market. And also the difficulties in obtaining any firm commitments for all available paper from his clients.

Recall any discussions on the subject of bookings with Mr Wilson or at other times? We certainly would have discussed the booking protocol if not earlier certainly in early 1982, and I can recall a meeting or at least a conversation with Mr Cash approximately four weeks before the Barranduna shipment at which we informed Mr Cash that he would have to make some form of commitment as to his booking on the first vessel and that that commitment would be the subject of confirmation acceptance by our principals ScanCarriers.

10

We certainly had no authority to confirm any booking space for the type of tonnages we were talking about, that is around 1,000 tonnes. For confirmation by East Asiatic? Yes. It would have been unfair of us to have misled Mr Cash into thinking that we did so.

20

You spoke of a month before shipment? Yes we had tried to obtain more specific tonnages from Mr Cash for the Barranduna sailing, on a number of occasions, and in particular we were trying to press Mr Cash for a firm commitment to be made no later than I believe two weeks before the Barranduna's expected arrival date in Auckland. This was to allow us to inform the principal of what space commitment totally would be required out of our area for that sailing and of course also to finalise and make arrangements for the logistics side.

30

You are referring to your authority as agents, can you explain the basis on which you made bookings generally and the basis of authority to Wellington? I understand the East Asiatic's authority to accept cargo was that in theory every booking was subject to confirmation by the principal but that in practice relatively small bookings of 1 or 2 container loads we were allowed some discretion over, up to a ceiling that we

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would be notified of by ScanCarriers in Wellington. Once that ceiling was reached we would in each case have been asked to refer all firm bookings to ScanCarriers for approval, but unquestionably that authority did not allow us to accept parcels anywhere near 1,000 tonnes. In fact I recall it was my practice to refer basically any booking in excess of one container load, say, for practical reasons 20 tons.

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No. 5.12.

Defendant's
evidence
David William
Teskey

Examination
- continued

10 Were you aware of the total NZ allocation for the cargo? No we were not. We were not given any specific figures for each sailing, although guidelines had been laid down. I can't even recall the tonnages, they weren't sent to us as a guideline for instance.

20 You refer to obtaining tonnages from Mr Cash, would you now look at document 43 of Volume 1? Yes.

That is a telex which appears to be dated 16th February? Yes. What does that telex sum up? That is as to the results of our pressing Mr Cash for some commitment for the Barranduna, the best tonnage indication which he could give us on that date.

30 And as I indicated in that telex he had no firm letter of credit established for this parcel but that he had reasonable expectation of receiving the appropriate letter of credit prior to the Barranduna's anticipated arrival date. Those tonnages did subsequently alter.

40 Did you have any contact with Aotearoa about those alterations? Yes we did. Between myself and Brett Freer, we were having daily contact around about that time.

To what purpose? To try to ensure that the most up to date information was being passed on to ScanCarriers. And secondly, that letters of credit had or were expected to be still established before the Barranduna's arrival. Obviously if one of the letters of credit say for the 650 tonnes to Bombay hadn't arrived, we would have been seriously disadvantaged, and ScanCarriers would have lost a considerable amount

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Zealand

of revenue which had they had prior notice they could possibly have obtained from other suppliers.

MORNING ADJOURNMENT 11.30A.M.

RESUMED 11.45A.M.

No. 5.12.

Defendant's
evidence
David William
Teskey

You were telling us about freight enquiries from Aotearoa and a discussion about letters of credit? Yes that is correct. We were trying to establish that in fact the bookings which Mr Cash had made was in fact likely to represent the tonnage to be finally shipped.

10

Examination
- continued

Are the existence of terms of shippers' letter of credit a matter which you go into with shippers? As a general rule we would normally assume that a shipper would have established a letter of credit at the time when he was making the booking, or at least have reasonable prospect to obtain such a letter of credit in sufficient time so as not to delay shipment. In general practice we didn't normally press a shipper too closely to establish if the letter of credit had been arranged since this was normally an automatic occurrence and unless we had specific reason to doubt the shippers having obtained the letter of credit we wouldn't normally ask the question. However for several reasons such as the waste paper in question, it was normal to at least enquire as to the status of the letter of credit and as far as I can recall the discussion on the letter of credit for this parcel was originated by Mr Cash's own admission.

20

30

Did Aotearoa's people have any discussion with you about the expiry date of letter of credit? No, not with me personally.

Is that something that is discussed with shippers as a matter of practice? Once again not unless we had reason to doubt that a letter of credit was likely to expire or reason to think that a letter of credit was likely to expire, or where the date of shipment is by the shippers own admittance critical in terms of the sailing date of the appropriate vessel. Again as far as I can recall at this stage that is before the Barranduna shipment, we had no reason to doubt either the

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existence establishment or expiry date of letters of credit covering these shipments.

In the High
Court of New
Zealand

I want to refer to two further telexes: ; document 38 in volume 1, is that a telex from you to Mr Robinson in Wellington? Yes that is correct.

No. 5.12.

10

And does that telex summarise a further discussion between you and Mr Cash concerning the rate? Yes it does. Mr Cash was still maintaining that ScanCarriers had made a commitment to him on the basis of \$120 which commitment we of course were not a party to since it was directly between ScanCarriers and Mr Cash and we were therefore unable to comment on it. The purpose of that telex really was just to pass on Mr Cash's sentiments that he still wanted further consideration of the rate.

Defendant's
evidence
David William
Teskey

Examination
- continued

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The next telex No. 39, fixes the rate and a copy was sent to you? Yes that is correct.

I want to turn to events on the 9th March when I think you inspected some of Aotearoa's cargo? Yes.

30

Do you recall inspecting a line of mixed waste? Yes, we had arranged with Mr Cash that both Brett Freer of the East Asiatic Company and myself would join Mr Cash to view the various different types of paper at a number of Mr Cash's suppliers' stores.

Whereabouts was the mixed waste? The mixed waste was at a store in Penrose, I can't remember the address but it was a store in Penrose.

40

Did you form any opinion about the mixed waste? Yes. Having inspected the other paper shipments which we felt were quite satisfactory, in terms of packaging, I was personally quite horrified at the state of the units which were presented as ready for shipment of the mixed waste at the Penrose store.

My major concern was that the bales and units appeared to be very poorly put together. The units appeared to me to be likely to fall apart when they were handled. The units were strapped

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Zealand

with steel banding which again in my opinion was not of sufficient strength to hold the units together, and in fact many of the steel straps which were holding the units together were extremely loose so as to be of little value in maintaining the paper in the cohesive manner.

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Defendant's
evidence
David William
Teskey

My other aspect of concern was that each unit was placed on cardboard liners, that is to say circular cardboard cores, to facilitate forklift handling. And these cores did not appear to provide sufficient strength to maintain the units when they were lifted and being cardboard of course would also have been subject to some deterioration if they became moist.

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Examination
- continued

My concern in discussion was obviously not so strenuously supported by my colleague Mr Freer, but nonetheless he also did indicate that the strapping should be of a better quality and should be tightened up. I actually suggested to Mr Cash that these units would be better presented possibly in some shrink wrapped form but Mr Cash countered that on the basis of the market price he was receiving for the mixed waste he would not be able to afford to shrink wrap these units. He did however indicate that when his Indian suppliers had had a chance to see the quality of paper involved they would hopefully be able to and be prepared to pay him a higher price thus allowing him to upgrade the packaging. Mr Cash did agree with us that the strapping would need to be tightened up and in fact had one or two extra bands would be provided around each unit. As a consequence of that meeting in a joint telex from myself and Brett Freer to ScanCarriers in Wellington, we did at my instigation highlight a note of concern at the packaging quality of the mixed waste.

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Look at document 61, is that the telex you refer to? Yes that is the one.

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See the 2nd to last paragraph. "Although the units..."? Yes.

I am bound to say that that statement was something of a compromise between myself and Mr Freer because I personally felt that the wording

or the cautionary note should have been a little more strongly worded.

In the High
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10 What did Mr Cash have to say about the units? I was going to say that I freely admit that the acceptance of the cargo in that form was not I felt within my jurisdiction. And that Mr Freer was best qualified to judge the packing standard, and in fact Mr Cash had made some strong representations to us that mixed waste paper presented in this form was normally quite acceptable to other carriers in this and other grades.

No. 5.12.

Defendant's
evidence
David William
Teskey

Examination
- continued

20 Going forward to the Tarago, would you or did you have any discussions with Mr Cash as to the shipment on that vessel? Yes. Following the Barranduna shipment Mr Cash attempted to make a booking through myself for a further parcel on the following vessel which was the Tarago. The tonnage was similar, I can't recall the exact amount, but it was similar.

Would you look at document 81? Yes.

That is a telex dated 25th March from East Asiatic to ScanCarriers in Wellington? Correct.

30 Were you aware of that telex? Yes I was. The author of the telex was Mr Paul Collins who at that time was an employee of East Asiatic Company on the marketing side and Paul actually sent the telex subsequent to a request from Mr Cash and informed me of the request for space.

40 When was that in relation to the Barranduna sailing? That is dated 25th March, after Barranduna had sailed. I am sorry, it must have been just before Barranduna sailed.

Did the question of that come up again later? Yes it did. In a subsequent discussion which I had with Mr Cash in East Asiatic's office, I can't recall Mr Cash's exact words, but he did lead me to believe that he understood that he had a confirmed booking on the Tarago for a further 1,000 tonnes. I was quick to point out to Mr Cash that his booking had been referred to Wellington for confirmation but that until that confirmation

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No. 5.12.

Defendant's
evidence
David William
Teskey

Examination
- continued

had been received we were not authorised to confirm that space. There was some additional discussion from Mr Cash who maintained that he had been told by somebody in the office that is in East Asiatic's office, that his booking had been confirmed. I indicated to him that his booking had not been confirmed and subsequent enquiries which I personally made to those members of East Asiatic staff who would have likely to have had some discussion with Mr Cash relative to the booking made it clear to me that there had been some misunderstanding and that in fact nobody from East Asiatic had given the clear undertaking to Mr Cash that his booking had been confirmed. Mr Cash appeared to accept this because in later conversations with him he did make reference to a booking and asked if any subsequent confirmation from Wellington had been forthcoming. That booking confirmation was never received.

10

Referring to Mr Cash talking about a previous quoted rate of \$120 quoted by ScanCarriers, did you at any time see any evidence of that? No I did not.

20

Did Mr Cash show you anything? No he didn't, and in some discussions I had by telephone with I think it was Mr John Robinson of ScanCarriers in Wellington the subject did come up and as far as I can remember Mr Robinson indicated that although the figure of \$120 had been discussed there had been no firm commitment made on ScanCarriers part. I should perhaps rephrase that as that is a little strong. To the best of my recollection Mr Robinson said something like we are still only discussing rates at this stage.

30

We have focussed on discussions you had with Mr Cash, about rates, quantities, tonnages, could you give some comparison of those discussions you had with other shippers around that time?

40

MR CLARK OBJECTS.

Were you following normal practice in relation to your discussions with Mr Cash? Yes we were. I think as evidenced by the amount of or I should say the number of attempts we had made to try to establish a firm and final figure, for the

Barranduna shipment, there were a considerable number of changes to the tonnages. But no more or less than we would have expected for this kind of commodity. Without a firm written contractual commitment from the shipper, particularly for these sort of tonnages, I would personally expect to see some variation in quantities and we were merely trying to cushion the possible far-reaching effects in too high a variation.

In the High Court of New Zealand

No. 5.12.

Defendant's evidence
David William Teskey

Examination
- continued

10 What is your normal practice in relation to possible shipments on vessels which may be some distance away or some time away from time of sailing? Following the booking we would maintain a reasonably close contact with the shipper to define reasonably, I would say weekly, to ensure that booking was still alive and that there were no major changes to the quantities.

20 In dealing with the rate application for Europe, were you following your normal practice? Insofar as the application for conference, yes we were. As I have already stated ScanCarriers as a member of the European Conference had an obligation to apply for any rate requests through the Conference channels, and the form of application which we referred to earlier was normal for such a request.

30 You spoke earlier about the enquiry for space for Cochin and Madras, was a booking ever made for Cochin or Madras? Not that I can recall.

Cross-examined Mr Clark:

Cross-Examination

40 I think you would agree with me that in ordinary language whether or not space is available on a ship directs the mind to whether there is room on the ship to take cargo, it's as simple as that isn't it? Yes bearing in mind ship owners commitments in other parallel trades.

We agree if he is committed to someone else than it wouldn't be available as there would be no room? Correct. I am sorry, there is one other consideration to be taken into account. And that is the practical aspects from the owner's point of view which may relate to the stability of the vessel. Which is an area that I am not really qualified to go into deeply.

In the High
Court of New
Zealand

No. 5.12.

Defendant's
evidence
David William
Teskey

Cross-
Examination
- continued

And which never arose in relation to Mr Cash either? I am not aware of that. May I say that we never became involved in a reason for accepting or not accepting shipments. Our involvement in this was as agent and in the normal course of events we were taking instructions from our principal.

Didn't East Asiatic advise that space wasn't available when in fact space was being offered to other people, I am talking of late shipments on Tarago? I cannot comment on what was said to Mr Cash. The phraseology used may have been as you suggested. But there again as an agent we can only pass on the instructions from our principal that we can accept cargo or we may not accept cargo and in general terms the reason for not accepting a parcel was little to do with us, it was not our business.

The point I am putting is whether on your principal's instructions he said to advise Mr Cash this ship was fully booked when you were still offering large amounts of space to other shippers? In one discussion I had with ScanCarriers, a comment of that nature was made to me. In the context of the way in which the statement was put to me, I didn't take it in its literal sense that I was being instructed that the vessel was fully booked and we wouldn't be able to take Mr Cash's cargo.

You were told it was fully booked when it wasn't fully booked? No I wasn't told to say anything of that nature.

Look at document 144, Mr Torgesen was your superior and Mr Collins your junior? Yes.

Does it not refer to any instruction from principals to say Tombarra was fully booked, its obvious isn't it? That is correct.

And is it not a fact that Tombarra was not fully booked and that large amounts of space were offered and still available and offered to prospective shippers? I really don't recall, which doesn't mean to say that isn't the case, but

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I don't recall that situation. Once again I would say that it was not up to us to define the reason for principals' non acceptance of cargo and we were merely acting on instructions from our principals. I did actually see this telex, I recall that. I had forgotten its existence.

In the High
Court of New
Zealand

No. 5.12.

10 I don't imagine you have forgotten that Arabian
Gulf uplifting on the Tombarra and the last
Barranduna was extraordinarily light with
prospects of large consignments between June and
July from Forest Products, General Foods or NZ
Steel after their early shipment had somehow not
eventuated? Yes that is correct, but we are
talking about shipments from NZ. ScanCarriers was
of course also serving Australia at that time and
we weren't made aware of what commitments the
company had from Australian ports. Again that is
20 not to say there was no space available but I
honestly don't know whether those vessels were
fully committed once they left Australia and New
Zealand.

Defendant's
evidence
David William
Teskey

Cross-
Examination
- continued

Do you recall on the same vessel enquiry being made from a firm for 500 tonnes space for fishmeal on the Tombarra? I don't recall it no.

30 On the 29th January there was was there not
discussion as to space availability on Scans ships
for the next six months, was there not? Yes that
discussion in context related to ScanCarriers'
ability to offer space to Mr Cash for the sort of
parcels that he was talking about.

40 Did you assure Mr Cash and the Englishman that
there was space available or would be? I can't
actually remember having done so but again in the
context of our discussions and in view of the fact
that ScanCarriers was obviously looking for cargo,
I am quite sure that some sort of assurance of
that nature would have been sought and
confirmed. But that would be normal practice.

In your evidence I noted as indicating that there was space capacity - I think you have already said that, but if I suggest to you that was more especially so north bound from this part of the world rather than southbound, would that be in accordance with the state of affairs as you

In the High
Court of New
Zealand

understood it? Yes, but again we only get the space allocation from local viewpoint. We are not in the position to have an overall view such as Scans in Wellington. We didn't know what it would be for New Zealand ports or from Australia.

No. 5.12.

But you did know an extra ship was being put on the run? Yes, I think that was a little later in the year, but yes there was an additional vessel.

Defendant's
evidence
David William
Teskey

I put it to you that it was part and parcel of the Arabian Gulf service that a third roll on/roll off vessel be made available because it takes a little time to divert between Australia and Suez into an Arabian gulf port? Yes, I am sorry, could you repeat that. I am suggesting that it was from the outset of the new Arabian Gulf service that you were soliciting for, that there be an extra Scans vessel, in other words that the time factor was immediate rather than later in 1982? To the best of my recollection ScanCarriers was intending to serve the Arabian Gulf with the current voyages or current vessels I should say, that were operating and it was after the service was implemented that a further vessel was brought in. I understood the reason for that to be partly trade commitments and partly because of the availability of that other vessel. Because it had been relinquished from another trade.

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Cross-
Examination
- continued

Are we agreed that it was from the outset an additional vessel was coming in? I don't recall that.

30

Look at document 6, the first paragraph, does that help you? Does that refresh your memory as to the additional ship coming in? Yes, but to my recollection that telex is undated, to my recollection that was in the context that ScanCarriers were going to be able to provide a direct port call at Dubai on every sailing, and serve alternately 3 and 4 New Zealand ports.

40

The decision to introduce the new service was made in November 1981 was it not? Yes I believe that is correct.

And the document No. 6 we are talking about was presumably contemporaneous with the decision to

run this Arabian Gulf service? Yes.

In the High Court of New Zealand

As I understood your evidence you said you told Mr Cash that in regard to his firm requirement for about 1,000 tonnes, you considered there would be ample space availability? Yes that is the indication which we had been given by ScanCarriers. But there was some discussion that I recall with ScanCarriers internally, not specifically relative to waste paper, which was I believe an attempt by ScanCarriers to get some sort of commitment from us as to forward projection of tonnages likely, because ScanCarriers was expecting some heavy commitments of seasonal crops from Australia. But we were still left with the if not clear instruction certainly impression that ScanCarriers would have little difficulty in accepting 1,000 tonnes per sailing. All other things being equal.

No. 5.12.

Defendant's evidence
David William Teskey

Cross-Examination
- continued

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20

Would you agree that as a general proposition even an experienced exporter like Mr Cash can't export if he can't obtain the transport service? Definitely.

30

And would you agree with me that the message that he received from the protracted discussions was that he had been offered a special export promotional rate for a certain period, and that you expect him to get cargo to use that special promotional rate? Yes.

40

In January or February you would not have expected Mr Cash to be denied space if space was available? No, except following the inspecting of the mixed waste. I am not suggesting that because of the form that packaging was presented ScanCarriers couldn't have continued to accept the cargo of the order of 1,000 tonnes. But I personally had misgivings, which I have already stated, relating to the form in which the parcels were presented, and ScanCarriers ability to be able to satisfactorily stow and handle the cargo in that form.

Would it be fair in saying you are not a master mariner or even having any marine experience at sea? That is correct. But you know Mr Anvin? Yes.

In the High
Court of New
Zealand

And he expressed he didn't expect any problem at all to start loading this cargo, would you prefer his judgment of loading cargo with his far greater expertise?. Yes I would.

No. 5.12.

And you know what a clean bill of lading is and a claused bill of lading? Yes I do.

Defendant's
evidence
David William
Teskey

We both know that never was any claused bill of lading proffered or issued to Mr Cash so far as insufficiency of packaging was concerned?
Correct.

10

Cross-
Examination
- continued

And as a shipping man you would know where a clean bill of lading is issued and the bill of lading passed hands, has major connotations as to who has to accept responsibility for stowage, damage?
Certainly.

The clean bill of lading is an indication that on acceptance the cargo did not suffer from any insufficiency in relation to its packing?
Correct.

20

Coming back to where we were a few minutes ago, in the context of this case, there was never any invocation of insufficiency of packaging by your principals? Not by our principals, no.

We all know that the export trade required almost as a matter of course, negotiation of a letter of credit? Yes.

30

And that the acceptance of cargo is a usual prerequisite of an exporter being able to be able to negotiate the letter of credit? Without being pendantic the acceptance of cargo for shipment, is not really the ship owner's responsibility to evidence the existence of a letter of credit. I would suggest that it is the exporter by presenting his cargo for shipment is effectively evidencing that he has the right to export that cargo because the ship owner rarely has an opportunity to establish in fact even if a letter of credit is necessary. Maybe I should rephrase that. The ship ower isn't required to interpret if a letter of credit is involved.

40

But you knew Mr Cash in January had letter of credit and was looking for more? Yes.

In the High Court of New Zealand

And you knew that without a bill of lading that the letters of credit because of their very nature would remain unnegotiated? Yes.

No. 5.12.

LUNCHEON ADJOURNMENT 1P.M.

10

RESUMED 2.15P.M.

Defendant's evidence
David William Teskey

I wish to take you back to the late morning of 29th January last year, in answer to my friend you told us that there was a certain amount of discussion re the North Europe Conference arrangements? Yes.

Cross-Examination
- continued

20

But that wasn't the main part of your discussion was it? No the main part was relating to ScanCarriers vessels, their layouts and abilities to handle various types of cargo.

30

You would have been given some idea by your principals as to the space the ships were likely to have for freight? Not in so many words. The principal e.g. never told us we could book up to 3,000 tonnes cargo on any particular sailing as space varied from voyage to voyage and as already stated we were clearly given to understand that commitments of a substantial nature would have to be confirmed by the principal. There was never a specific figure given to the carriers to any particular tonnage on any one or a number of sailings.

40

But the fact of the matter was that the two Roro vessels on the service had been going northbound less than full, is that not so? From New Zealand yes.

And a promotional freight that is something a little different from ordinary freight and commonly limited to finite period of time like 6 months? Yes.

Have you ever heard of ScanCarriers or any other company offering a promotional freight for a period and then declining to take any cargo during the latter half of the period, heard of that

In the High
Court of New
Zealand

before? No, but not limiting the commitments to a promotional rate I can see carriers not accepting cargo for very good reasons.

No. 5.12.

I believe that Forest Products were offered by you promotional rate for 30th September of US\$140? The offer was made by ScanCarriers and may be transmitted through us that offer made by ScanCarriers.

Defendant's
evidence
David William
Teskey

The date does have some significance doesn't it, or supposed to? You mean date of the term of special promotional rate, the expiry date. Yes I would agree it has significance insofar as that is the period to which the carrier is prepared to carry cargo at the special rate.

10

Cross-
Examination
- continued

You wouldn't expect a decent carrier to be wanting a higher rate than quoted during the same period would you? No, unless it was agreed that for some reason or other the higher rate was appropriate.

20

There was no question of shutting out Forest Products during this period of six months last year? No not as far as I am aware.

And if it mattered, what Forest Products was sending forward would have had a very much higher f.o.b. value than anything Mr Cash would be likely to be able to bring forward? I can't really comment on that, that is what one would expect in the situation.

30

You have the f.o.b. value for the compensation calculation? Yes.

I don't think it was your practice to write to shippers such as Mr Cash to advise that their confirmation of space? Well it wasn't a question of trust. If any shipper requested confirmation that a booking was accepted there was no reason why we couldn't have done so but it became a matter of practice with carriers involved that we didn't normally confirm bookings.

40

I expect we can be quite sure that your principals in Wellington at least have been told by you what you had expected in way of cargo to come forward from Aotearoa? Yes that is correct.

Would it be true that when space was denied that you personally had some degree of sympathy for the position Mr Cash was thereby placed in? Yes I did.

In the High Court of New Zealand

Re-examined Mr Broadmore:

No. 5.12

From your perspective as an employee of ScanCarriers agents, what awareness did you have of the overall utilisation of ScanCarriers vessels bound from Australia and New Zealand? Very little if any. Apart from general comments made to us by ScanCarriers.

Defendant's Evidence
David William Teskey

Re-Examination

Would you - what awareness would you have of loadings booked from Australia? Almost none at all.

Would you turn to document 48, recall having seen that letter or something like it and the document behind at any time? I can't recall having seen the letter but certainly the attachment was circulated. I have seen it.

MES means middle east service does it not? Yes.

Before the date of that letter 27th February, page 2, what awareness did you have of ScanCarriers policy as to cargo acceptance and priorities? As far as the middle east service was concerned, it was relatively non specific insofar as it was a brand new service, we had had meetings with ScanCarriers management to discuss potential, likely areas of interest, method of transshipment, and other general details. But until this document came out we had little in the way of a clear and precise instruction of acceptance of cargo.

Or the attractiveness of various cargo for various destinations.

My friend asked if you ever heard of any shipping company quoting promotional rate for non-accepted cargo; I want to ask you about shippers: what is your experience of shippers being quoted a promotional rate and not presenting cargo for shipment? It very frequently is the case. Often

In the High
Court of New
Zealand

lines can get into protracted negotiations with shippers and in some cases there is very little reason to doubt that there is a market for that particular cargo, but for one reason or another the cargo doesn't come forward.

No. 5.12.

Defendant's
evidence
David William
Teskey

My friend asked you about shipments to India for Forest Products. Do you know what sort of cargoes they were shipping and the destination? Yes, NZ Forest Products were shipping a range of finished paper products some of which were for further manufacturing processes and their major markets were in the Arabian Gulf.

10

Re-
Examination
- continued

Are you familiar with the concept of stowage factor? Yes I am.

Is that a comparison of cubic measurement of cargo with its weight? That is correct.

In relation to a weight of freight quoted per tonne basis, does the stowage factor influence the degree of acceptability of cargoes shipped at the same weight per tonne? Yes it does.

20

So that cargo with a higher cubic capacity or less dense would be less acceptable than cargo with a smaller cubic capacity but the same weight? Its a little bit of an over simplification. It depends a lot on trade, but yes in this context I think it would. The stowage factor often has a greater bearing on the ocean freight rate than the value of the cargo.

30

My friend asked about Forest Products cargo at \$140 per tonne and I ask whether the cargo you described for Forest Products would be more or less favourable on the basis we have been discussing - I mean profitable to the shipping company? That is really a question you would have to direct to ScanCarriers.

40

No. 5.13.

Defendant's
evidence
John Andrew
Robinson

JOHN ANDREW ROBINSON (Sworn)

I live at Epuni Street, Lower Hutt. I am marketing and operations manager for ScanCarriers in NZ. I am the holder of a masters foreign-going ticket issued by the Ministry of Transport. I am British by birth and came to NZ some 5 years

Examination

ago. Before then I had sea experience in the Blue Star Line and rose to the rank of chief officer for some two years.

In the High Court of New Zealand

You joined the Union Company and worked as stevedoring and supervisor but left that company to join ScanCarriers in about August 1975? That is correct.

No. 5.13.

10 Were you aware of Aotearoa as a result of having shipped cargo of fish to Saudi Arabia in 1981? Yes that is right.

Defendant's evidence
John Andrew Robinson

And did you first come across Mr Cash of that company in December 1981? That is correct.

Examination
- continued

At that time you were evaluating the service ScanCarriers were proposing to offer to the Arabian Gulf? That is correct.

20 ScanCarriers' Auckland agents referred to Aotearoa as a possible shipper? Yes.

Describe the meeting you had with Mr Cash at that time? We went to see Mr Cash who was wishing to know about our possible service and also to discuss with him the type of cargo he was shipping and the methods he was using for shipping this cargo. Our discussions at that stage were around the points I have just raised.

30 Did you see some of Mr Cash's product at the discussions? Yes I did see some of his product. The product I saw was actually the computer waste or magazine waste.

How was that packed? That was an extremely good unit, packed on a pallet, approximately 4 ft x 4 ft and about 4 ft high. Well strapped and well secured.

40 By pallet do you mean a wooden pallet board? Yes that is correct.

Did Mr Cash discuss with you the possibilities of his trade to India and Pakistan? He mentioned that he was looking at a shipment of approximate 1000 tonnes at this stage.

In the High
Court of New
Zealand

Did he give any indication of any other shipments he might be contemplating? To the best of my knowledge he did not indicate or give us any indications of any further shipment.

No. 5.13.

Defendant's
evidence
John Andrew
Robinson

Did he discuss possible freight rates at that time? To the best of my knowledge the question of freight rates was on the question of what his product would stand. He indicated to us that this particular cargo could not stand more than US\$ 100 per tonne. That was as far as we discussed it.

10

Examination
- continued

Did you discuss the nature of the units which would be acceptable to ScanCarriers? This was discussed and the concept was based on a 4 unit, multiples of four. We try to obtain all our cargo in 4 units, that is 4ft long x 4 ft wide by 4 ft high. All multiples of four within the capacity of our decks. I seem to recall that Mr Cash was shipping an extra big unit and there was some brief discussion of a unit about 10 ft long. During this discussion we made it plain we weren't able to take a unit of that size because of the size of our decks.

20

Was any conclusion reached at that meeting in December? No, no conclusion was reached at the meeting. it was purely a fact finding meeting.

You accept the meeting took place in December? My first meeting with Mr Cash took place in December.

30

Why was it you who was seeing Mr Cash? The reason for this is my practical experience as master mariner and my position with ScanCarriers.

As marketing manager what is your general role with the Company? As marketing manager my responsibility is to promote our particular concept and also to meet customers, evaluate from customers the possibility of sales and imports for markets, to liase with our agent and ensure the correct procedure is followed, with customer contact, assist in negotiating where necessary, provide our agents with up to date information, and freight tariffs or any changes in freight tariffs or any other information they require.

40

Who is your superior in NZ? I am responsible to

Captain Andersen.

In the High Court of New Zealand

Is he the ScanCarriers representative in NZ? Yes he is, for the whole of NZ.

Do you recall any other contact with Mr Cash either on the telephone or personally till the end of January 1982? No I had no contact to the best of my knowledge with Mr Cash until the 29th January 1982.

No. 5.13.

Defendant's evidence
John Andrew Robinson

You saw Mr Cash on the 29th January? That is correct. I was in Auckland on that day.

Examination
- continued

Wherabouts did that meeting take place? That meeting took place at Mr Cash's premises in Parnell.

How do you know the date? The reason I recall that date is because I was in Auckland to see one of my vessels and I actually left Freyberg Wharf to go and see Mr Cash.

What vessel was in port and what day? That was the Tarago and it was a Friday.

You went to Mr Cash's premises in Parnell? Yes that is right.

Was anybody with you? I was accompanied by Mr Brett Freer.

Was anyone with Mr Cash? To the best of my knowledge nobody was with him but he did have an assistant in an outer office.

What was the purpose of the meeting as you understood it? I was informed by East Asiatic our Auckland agent that Mr Cash wished to see me with respect to the unitizing of the cargo.

Did you discuss that subject at all? We barely touched upon that subject.

What did you discuss? When I arrived there I found Mr Cash wished to discuss the freight rate and not particularly the unitizing of the cargo.

Tell us what took place? To the best of my

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In the High
Court of New
Zealand

No. 5.13.

Defendant's
evidence
John Andrew
Robinson

Examination
- continued

knowledge Mr Cash produced some letters of credit of previous shipments which I believe stated an f.o.b. value of \$180 per tonne US. And this was Mr Cash's basis for trying to obtain as cheap a rate as possible for any cargo that could be shipped to India. We could not give Mr Cash any firm indication of what the freight rate was going to be and based upon this the meeting closed but we assured Mr Cash that we would investigate the freight problem.

At about that time did you have any contact with Mr Teskey about the freight rate? Up to that time of my meeting on the 29th I recall a discussion with Mr Teskey for a freight rate on that particular shipment.

Look at document 38 of Volume 1? Yes.

Is that a telex dated 2nd February addressed to you from Mr Teskey? Yes.

Remember receiving that telex? Yes I received this telex.

Did you have any discussion about it with Mr Teskey on the telephone? I recall Mr Teskey discussing this with me because it required an urgent reply.

Did you discuss the question of the freight rate with anyone else? Yes, naturally. I discuss all freight rates and the striking of freight rates with my superior Captain Andersen and this cargo was no exception.

At the bottom of that page you see telex no 39, is that a telex which you sent to Mr Cash on the 3rd February quoting a freight rate of US\$120 per tonne? Yes that is correct.

When trying to settle a freight rate what sort of factors do you take into account? When trying to establish a freight rate there are various factors which you consider. The first is the f.o.b. of the cargo, then the c.i.f. value of the cargo, then the utilisation of the cargo, then the type of equipment to be used for the cargo and then the final destination of the cargo.

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30

40

And so it was on the basis of these factors that you came up with the rate mentioned in the telex? Yes that is correct.

In the High Court of New Zealand

Had that rate of US\$120 been the subject of any previous discussions between you and Mr Cash? To the best of my knowledge no.

No. 5.13.

10 What if anything did Mr Cash say to you about his previous experience in exports? Mr Cash did not go into any great detail of his previous experience with exporting with the exception of stating that he had been dealing with waste paper for a number of years.

Defendant's evidence
John Andrew Robinson

20 Did you make any assessment of his knowledge of shipping practice? He gave the impression of being well aware of shipping practice and I had no reason to doubt that this wasn't the case. Mr Cash ...

Examination
- continued

MR CLARKS OBJECTS

In the telex No 39 there is a reference to caf and baf that means currency adjustment and bunker adjustment factor? That is correct.

30 Did you discuss the freight rate with Mr Cash subject to those matters? Had you used those words in discussing the freight rate with Mr Cash? To the best of my knowledge yes.

Recall whether or not that caused any difficulty for Mr Cash? Again to the best of my knowledge, no, it did not cause any difficulty.

40 At the time of your discussion with Mr Cash on 29 th January what sort of quantities was he talking about? Mr Cash indicated quantities up to 1,000 tonnes.

Was he talking of one ship or several? On the 29th it was centred around our first vessel, the Baranduna, which was the smallest shipment.

Was the destination discussed? Yes. for Karachi and Bombay.

In the High
Court of New
Zealand

Any mention of other ports? No, at that stage there was no mention.

No. 5.13.

Defendant's
evidence
John Andrew
Robinson

In that telex No 39, were arrangements for a period about 29th July, can you recall the basis of making that at the time? The basis of establishing that rate was on the information provided in document No 38 where you will see that the shipper has requested that we provide him with a rate for a six month period if possible.

10

Examination
- continued

Was there any reference at that meeting to any future shipments? To the best of my knowledge, no.

If there had been a request for space for the first ship or later ships at that time, how would that have been handled? It is handled in the normal procedure where the shipper contacts the local agent and requests space on a particular vessel.

20

What reference if any would there be to you following that request? If for large parcels, and i mean 1,000 is a large, before an agent would accept that parcel he would refer it to wellington because Wellington is sitting with the complete booking for the whole of the country therefore can evaluate whether it can take the cargo or not.

Is there some response to that? Yes. As soon as Wellington can establish a space on the vessel then they would go back to the agent and inform the agent it is quite all right for him to accept the booking.

30

Do you recall what the NZ allocation for the cargo on Barranduna was? I cannot recall the allocation for the Arabian Gulf but I recall that NZ total allocation was approximately 6,000 tonnes.

40

For what other destinations apart from Arabian Gulf? This allocation had to cover our commitments to Scandinavia and the north continent of Europe as well as Jeddah, Saudi Arabia and the Arabian Gulf.

Is there any procedure whereby bookings of any type have to be referred to ScanCarriers in

Norway? Yes, once we go past our allocation and require additional space this must be referred to our office in Oslo who are controlling the total space on the ship. Also if cargo is going to certain destinations then that also must be referred to our head office in Oslo.

In the High
Court of New
Zealand

No. 5.13.

10 What was done on the 29th January about this parcel of 1,000 tonnes Mr Cash had spoken of? Nothing was actually done on the 29th. We agreed to go away and evaluate whether it was possible to provide Mr Cash with a very very cheap freight rate and that was more or less the whole lot.

Defendant's
evidence
John Andrew
Robinson

Examination
- continued

20 What would you expect to have happened after you had quoted the freight rate at US\$120? We would then expect the shipper to use that freight rate, acknowledge he is going to use the freight rate, and try to conclude sales based on that.

When would you expect to hear from the shipper? Depending on the area, it is usually the case up to 3 months before a shipper will come back on this sort of thing.

30 If he concluded sales what would he come back with? Once he concluded the sales he would request our local agents for space on a particular ship.

Look at document 43, is that a telex of 16th February to you from Mr Teskey? Yes that is right.

40 How does that fit in with the procedure you described? This is unusual procedure because it appears that the shipper had already concluded sales and was just waiting for a freight rate.

Are you looking at document 43? I believe so.

Does that follow the procedure you described about the question of space? Yes that is correct.

What about space on future ships, what if anything was said about that when you saw Mr Cash on 29th January? I have already answered that question. To the best of my knowledge there was no discussion about future shipments.

In the High Court of New Zealand

AFTERNOON ADJOURNMENT 3.30 P.M.

RESUMED 3.45 P.M.

No. 5.13.

Defendant's evidence
John Andrew Robinson

Examination
- continued

We were looking at the telex No. 43 and you said that there was something unusual about it? My reason for believing this was unusual was because I had the telex and I recall the date it was the 3rd, and this was the 16th, and Mr Cash was to let us know as soon as we received the freight rate.

10

The telex also uses the phrase promotional rate, could you explain that? The promotional rate is a rate normally struck for a limited period based on information obtained from the shippers in order to assist him with his freight rate. Normal practice is that once this rate expires then the freight rate takes an increase to the level which the shipping Company normally requires.

Can you make any comment about what would have happened to this freight rate after its expiry on 29th July? Approximately a month before the expiry date we would have approached the shipper and informed him that the rate would have to take an increase after expiry date and at that stage the increase would be \$60 bringing the rate up to US\$180.

20

On what basis do you say it would have gone up by \$60? The freight rate required for India and Pakistan was US\$180 per tonne consequently by giving Mr Cash promotional rate of \$120 it meant the rate had been reduced by one third. Our head office established it required a rate of \$180 to that area in Pakistan and India because of very high transshipment costs.

30

Is that a rate which had been furnished to other shippers they deal with? Yes that is correct.

40

Also in the telex of 3rd February you refer to packing on pallets or skids, can you explain what you mean by skids? A skid is a cheaper version of a pallet and normally consists of two wooden boards with a centre board binding them together.

Is that to form a base to the unit? Yes that is

correct. During the discussion with Mr Cash I don't think I referred to any of the pallets.

In the High
Court of New
Zealand

Did you subsequently discuss with Mr Cash the question of booking on subsequent vessel? Yes I did but that wasn't until our vessel Barranduna was in port in March.

No. 5.13.

10 What transpired about that? Mr Cash was wishing to make a further booking on our next vessel and I asked him to inform our Auckland agent so that they could follow normal procedure for making bookings.

Defendant's
evidence
John Andrew
Robinson

Remember the precise date of that? Yes, that was on the Friday 26th March when the Barranduna was working in Auckland.

Examination
- continued

20 What was Mr Cash 's reaction when you referred him to the agents to effect a booking? He made no comment.

Did it surprise you to be approached in this way? No, it didn't really surprise me. Shippers often approach you when they see you about further bookings so I wasn't at all surprised.

30 Was he referred to the agents - was he surprised at that? To my knowledge no, because that is normal procedure.

Look at document 61, is that some information from Mr Freer about the dimensions of Mr Cash's cargo? Yes that is correct.

40 The 2nd to last paragraph, what did you do about that? In actual fact this telex is required for the loading details of the vessel. My assistant pointed out that the height of the units was 5 ft or 10 ft, it is difficult to read this copy, the reason for his concern was that it wasn't 4 ft or 8 ft. We then took the height of the unit, decided it could be stowed reasonably well 3 high in the ship, and therefore there should be no reason for concern. This telex was then sent to our cargo people in Australia so that he could make out his preplan.

The paragraph immediately below that contains a

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Defendant's
evidence
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Robinson

Examination
- continued

comment from Mr Freer about those units, what did you do about that? I did nothing about that because it stated that Paul Cash of Aotearoa who is dealing in waste paper on a regular basis informed our agent that the units would travel and sustain all handling involved.

I take you now to the events when the Barranduna was in port: would you describe what happened from the time you reached the vessel which is in early afternoon of the 25th March? I arrived down at the ship on Freyberg Wharf at approximately ten to five on Thursday afternoon. Next to the ship we have a portable office where our cargo superintendent controls the loading and discharge operation. I went to this office, spoke to the cargo superintendent Mr Bengt Anvin, also our local port representative Mr Brett Freer. Bengt Anvin was most concerned about the units of mixed waste. Also about the time factor. I walked across to Freyberg West shed to inspect the cargo togetherwith Mr Anvin and Mr Freer. I walked through the shed and inspected all the waste paper on the face of the stow, that is the paper I could actually see and get to. I then came out of the shed and asked Mr Freer to ring Mr Cash of Aotearoa because I wasn't satisfied with the banding on the units. I am talking just of the mixed waste. Mr Freer tried to contact Mr Cash and unfortunately he couldn't reach him and to the best of my knowledge he got through to someone else at his warehouse at Parnell. I then stayed down at the ship until we completed the starting of the deck where the cargo is going to be loaded, and we commenced loading the waste paper at approximately 6.30 in the evening. We commenced with the magazines and computer waste because of the shape of the ship and put in approximately two tiers. Then we tried to start the mixed.

What do you say about unitizing of magazine waste? They were excellent units, exactly the same as I had seen previously at Mr Cash's warehouse and quite honestly you couldn't have asked for a better unit, they were perfect.

What about the mixed waste? Unfortunately that was a different story. I presume the cargo was handled twice, it would be picked up from a store

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20

30

40

, loaded on to a truck, taken down to the wharf and discharged off the truck and put on the shed floor. A lot of the metal strapping bands had become loose, the units were looking a little bit unstable and it was completely different to what I had even envisaged.

In the High
Court of New
Zealand

No. 5.13.

10 What sort of base did these units have? These units were sitting on cardboard cores, and I believe they were the cores from a centre of a reel of paper. The core wasn't sufficient to support the cargo and stop the cargo from touching the floor of the shed. The units were only stacked one high in the shed, and because of this gave thee appearance of being stable, but once we tried to strap them, which is holding the unit to the cores, there was a great deal of play in the strapping an dit couldn't really hold the unit together.

Defendant's
evidence
John Andrew
Robinson

Examination
- continued

20 The cores described, do they constitute a skid in your view? In my view the cores do not represent a skid. A skid in my view is a solid piece of wood or in some cases a piece of steel, and most certainly not a core of cardboard.

30 When did you see Mr Cash to discuss this? Mr Cash came down to the wharf at approximately in the morning on Friday, 26th March. I went across to meet Mr Cash by the shed. I walked into the shed with Mr Cash and explained to him what we didn't like about the units. I also asked him to bring people down and start to re-strap the units. I made it qutie clear to Mr Cash that one parcel of approximately I believe 30 tonnes sitting just inside the shed on the right hand side would definitely not be shipped if he didn't do anything about securing the cargo. Mr Cash agreed to send
40 some people down to re-strap the units concerned. On the way from the shed with Mr Cash I informed Mr Cash that because of the shape and size and instability of the units it would be very doubtful if we would be able to load his cargo in time before we left Auckland. I also informed him that if this was the case we would do everything possible to send his cargo to our next port. I then left Mr Cash and to the best of my knowledge he proceeded to his warehouse to obtain people for re-strapping his units.

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Defendant's
evidence
John Andrew
Robinson

Examination
- continued

You mentioned the time problem, how did that arise? Well, because of the instability of these units it was very difficult to load them with any efficiency or speed whatsoever. When we put one on top of a bottom one it started to fall and collapse, and instead of being able to run an inefficient operation whenever we handled the unit we lost a lot more time than anticipated.

What was the vessel's proposed schedule round the NZ Coast? Our schedule was based on arriving in Auckland Thursday, working in afternoon and departing at 10.30 p.m. Friday evening. Arriving Tauranga at 7.30 on Saturday morning, departing Tauranga at 3.30 on Saturday afternoon. Arriving Napier at 700 on Sunday morning, departing Napier at 2000 hours on Sunday evening, and arriving Timaru at 0600 hours on Tuesday morning and departing Timaru 2300 hours on Tuesday evening.

10

Was that Tuesday 30th March? Yes that would be correct.

20

What was the position about labour in Tauranga and Napier? Our labour in both Tauranga and Napier was ordered on Thursday morning, confirmed on Friday morning, and therefore was waiting both on Saturday in Tauranga and Sunday in Napier for the vessel.

Would you have had to pay for that labour if there was a delay? Most certainly. Once we order the labour and confirm it on Friday we are committed to that labour and whether we use the labour or not we have to pay for the labour. In this case it was cheaper to carry the cargo by road to Napier than to pay for the labour in Tauranga and Napier which had already been engaged.

30

When did you leave Auckland on Friday 26th? I actually left Auckland on the 11.25 flight to Rotorua. But I left the wharf at approximately quarter to ten that morning.

40

Had you done anything about the road transport before you left? Yes I discussed this with Captain Andersen on the phone and it was agreed that we should road the cargo through to Napier.

Based on that I instructed Brett Freer to approach transport companies and obtain prices.

In the High
Court of New
Zealand

Can you help us further with events on Auckland on the Friday? No. After talking to Captain Andersen I then relayed messages to Brett Freer and once everything appeared in order I then went out to the airport to obtain my flight.

No. 5.13.

10 What were you going to Rotorua for? I wasn't going to Rotorua I was going to Tauranga but I should have been on the flight on that morning, but because of not being able to get hold of Mr Cash and trouble with unions, I decided to see Mr Cash explain the situation and go to Rotorua. I was met at Rotorua airport and drove to Tauranga. I went to Tauranga because this was going to be the first vessel in our service to call at that port therefore it was necessary to go there and ensure everything was ready and in correct sequence for loading with the vessel being due the following day.

Defendant's
evidence
John Andrew
Robinson

Examination
- continued

Did you see Mr Cash again after that? At any later time? I next saw Mr Cash when he came to Wellington in early April to visit our office.

30 What took place at that meeting? Mr Cash actually rang to arrange a meeting to discuss future shipments of waste paper. He arrived at our office and a brief discussion took place between Mr Cash, Captain Andersen and myself. During the discussions Mr Cash mentioned that he was endeavouring to complete sales to that area, and required space on our vessels.

Did he say anything about having made purchases in New Zealand? I believe he did.

40 What did he say about bookings or space on future ships? To the best of my knowledge we informed Mr Cash that he would have to go through the normal booking procedure via our Auckland agent and each case would be evaluated based on the bookings for each ship.

What was Mr Cash's reaction to that? He was most irate and very upset and not at all happy with ScanCarriers.

In the High
Court of New
Zealand

Did he say anything about the possible involvement of sales he was working on? I believe he was talking about shipment of 1,000 tonnes.

What about the volume of purchases, did he mentioned that? To the best of my knowledge no.

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Defendant's
evidence
John Andrew
Robinson

Look at document 89 of Volume 1, would you look at paragraph 5 of that document, a telex to Captain Andersen from Mr Cash? Yes. Read that paragraph 5 to yourself: Yes I have read that.

10

Examination
- continued

What can you say about accuracy or otherwise of that paragraph? I disagree with that paragraph because I know that I did talk to Mr Cash about strapping of these units.

He says you spoke with him Friday morning about a time problem? Yes that is correct, there was a time problem as I mentioned earlier and it looked pretty certain we wouldn't be able to load all this cargo.

20

If a shipper were to request space guaranteed to him for a period of time, how would that be dealt with by ScanCarriers?

***MR CLARK OBJECTS.

What is your practice - what was your practice in 1981 and 1982 when a shipper requested space be guaranteed for a certain number of sailings? Our procedure was to document the cargo, establish how much there was to be, how many vessels were involved, what the freight rate was, and ensure that the shipper and the shipping company were in complete agreement as to all points.

30

Would any arrangement be recorded in some way? Yes, these arrangements must be recorded. If they are not recorded then it is impossible to cover a booking for them.

40

What was your practice about the way in which they were recorded? Presuming we did not require an authorisation from Oslo, meaning a small booking taking four containers spread over four vessels, then I would do a memo to my superior Captain

Andersen, outline the cargo to be shipped on each ship, and once he agreed to this I would then copy the memo, and I would put my name on bottom too, to the agent concerned at the booking centre, also to the shipper concerned, so that both parties were aware of what was agreed to.

In the High Court of New Zealand

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10 What about where there are large amounts involved? If large amounts of cargo are involved then these still have to be referred to Wellington, we still do a memo along the same lines, but then we can only commit ourselves to two vessels, and anything above two vessels must be referred to our head office in Norway. What is the outcome of that process so far as shipper is concerned? The outcome is we cannot accept the shipper's booking in advance unless we have permission to do so from our head office in Oslo.

Defendant's evidence
John Andrew Robinson

Examination
- continued

20 You send a copy of the memo to the shipper? Yes that is correct. Would that document the arrangement so far as shipper is concerned? Yes that is correct.

Have you ever been involved in negotiations for contracts of affreightment? Yes, but only with shipments of tallow in bulk. That is in liquid form? Yes that is correct.

30 Been involved with other conference members in other negotiations? Yes on behalf of ScanCarriers I have been involved in negotiation with statutory bodies, Apple & Pear Board, those type of people.

40 What sort of arrangement emerges from those negotiations? Well the shipper body usually involves more than one shipping [company which] will usually enter an exclusive agreement with the shipper body to carry their cargo over a certain period of time usually one year, and usually at the same freight rate, but with a proviso laid down for c.a.f. and b.a.f.

Are such arrangements documented in some way? Yes these arrangements are fully documented so that both shipping company and shipping bodies can have these arrangements on their files.

You spoke about booking ahead for maximum of two

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evidence
John Andrew
Robinson

Examination
- continued

Cross-
Examination

vessels, explain that? The reason for that is that if a ship is divided between New Zealand and Australia and then also divided upon areas, namely Arabian Gulf, Jeddah, north continent of Europe and Malaysia [?Scandinavia]. We as ScanCarriers New Zealand estimate our required liftings which really are our bookings, to each area, then telex our head office at Oslo requesting allocation of space to meet our requirements. This is normally done two months in advance. It is actually a three-vessel cycle, but we normally have one vessel on coast loading, one that has received its paletization and one to be worked on, but usually the allocation is not received until the vessel on the coast has sailed. That is the allocation received from Norway to get permission to lift a certain amount of cargo.

10

Cross-examined Mr Clark:

The Tombarra, there was space available on that ship in May notwithstanding Captain Andersen's refusal of space to Mr Cash? To the best of my knowledge there was no space on that vessel. Did you not on the 18th May release to Australia 1,000 tonnes of New Zealand space as being superfluous on the Tombarra for New Zealand? I did not release that space.

20

I show you a telex? As I explained earlier I did not send this telex and I didn't know about it.

30

Now that you have seen it with your knowledge of your office telexes do you think it is a forgery? No.

Does it refer to 1,000 tonnes space being released to Australia as not being needed by New Zealand. It states here quite clearly due to lack of support caused by not calling at Timaru we can release 1,000 tonnes.

40

Would you look at a document that is in volume of documents, No. 128 dated 23rd April? Yes.

That refers does it not to Mr Cash daily requesting confirmation of bookings for the Tarago? Yes that is correct, Tarago voyage 48.

It refers also to problems of obtaining shipment etc? At the bottom? Yes that is what the telex says.

In the High Court of New Zealand

Look at the next document 129, it begins by saying "No space available for waste paper except that short shipped on Barranduna 72"? Yes sir.

No. 5.13.

10 Would I be correct in supposing that that was advice by Scans as to no space for waste paper as contrasted with no space for cargo or am I being unfair? This telex "regret no space available for waste paper"?

Defendant's evidence
John Andrew Robinson

Was that limited to waste paper or was there space available for other types of cargo? I cannot honestly comment on that.

Cross-Examination
- continued

20 Do you know that the official advice to Mr Cash repeatedly was that there was no space on the ships because it had been booked and given to other people? Well again I cannot comment on that as I wasn't the person presenting Mr Cash with that all the time. I believed on two occasions I told Mr Cash there was no space, with the exception of that telex.

30 But you told us you conferred on anything important with your superior Captain Andersen? Yes that is correct.

40 Did you still not know whether or not the space allocated for New Zealand on the Tombarra was used by New Zealand? No I am afraid I don't, you must appreciate I am not in the office all the time and don't see the telexes. I am the marketing representative and don't sit in the office all day. I think I should also explain to you that I am not controlling the bookings.

Mr Cash said in evidence that when he was in Wellington he asked you for space? To the best of my knowledge that is correct. And he has said in his evidence that Captain Andersen told him that the space was all booked, is that true or false? I have no reason whatsoever to doubt that. This I presume is his visit on the 7th April.

We haven't had a date from you, but he only came

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Robinson

Cross-
Examination
- continued

to see you in Wellington about space on one occasion? Correct.

You told us you don't know and never bothered to find out whether or not all available space to New Zealand was booked or not? It is not my job to check on the space, it is not that I didn't bother to find out.

Did Mr Cash, he told us Captain Andersen said he might be able to find some space at \$150 but he would make no promise in that regard? Does that sound as if that is truthful? You were present when Mr Cash spoke to Mr Andersen? Yes, I was - I honestly cannot recall if that was said, maybe Mr Cash did, but I don't recall it being said.

10

Mr Cash in evidence went further, he said that Captain Andersen left the room fairly briefly and probably to arrange some transportation for Mr Cash or a taxi, and you said to him in a helpful way, I don't think you will get it at \$150, don't put your faith in that, or gave that message to him? I am afraid I cannot recall that either.

20

Captain Andersen did he show you the letter he wrote from the solicitor for Mr Cash? No.

Would you have known if Captain Andersen was seeking space for Mr Cash urgently in May? Yes if it was something urgent I am sure he would have told me.

30

But he wasn't was he? I don't know.

You told us that if Captain Andersen had been urgently seeking space for Mr Cash in May you would have known? I presume he would have told me.

40

My question is, you don't know of any space being sought for Mr Cash in May do you? I cannot recall anything along those lines.

Do you know how much cargo went to Dubai on Tombarra? No I am afraid I don't.

Would you be able to check overnight? Yes as long as I can get the information from someone in the

office.

Would it help you to refresh your memory, was it not a little cargo from any source from New Zealand going to Arabian Gulf on Tombarra? As I said I don't know, I would have to check.

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No. 5.13.

10 When the Barranduna was in port, if anyone gave evidence that the problem with loading the cargo didn't start until they began loading, does that sound right to you? (Page 45). We actually started loading the cargo on the 25th. I don't know what you are looking for sir.

Defendant's
evidence
John Andrew
Robinson

Someone has said in this case earlier that they loaded the cargo and when asked if any problem emerged he said "We didn't expect any problem to start with", is that right? I cannot say.

Cross-
Examination
- continued

20 If Captain Anvin had said that New Zealand had let him down in not giving him a proper stowage would you agree with that? No I cannot agree with that either.

Would you agree with him that it wasn't a practical suggestion at any time to ship forward to Napier, would you agree with that? I would not agree with that. Would you repeat that.

30 Captain Anvin said that it wasn't a practical suggestion at any time to take cargo by road down to Napier? Would you agree with that? No I cannot agree with that, we are not talking of practicalities we are talking of a shipment of cargo.

ADJOURNED 5 P.M.

In the High Court of New Zealand

RESUMED 14TH JUNE, 1983, AT 10 A.M.

Cross-examination continuing by Mr Clark:

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Defendant's evidence
John Andrew Robinson

Cross-Examination
- continued

Late yesterday you told us that it was not correct that New Zealand had let Captain Anvin down by not giving him a proper stowage factor, remember saying that? Yes I do.

What stowage factor did you convey to Captain Anvin and in what form? Well first of all we sent him a telex, I don't know the date, it was a long telex, giving exact sizes of particular units. From this he would ascertain the cubic metre ratio to the weight tonne which is in effect the same factor.

10

You left him to work out the stowage factor for himself? That is correct.

And you assumed that the cargo could be stacked three high even though two high had been the previous advice given? Well that is not quite correct, as the previous advice was based on two large units 8 ft. high and consequently that would be two high.

20

Would you agree with me that the stowage factor is an internal matter for the ship owner and not a matter where the shipper is required to make calculations? I will have to disagree on that slightly. The reason is that any cargo owner should know all about his own cargo and therefore should know his own stowage factor.

30

Yesterday you will recall I suggested to you that and showed you a telex to demonstrate the point that Tombarra had not been able to take up her New Zealand space allocation? Yes I remember that. There is a difference isn't there between allocations and bookings, a considerable difference? Yes that is correct.

40

Can you now tell us as a result of your researches overnight as to whether the point we were discussing yesterday is correct? Could you repeat the point I was to comment on please. The Tombarra having plenty of space ex New Zealand allocation? From New Zealand according to our

cargo, the vessel left with 4,077 tonnes. To the best of my knowledge our original allocation was 6,000 tonnes.

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Court of New
Zealand

10 So the answer is yes New Zealand had surplus allocated space available for any cargo whatsoever that would fit in? I cannot agree with that as I don't know if any further agreement had been made with Australia for that space, so I cannot really say yes that is true. The reason is that Australia and New Zealand are liaising on a daily basis to make sure we don't have vacant space.

No. 5.13.

Defendant's
evidence
John Andrew
Robinson

20 But you do know I think that on the document I showed you yesterday in middle of May New Zealand released 1,000 tonnes as superfluous as to its lifting requirements? Yes that is true, I have never disputed the fact, I only dispute the fact that I released the space.

Cross-
Examination
- continued

Before we leave that point, in the normal course there are tentative allocations made for a vessel such as the Tombarra which are quite different from bookings, is that not right? The allocation is made based upon our expected bookings.

30 Can you tell us as the result of your search what allocation had been made for Tombarra as at 7th April 1982, in relation to general cargo or who by? No I am afraid I cannot.

The document put in by consent, dated 7th April 1982, in respect of Tombarra V.64, headed "Tentative Allocations", is now in front of you, you had a big allocation for Dubai at that stage of genuine cargo? Yes that is correct.

40 And the tonnage? 2,700 tonnes equivalent to 4,860 cubic metres.

I show you a further document dated 17th May, 1982, also bookings for Dubai; and you can confirm by looking at that that the Dubai bookings had gone from the thousands down to less than 1,000? No I am afraid this is incorrect. And the reason I say that is because the Dubai allocation covered the whole of the Arabian Gulf. The figures shown for 4th July state 91 tonnes, but the bookings on this report include Bahrain,

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Damman, Riyadh, Kuwait, Baghdad, and Karachi.

The Dubai figure is 91 tonnes at that stage? And the Karachi figure is how much? 322 tonnes.

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Defendant's
evidence
John Andrew
Robinson

Would you look at a final document of what was actually loaded as at 10th May, is the Dubai figure further reduced and the Karachi figure further reduced? This telex was sent a week before the previous telex, that is the reason why it was reduced, but the actual bookings have increased in a week. These tonnages are on a weekly basis normally Monday and the changes in bookings are shown in the past week.

10

Cross-
Examination
- continued

The Tombarra sailed from Napier on 9th June, 1982? I believe that is the date, definitely early June.

What was its total uplifting from Auckland, Tauranga, Napier and Wellington? Based on the figures taken 4,077 tonnes.

20

Look at this document, is that inconsistent with the telex that was advised on the date of sailing? Is the tonnage consistent with the telex? I am afraid this telex is incomplete. It only shows our lifting to north continent of Europe and Scandanavia. It doesn't show lifting for Jeddah, Saudi Arabia or the Arabian Gulf. (Document produced as Exhibit 14).

30

Taking you back to Friday, 26th March, you left us at the stage where you had arranged and given instruction for the cargo to be left behind to be roaded to Napier? We started to make arrangements and obtained quotes for moving the cargo to Napier.

Referring to the notes at page 130, line 13: "Have you done anything ... to Napier", a little different from what you say now? No, I can agree with that.

40

Who was to pay for the roadage freight? That would have been ScanCarriers account.

Would I be correct if I say that wasn't because of any generosity but because of a feeling of

commercial obligation? Yes that is correct.

In the High
Court of New
Zealand

You had nothing to do with the later decision not to send Mr Cash's cargo to Napier did you? No I did not.

10 You did not recommend any change because of packing or for any other reason for change of plan? When I left Auckland the complete operation was then left to cargo superintendent and he was to liaise with Captain Andersen in Wellington.

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Defendant's
evidence
John Andrew
Robinson

20 Coming to the next time you met Mr Cash in Wellington, you didn't tell us whether packing was discussed there, was it? To the best of my knowledge I did not discuss packing at that meeting. I ask you to look at a small photograph which was produced earlier (Exhibit 3) have you seen that photo before? Its a little bit difficult to say, but I believe I might have seen this before. The reason why I say it is difficult as I see no end of photos concerning different types of units.

Cross-
Examination
- continued

Does it resemble a photo of waste paper stacks unitised three high? Yes it does.

30 And its a good pack isn't it? It appears to look good on the outside but I can't give my comment if it is good or not until I have actually seen the unit.

Might that be a photo shown to you and Captain Andersen by Mr Cash in Wellington, he says it was? That could well be.

40 It doesn't have anything to do with 4 x 4 x 4 does it? I can't really say, but the left appears to be very close to the height, if it is 4 or 5 ft long it could be 5 ft high.

Had you been requested to come to Auckland and see the photo? I can't recall coming to Auckland for that.

You were told that Mr Cash's new pack had been approved by the Shipping Corporation of India. I do recall Mr Cash mentioning something about that but not specifically the Shipping Corporation of

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Court of New
Zealand

India.

Then you had been told by agents the Shipping Corporation of India had approved the pack when this was discussed? Yes, I believe I have seen a copy of a telex with that written on it.

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Defendant's
evidence
John Andrew
Robinson

In Wellington you said yesterday to the best of your knowledge you informed Mr Cash that to apply for space he should go through the normal procedures by going through the Auckland agents? Yes that is correct.

10

Cross-
Examination
- continued

Would I be correct that what would happen to Mr Cash if he had taken your advice he said he would ask the Auckland agents again because he had already done that didn't he and they would refer it to you again? Yes they would refer it to Wellington again.

And Wellington would give an answer most likely the one that he had come down to ask you for in the first place? That is quite possible.

20

These memos you spoke about where someone wanted to cover their space requirement, how many did you do approximately and sent to shippers last year? Its a fairly unusual occurrence? It is not particularly unusual. I can't name the exact number I sent last year.

30

I put it to you that shipping companies more often than not do not bother with confirming that space is covered in writing? Well from ScanCarriers' point of view I disagree with you. If its just a plain cover booking then a booking note is made out for a booking.

Another witness will also speak of that, Mr Freer, and he will be more closely associated with confirming cover or space allocation than you would? Mr Freer is with the client on a day to day basis and accepts bookings so he more or less deals with that every day.

40

Re-
examination
Court

Re-examined Mr Broadmore:

COURT: When a cover booking is made is there any charge made for that by Scan? No, no commitment,

it is purely a cover and the only sort of clause is a time limit, if the booking is not firmed up with in 2 or 3 weeks of ship arriving it is normally cancelled. Alternatively if other cargo comes up meantime and that shipper doesn't come up with his goods then that is cancelled.

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10

Am I correct that in understanding the cover booking doesn't give the shipper a legal right to ship cargo? I am afraid I cannot comment on a legal point. But the practice within NZ is if you make a cover booking you have to come back and firm it up but if you can't come up with the booking then it is cancelled. Before we cancel a booking we discuss it with the shipper first before we actually cancel the booking.

-Defendant's
evidence
John Andrew
Robinson

Court
- continued

20

COUNSEL: You spoke about cover bookings, you also referred earlier to the practice of sending some sort of memo to a shipper relating to bookings on future ships not necessary the next ship. Is there any distinction between those two situations? I don't understand.

Re-
examination
- continued

You refer to doing a memo in respect of a request for space on a future ship or ships? yes that is correct.

30

You have now explained about cover bookings, is a cover booking the same thing as the memo about future shipments? No that is not correct. The memo I was referring to is really an agreement between the shipper and the shipping company to make space available for the amount of cargo that the shipper wishes to ship on a vessel basis.

40

And what is the status of a cover booking as compared to a booking? Well a firm booking as the word states is firm and is going to be shipped. A cover booking is a booking made by a shipper in order to secure space but as a general rule he probably doesn't negotiate it the same and hasn't negotiated the sale so is not in a position to make firm booking. Once there is a firm booking he normally makes the sale and makes the booking on the vessel.

Once a firm booking is made is there any payment made by the shipper? No, no payment is received.

In the High
Court of New
Zealand

No. 5.13.

Defendant's
evidence
John Andrew
Robinson

Re-
examination
- continued

Referring to the meeting in Wellington on the 7th April, there was a reference in cross-examination at p.134 as to space being all booked; following a request for space by Mr Cash. Did that relate to the Tarago or to other ships? On the information given, I am not too sure about it, but I think that was referring to the Tarago.

Do you recall whether or not that discussion related to bookings for the Tarago or future ships? I would think that referred to the Taraago only.

10

Does Captain Andersen communicate with Oslo by telephone and telex? Yes that is correct. We are in constant contact both by telex and telephone.

Would you be present with Captain Andersen when he telexed Oslo? Not usually unless the subject concerned me but I am in a room adjacent to him and the partition doesn't go to top of ceiling consequently what he says and what I say can be heard.

20

You were asked about the stowage factor, is the weight of the cargo a stowage calculation factor? yes that is correct, to obtain stowage factor is actually the ratio based on one ton, the space for one tonne, otherwise it is most important.

30

How ordinarily do you obtain that weight? We must obtain the weight from the shipper based upon his declaration.

In the allocation which are given for ships, are the tonnage figures mentioned as weight tonnes or do they refer to a cubic measurement? The allocation of space on both tonnage and space is taken as cubic metres. Each particular commodity, or the main commodities are specified by an average stowage factor.

40

What is the significance of a shortfall of tonnage in relation to a cargo such as waste paper? Well based on our experience with the ship Barranduna it is more or less a 3 to 1 ratio, consequently for each ton of vacant space we have approximate

three cubic metres.

A tonne of waste paper would take up 3 cubic metres? That is correct.

Based on the figures put to you by my friend, are you able to reach any conclusion as to the capacity of the Tombarra to carry waste paper? I am afraid those figures are not correct, as only part of the telex is presented. Presuming the figures as lifted are correct, then based on that we lifted 4,100 tonnes which the vessel to my knowledge reached 900 tonnes of allocation was returned to Australia. But in the telex that we sent to Dubai where we specified our allocation we required I think 2,700 tonnes, the allocation on space for Dubai was only 4,600 cubic metres. So from what I would say we hadn't made an allocation for waste paper.

Coming back to events of 26th March, can you tell us what the authority of the cargo superintendent Mr Anvin had been in relation to arranging transport to other ports? MR CLARK OBJECTS.

Mr Anvin's responsibility is to load and discharge the ships in the NZ Ports. He has no authority to organise or arrange internal transport within NZ.

I want to return to the subject of cover bookings, and recorded bookings in respect of future ships as described in relation to bookings and future bookings if I call them that, what do you say as to the obligation as you understand it on the part of the shipowners to ship the goods? If we have taken a booking and that relates to e.g. two vessels in advance, then we have an obligation to take that booking. We would do everything within our power to ensure that we did. But that booking would not be up to 1,000 tonnes. The reason for this being that we can't book more than a small amount of cargo more than 2 months in advance, without having prior arrangements with our head office to ensure that we would obtain the allocation that we require.

Yesterday we used the word memorandum to describe the arrangement made for shipments on future vessels, is there any difference in status between

In the High Court of New Zealand

No. 5.13.

Defendant's evidence
John Andrew Robinson

Re-examination
- continued

10

20

30

40

In the High
Court of New
Zealand

that and a booking on the ship? Yes there is a difference because we would have committed ourselves to taking that cargo and therefore that cargo would be given priority over a booking which was made two weeks before the vessel came into port for example.

No. 5.13.

Defendant's
evidence
John Andrew
Robinson

Is that because it is earlier? No, the reason is because we have agreed to take that cargo at an earlier stage, not because the booking was any earlier.

10

Re-
examination
- continued

COURT: I just wan to clarify one matter arising out of the question of stowing two or three high: am I correct in understanding that when it was considered that the bales of mixed waste would be stowed two high it was thought each bale had a height of 8 ft. 6 inches? Yes that is correct. It would be actually each unit had a maximum height of 8 ft. 6.

20

What was the position in relation to the size of units when it was thought you could stack three high? My assistant was concerned when we received a telex from our Auckland agents showing the sizes of the units because the height of that unit was of a unusual height 5 ft. 8 inches, and he was a bit concerned that he wouldn't be able to stow three high, plus the fact I informed him earlier that we expected the mixed waste to be in larger units or else smaller units.

30

Three times 5 ft. 8 gives a height of 17 ft.? Yes, and that gives a six inches clearance under beam of the ship.

Is that why the decision was made to stack three high? Yes.

No. 5.14.

BRETT KENNETH FREER (Sworn):

40

Defendant's
evidence
Brett Kenneth
Freer

I live at 23 Wily Avenue, Forrest Hill. Operations controller employed by East Asiatic NZ Ltd., they are the Auckland agents.

Examination

As operations controller you are in charge of whole physical handling of cargo for ships through the port? Yes.

And you maintain a supervisory role in respect of bookings for each vessel? Yes.

In the High Court of New Zealand

And you are responsible for co-ordinating physical receipt of cargo for shipment? That is correct.

10 Would you describe the usual procedure prevailing in office for making bookings? Normally a booking is telephoned into the office and registered in a booking file and it is then made up into a booking list each week and forwarded to ScanCarriers in Wellington.

No. 5.14.

Defendant's evidence
Brett Kenneth Freer

20 Is there any limitation as to your acceptance of bookings? The general cargo we are basically allowed to book as it comes in. Refrigerated cargo we would have to refer to ScanCarriers in Wellington. Any unusual cargo or bulk cargo would also be referred to Wellington. If the vessel looks like it is over tonnaged or we are coming close to our allocation then we stop booking.

Examination
- continued

What do you say about referring to Wellington in the case of a parcel of 1,000 tonnes? This would be immediately referred to Wellington.

30 What happens after referring to Wellington? They, if it is a large parcel, would contact Sydney to ascertain if there was space available on the particular vessel. Otherwise they would refer it to us as soon as possible to advise if it was available.

Is there some communication with the shipper? The shipper is usually advised at all times whether his cargo is accepted or is not accepted. Normally this would be an overnight reference and we would have an answer back.

40 What record is made of the provisional arrangements? All communication is kept in a file.

What about requests made orally by shippers which you deal with on the spot? If it is normal cargo we would make the booking. This would be placed in ship's booking file and ScanCarriers would only become aware of the booking at the end of the week when it received the list.

In the High Court of New Zealand

Would you refer to the booking list in Volume 1 of the documents, No. 71, when is that document made up? This is a summary of all bookings received in pencil and it is made up each week and forwarded to Wellington.

No. 5.14.

When the new one is prepared what happens to old one? The old booking list is then discarded.

Defendant's evidence
Brett Kenneth Freer

Is this document 71 the list prepared? This would be the final booking prepared before pre-planning when we plan the vessels.

10

Examination
- continued

That booking does relate to the Barranduna? That is correct.

When the vessel is on the horizon, if I call it that, you make arrangements for the cargo to be brought to the wharf? Yes I see that it is received on the designated receiving days.

20

Look at these photos, (Exhibit C) is that a series of nine photos which you took in relation to waste paper shipped on the Barranduna? That is correct.

In the order those photos are now, is the first one "I" a photo of bales of mixed waste stacked in the Auckland Harbour Board shed awaiting shipment on the Barranduna? That is correct.

And the second photo "L", is that a photo of four parcels magazine waste awaiting shipment? Yes.

30

The third one "H", is that two pallets of magazine waste and one pallet white ledger paper loaded on transporter for the vessel? Yes that is correct.

And the fourth photo "K" is that a photo taken on board the vessel? That is on deck three of Barranduna.

40

It shows stacks of various grades of waste paper? Yes.

The next "F"? Once again it shows various grades of paper, computer paper, and mixed waste.

And the next one "J"? That is the same photo but

at a different angle, on deck three.

And the next one "M"? That is in shed 55 partly loading on board. That was taken just prior to the loading.

And the last two photos? No. N and G, shows waste in storage awaiting shipment on the Tarago.

Are those all photos which you took? Yes.

Would you now produce those as "Exhibit C"? Yes.

You first met Mr Paul Cash on 29th January? That is correct. What were the circumstances of that meeting? I met him with Captain John Robinson to discuss possibilities of shipment of waste paper.

Did you participate in the discussions at all? A little.

What is your recollection? The discussion was basically whether ScanCarriers could accept the cargo, what freight rates would be workable for the company, and what type of packing would best suit the cargo.

Was there any mention of quantities to be shipped? I have no recollection of the quantities to be shipped. I am not sure if any exact quantities were spoken of.

COURT: When did that meeting take place? I think it was the 29th January.

How do you date that? At that particular time we had another ScanCarriers' vessel in port and I was working that vessel when I was requested by Captain Robinson to ring up Aotearoa.

Was there anyone else there? There were other people on the premises but no one with Mr Paul Cash.

Was that at Aotearoa's premises? That is correct.

Was anything said about whether or not the cargo would be acceptable to ScanCarriers? ScanCarriers' representative expressed interested

In the High
Court of New
Zealand

No. 5.14

Defendant's
Evidence
Brett Kenneth
Freer

Examination
- continued

Court

Examination
- continued

In the High
Court of New
Zealand

in accepting the cargo, and it was just a matter of negotiating the freight rate and the type of packing for the carriage.

No. 5.14.

Did Mr Robinson have to do anything after the meeting? Nothing was formally agreed at the meeting and John Robinson was going to get the information he required and forward it on to ScanCarriers.

Defendant's
evidence
Brett Kenneth
Freer

Did you see any waste paper at the premises? Yes we were shown some paper on the premises. From memory it was possibly magazine waste and was palletised.

10

Examination
- continued

Do you mean on wooden pallet boards? Yes a wooden pallet base.

Would you look at document 43 of Volume 1, is that a telex dated 16th February from Mr Teskey to ScanCarriers in Wellington passing on a request for a booking? Yes that is correct.

20

Were you aware of that telex? I became aware of that telex as a guideline for the shipping on the Barranduna.

Refer to document 71, in the column by the waste paper is 0605 telex reference? That is a reference to that telex as a booking guideline.

30

On a date earlier in March did you go with Mr Teskey to inspect the Aotearoa's waste paper sites in Auckland? Yes I did.

Look at document 61, is that a telex you sent to Mr Robinson reporting on your inspection? That is correct.

Was Mr Cash with you during this inspection? Yes he was with us at the inspection of these units here.

40

How do you assess the weights of the various units? To my knowledge the weights of each unit was not assessed. The weights mentioned in the telex were taken from the original telex of the bookings taken and the tonnage.

Could anything have been done about weighing them? Not at the time of inspection. At that stage we basically receive information rather than weight.

In the High Court of New Zealand

At the bottom of the page of document 61 is a sentence starting "Although the units of mixed waste ...", what was the basis of that comment? The basic appearance of the mixed or shredded waste.

No. 5.14.

Defendant's evidence
Brett Kenneth Freer

What was that appearance? It just left a lot to be desired for shipping purposes, the general strapping.

Examination
- continued

Did Mr Cash make any comment about the units? He agreed that they weren't the best. He hoped that for future shipments he would be able to spend more money on the packages and make them more secure.

Did Mr Cash make any comment about future shipments? The only comment to me re future shipments was that in future he had hoped to obtain a better deal on this type of paper and would be able to spend more money on the strapping, this type of thing.

That was during this inspection? Yes.

Had you heard of future shipments earlier? No that was my first knowledge of future shipments being made.

So that telex No. 61 is the outcome of your investigation at that time? That is correct.

MORNING ADJOURNMENT 11.33 A.M.
RESUMED 11.50 A.M.

Would you look again at document 61, the last paragraph would you read? Yes.

That means for your guidance? That is correct.

Had you received some information from Aotearoa about this? The only reason that the paragraph is there is that we were expecting roughly 1,000 tonnes paper and at the time of inspection letter

In the High
Court of New
Zealand

of credit for 150 tonne only was approved. We received other letter of credit to be followed shortly after.

Did you receive any assurances from Aotearoa about that? Yes we did.

No. 5.14.

Defendant's
evidence
Brett Kenneth
Freer

Following that did you have contact with Aotearoa about their letters of credit after that? I was in daily contact with them about the tonnage we were expecting.

10

Examination
- continued

Did you make a note of that always? Yes we kept a record and kept Wellington advised of what we were expecting.

Look at document 72, is that a telex again passing on information from Aotearoa? Yes this is the up to date tonnages we were expecting on the wharf.

Going back to document 71, the booking list, is there another alteration to the tonnages there? That operation was from the time of the meeting until the actual time it arrived.

20

How many days is that? That would possibly be around ten days. I am speaking of the alteration from 300 tonnes to 110 tonnes.

When the Barranduna arrived in Auckland what was your job? Once the vessel had physically arrived it is my responsibility to make sure all the vessel's requirements were looked after, stock lists, etc. and provedoring etc.

30

Did that include assisting with loading operations if required? Yes, including labour and various other operations that go on.

On the Thursday, 25th, did you have a discussion with Mr Robinson about Aotearoa's cargo? Yes.

40

What was that about? At that stage it was about the packaging of the waste paper.

What was your concern? We appeared to be concerned over the strength of our units and whether it would hold the shipment.

Was this concern in relation to all the paper?
Just the mixed waste.

In the High
Court of New
Zealand

Did Mr Robinson ask you to do something about
that? He requested me to attempt to get someone
down at the wharf to strengthen the bales.

No. 5.14.

10 Did you contact anyone about that? Yes I
contacted Aotearoa and their company sent in staff
to assist where possible.

Defendant's
evidence
Brett Kenneth
Freer

Next day was there some discussion about the
problem of loading the cargo? Yes there had been
discussions regarding that question.

Examination
- continued

What period of the day was that? Basically
throughout the whole day.

20 During the morning did you have discussion with
Robinson about that? Yes from memory he was on
the wharf fairly early in the morning.

What conclusion arose from that discussion? It
looked very doubtful whether we would be able to
load the full supply of waste paper.

30 At that time what was the difficulty about that?
It concerned the safety in the way we could stow
it on board apparently.

Did Mr Robinson request you to make some
arrangement about the mixed waste? When it
appeared we may have to leave some paper behind he
requested I look into the feasibility of trucking
the cargo that was left behind.

40 Did you make some arrangement about that? We made
enquiries about that with regard to the costs. No
firm arrangements were made.

Did the situation change? Did you have a
discussion later on with Mr Anvin about the
stowage? Later it became apparent that we did not
have the space to stow the paper in Auckland or in
Napier. Therefore the idea of trucking it to
Napier was discontinued.

Do you know why you didn't have the space? To my
knowledge the space was allocated in all New

In the High
Court of New
Zealand

No. 5.14.

Defendant's
evidence
Brett Kenneth
Freer

Examination
-- continued

Zealand ports.

Was this something to do with stowage of mixed waste? We certainly didn't get the stowage for the units that we originally expected. During the day had there been any change in system for loading waste? At preplanning we had originally arranged to stow the paper three high. When it became obvious the watersiders were stressing the safety at this stage the cargo superintendent decided to stow it two high.

10

As a result of that was there difficulty in utilising the space? That is correct, we utilised far more space than expected.

Were you aware of a discussion between Mr Anvin and Mr Cash about that? Yes.

About what time was that? Between 5 o'clock and 6 o'clock on the Friday evening.

20

What was the outcome of that discussion? Initially Mr Cash realised a certain amount of waste paper would be left behind. He requested that we do everything possible to complete certain lines of waste paper on the wharf.

Was his requested attended to? Yes to the best of our ability we were able to load as he requested.

30

What lines of paper were left behind? There was a small parcel of palletised cargo, nine pallets of mixed waste.

What happened to the mixed waste left behind? We were instructed to get it off the wharf as soon as possible and into storage to await the outcome of discussion.

Where or when it was removed? In order to ascertain exactly what had been loaded we weighed the paper before putting into store.

40

Look at document 112 of document volume 2: is that a schedule you prepared? Yes that is a schedule of the paper that was left at Freyberg Wharf.

What happened to the tonnes? 17 tonnes of palletised ledger was as far as I can recall a complete line of cargo and was removed.

In the High Court of New Zealand

The rest of it? The balance was part of a consignment already [partly loaded] and was removed for storage for shipment on the next carrying vessel.

No. 5.14.

10 The figure 271.12 crossed out there, is that a tonnage figure? That is a tonnage total left behind after the sailing of the Barranduna.

Defendant's evidence
Brett Kenneth Freer

The figure of 271.12 at the bottom is that a tonnage figure? That is correct.

Examination
- continued

Is that the total of all listed? That is the total tonnage left on the wharf.

20 Is the 261.63 the tonnage held under ScanCarriers control? That is correct.

Is that the total of all listed? That is the total tonnage left on the wharf.

Is the 261.63 the tonnage held under ScanCarriers control? That is correct.

30 That was to be shipped on the Tarago? Yes that was reshipped on the Tarago.

When the goods came down to the wharf before Barranduna arrived had they also gone over the weighbridge? Yes.

40 On the basis of those calculations was Aotearoa able to prepare a bill of lading for the portion loaded of mixed waste on Barranduna? Yes, by deducting the tonnes we concluded a figure of 249.6 tonnes of waste paper had been loaded on board the Barranduna.

Have you a copy of the bill of lading No. 57? Yes I have.

Would you produce that as Exhibit D? Yes.

On the basis of that tonnage were you able to calculate the freight due on that parcel? Yes.

In the High
Court of New
Zealand

Is that \$37,397? Yes that is shown in the freight column of the bill of lading.

Is that your office copy of the bill of lading the original of which was given to Mr Cash? That is correct.

No. 5.14.

After the Tarago sailed, did you make a calculation of the freight due? Yes a proforma bill of lading was made up from manifest and the freight costing.

Defendant's
evidence
Brett Kenneth
Freer

10

And was the freight calculated on that parcel of \$40,608.86? That is correct.

Examination
- continued

Do you produce the office copy of the proforma bill of lading? Yes. (Exhibit E).

Those calculations are obtained by applying the tonnage to the freight rate? That is correct, in New Zealand dollars.

20

I refer now to document 61, a reference there to 150 tonnes mixed waste? Yes.

There is a further 500 tonnes at the bottom? Yes.

Were they two different lines of mixed waste? From memory they possibly came from two different suppliers and were of slightly different sizes.

30

Would you look at the photo "I" (nine photos), do you recall which line that is? No, it was received on the wharf as all mixed waste.

Is that on pallet boards? Yes it would appear the top tier is on pallets.

Was the bulk of the mixed waste on pallets? The bulk was strapped to cardboard cores.

40

That inspection described in telex, were you with anyone? I was accompanied by David Teskey.

Cross-examined Mr Clark:

Would I be right in saying that very frequently no written confirmation of a cover booking is given

Cross-
Examination

to a prospective shipper by Scans, in your business? That is correct.

In the High Court of New Zealand

Going a little bit further, quite frequently no written confirmation to a prospective shipper of even a firm booking? That is correct.

No. 5.14.

10

The absence of a memo or advice note is the general rule is it not for a shipper? To a shipper, yes.

Defendant's evidence
Brett Kenneth Freer

You told us that you believed the Barranduna was full for both its Australia and New Zealand allocations, and that was why it was impractical to ship the cargo that had been shut out to Napier? Yes.

Cross-Examination
- continued

20

Would you agree with me that that wasn't the situation when cargo was shut out from later vessels, say the Tombarra? I have no knowledge of that.

Had you knowledge that space was being refused for Tombarra to Mr Cash? Yes.

Do you know Mr Paul Collins, was he your junior? Yes.

30

Would you recognise his signature? Yes.

I show and ask you to produce a document dated 28th May signed by Paul Collins on East Asiatic Co. letterhead. Is that an allocation of 500 tonnes of space on the vessel Tombarra to Tredex NZ Ltd? It appears so. (Exhibit 15).

40

Was not that after space had been denied Mr Cash for that vessel? I have no recollection of when his space was denied.

Mr Teskey in his evidence indicated a degree of sympathy for Mr Cash for not getting the allocated space, would that be your own view of the matter? Reference to future space or on the Barranduna. Future space? I was unaware he required space on future vessels and I was not involved in any dealings where he required space.

Did you not know of promotional rate to run

In the High
Court of New
Zealand

through to 29th July 1982? Yes I did.

You weren't the marketing manager in July 1982 or
in May 1982? No.

No. 5.14.

Defendant's
evidence
Brett Kenneth
Freer

You didn't know if Mr Cash wanted any space? I
was not involved in any dealings for space. It
had been spoken of he was interested in more space
but I was under impression we were attempting to
finalise arrangements for the two previous
shipments.

10

Cross-
Examination
- continued

In answer to my friend you have spoken of \$40,000
freight being due on the Tarago? That is correct.

Did you calculate that claimed freight on the
basis that ScanCarriers would carry that cargo to
India? That is what the freight was calculated
on.

You didn't calculate it on the basis of cargo
carried to Europe? No.

20

Do you know if Scans took that cargo to Europe, if
Tarago cargo was taken? I was told it was taken
to Europe.

Captain Anvin in his evidence, you know him? Yes.

Said that he couldn't get a cargo stowage factor
from New Zealand, now that would be right wouldn't
it from your own personal knowledge because you
didn't know the weight per volume ratio which is
essential for calculating the stowage factor? I
don't quite follow. Firstly I was only recently
advised by Captain Anvin that he was not advised
of any stowage factor on the cargo. I would have
felt it would have been easy enough to obtain if
required at the time.

30

Is the answer to my question, yes he wasn't given
a stowage factor? He certainly wasn't given one
from, I was never asked for one and I never gave
him one. Any information of that nature would be
forwarded to him from ScanCarriers in
Wellington. Any details regarding the cargo
though they would refer to us for information.

40

I am not criticising, I am asking whether or not

if you don't know the weight of bale or how many bales there are, how can anyone compute a stowage factor? We had guidelines of the number of bales and tonnage we expected on the wharf. This tonnage changed daily and we advised Wellington accordingly. Presumably they would advise the cargo superintendent with similar information.

In the High
Court of New
Zealand

No. 5.14.

10

In your evidence you spoke of units of the size originally expected, that was your phraseology, did you ever obtain from Mr Cash advice as to unit sizes that were different to those that you noted when you made available the cargo for inspection at the various suppliers warehouses? Mr Cash was out of the country from shortly after the inspection until a day or so before the vessel arrived in the country.

Defendant's
evidence
Brett Kenneth
Freer

Cross-
Examination
- continued

20

Mr Cash hadn't told you ever of these being any different sizes to be brought down that he in fact presented? That is right.

30

In your evidence in response to questions by my learned friend, you didn't seem to know anything about future requirements by Mr Cash of space allocation beyond the Barranduna? That is correct. Were you ever shown a telex advising of a promotional freight rate to go to 29th July? Yes I was. Did you in the Auckland office give a similar promotional rate to Forest Products? I remember we did, yes.

40

Did your principals instruct you to shut out any of their cargo during the period of commitment? Not to my knowledge, but I cannot really answer that question as it is not at a port at Auckland. Some Forest Products stuff goes out of Mt. Maunganu, and some goes out of Auckland does it not? We have had small quantities out of Auckland. As a shipping man you would have been very surprised indeed if Forest Products had either been shut out during period of commitment or higher freight rate demanded or sought? That is correct.

Mr Cash told you that Forest Products had been shipping by another shipping company in a similar fashion so far as packaging is concerned when you made your March visitation did he not?

In the High
Court of New
Zealand

Possibly. I don't recall.

Did you hear on the 26th March that there had been a late allocation of space in Australia for onions which would then be coming in season? No, that type of information would normally not come to us anyway.

No. 5.14.

Defendant's
evidence
Brett Kenneth
Freer

Re-examined Mr Broadmore:

My friend showed you a letter dated 28th May about shipment of fishmeal to Jeddah, had you ever seen that before? No I had not.

10

Re-
examination

Do you have any idea of freight rate on fishmeal to Jeddah? No I have no idea.

Is the allocation of ScanCarriers cargo for Jeddah dealt together with the Arabian Gulf or separately? I don't know how the allocation is made up.

20

At the time the Tarago sailed with the second lot of waste paper, do you know where it was intended that cargo be discharged? To the best of my knowledge it was to be discharged at Dubai for a forward destination which I understand was India.

Was there some change? I realised negotiations were still going on between Mr Cash and ScanCarriers with regard to the previous shipment on the Barranduna.

30

In relation to the dimensions and stowage factors of cargo, do you have any further responsibility after supplying something like the telex document 61? I have a responsibility to supply ScanCarriers with anything they request. Normally we would supply the freight and any other information that they would request.

40

Where normally does your information to weight come from? Where possible all information is obtained from the shipper.

Are you involved at all in negotiation of promotional freight rates? No.

In relation to cargo for New Zealand Forest

Products, were you aware of the freight rates for that cargo? Yes I was.

In the High Court of New Zealand

In relation to Forest Products cargo to Gulf what was that? I do not recall that rate.

Recall the destinations of Forest Products cargo? To the best of my knowledge we accepted their cargo for various destinations in the Arabian Gulf.

No. 5.14.

Defendant's evidence
Brett Kenneth Freer

My friend asked about shutting out of cargo, does that - what is your definition of shutting out? Leaving it behind.

Re-examination
- continued

Leaving behind cargo that has been booked and presented for shipment? That is right.

Would you use the phrase in relation to bookings requested but not accepted? No.

Going back to that letter my friend showed you, is the writing of a letter in those circumstances normal? I find it extremely out of character, both the wording and the fact that the letter was sent is completely out of character.

Why? Normally if a shipper requires confirmation to cover booking of that magnitude it would be handled by the marketing manager, and a more detailed reply would have been either telexed or processed.

Do you know whether the fishmeal was presented for shipment? Not to my knowledge.

That was not presented for shipment? No.

Would you be in a position to know if there was any? I don't remember it being shipped out of the port of Auckland.

The shipper to whom that letter was addressed, Tredex NZ Ltd., had you dealt with that company before? No.

No. 5.15.

Defendant's evidence
Oddvar Andersen

ODDVAR ANDERSEN (Sworn):

I live at 10 Myrtle Street, Lower Hutt.

Examination

In the High
Court of New
Zealand

Are you the general manager and owners'
representative of New Zealand of ScanCarriers?
Yes I am.

You have been in New Zealand for 17 years now?
That is correct.

No. 5.15.

Defendant's
evidence
Oddvar
Andersen

Before that you were at sea with Wiih Wilhelmsen
the Norwegian ship owners for about 20 years
rising to rank of Master? I joined Wilhelmsen in
1946 and they are the main shareholder in
ScanCarriers. I got my first command in 1957. I
stayed with that company until I was transferred
to ScanCarriers.

10

Examination
- continued

What is your function as ScanCarriers'
representative in New Zealand? To look after
their business.

Does that involve working with the company's
agents at the various ports? ScanCarriers is a
line operated and a member of the shipping
conference and as such we have a number of local
agents in New Zealand. ScanCarriers have a small
team of employees stationed in Wellington and my
function is to lead that team and look after the
agents' operations.

20

How are communications between your office and the
head office in Norway handled? It's by telex or
by telephone.

30

In the ordinary course of events who is authorised
to deal with Norway on the telephone? I would be
the only one.

Does that cover your agents as well? Yes. Line
communication is through Wellington.

How frequently would you expect to speak to
Norway? On the telephone nearly four times a
week.

40

In 1981 did ScanCarriers propose to offer a
service to the Arabian Gulf? Yes that is correct.

Tell us of the background of that? In relation to
tonnages carried on your ships? We were looking

for more cargo as we had vacant space and capacity.

In the High
Court of New
Zealand

Would you look at the documents, Volume 1, No. 5, is that a telex sent by you to ScanCarriers' agents in New Zealand ports setting out the basis of the new service? Yes.

No. 5.15.

10 Following that was some exercise undertaken to evaluate possible cargo availability? Yes we were asked by our principals to conduct a study.

Defendant's
evidence
Oddvar
Andersen

And on the basis of that study was a report prepared dated 16th December? Yes that is correct.

Examination
- continued

Is that document 10 in the bundle of documents? Yes.

20 In that report is there any reference to the possibility of waste paper as a cargo? Not to my knowledge.

And in appendix 10 attached, is there a proposal for a freight rate for such cargo? Yes it is a freight rate for waste paper. Were there any discussions between you and Norway?

30 LUNCHEON ADJOURNMENT 1 P.M.
RESUMED 2.15 P.M.

Had there been discussions between you and Norway as to guidelines for cargo acceptance for this new service to the middle east? Yes we had several discussions at head office based on liner operations.

40 You mean what? ScanCarriers operating a liner service completely different from their normal service. We were shown a number of specific reports to a fixed schedule and the carriage of cargo is in accordance with the liner operations.

Look at document 48, is that letter dated 22nd February from Norway to Geo. H. Scales in Wellington? That is correct.

And attached is a document headed ScanCarriers A/S acceptance policy? That is correct.

In the High
Court of New
Zealand

Was that policy the outcome of discussions with
Norway? Yes.

Are Indian or Pakistani ports referred to in that
document? Yes.

No. 5.15.

What was the policy for such cargoes by the
company's policy having to be written down?

Defendant's
evidence
Oddvar
Andersen

Naturally we gave priority to cargo for the ports
we called direct for transshipment and onforwarding
from Dubai.

10

Examination
- continued

When did you first hear about Aotearoa
International? I am not quite sure the exact date
but it must have been after Captain Robinson's
meeting with Mr Cash.

Do you know what month that was in? December
1981.

Would you look at document 26, is that a telex
dated 26th January from East Asiatic to you
enquiring about space for a shipment of paper to
Cochin or Madras and referring to possibility of
further shipment to Bombay? Yes.

20

Did that telex require any action on your part?
Yes I had to forward it to my head office.

Turning the page to document 27, is that a telex
which you sent to your head office? That is
correct.

30

You used the phrase firm enquiry, does that have
any significance? In shipping we usually deal in
New Zealand with firm booking or a cover
booking. A cover booking is usually done before a
shipper has completed his business and it is a
cover booking for the intention of shipping. A
firm booking is when the business has been
concluded between the seller and the buyer and we
understand the Letter of Credit has been
established and we consider it to be a firm
booking.

40

And the shipper makes a firm enquiry for space? I
am sorry, I don't understand the question.

No. 28, is that a telex you received back from Norway seeking your views about appropriate freight rate? Yes, it is a reply from my head office to my telex No. 27.

In the High Court of New Zealand

Turn over two pages to No. 32, is that your response to the telex No. 28? Yes.

No. 5.15.

Agreeing with the freight rate of US\$150? Yes.

Defendant's evidence
Oddvar Andersen

10

When it says in that telex you have been told by the shipper had you had any direct contact with Aotearoa yourself? No all contacts or negotiations as a policy is done between the organisation in the port concerned.

Examination
- continued

Is that concerning the freight rates? Yes who has the bookings.

20

Then the next telex No. 33 is that the response from Norway to your telex agreeing to the quotation of that rate US\$150? That is correct.

And the telex at bottom page No. 33A, is that a telex with Mr Robinson's initials setting out that rate? That is correct. He has to give information from our head office as his duty to pass on to the agents, and that is something which has been done here.

30

You delegated the task of telling the agents to Mr Robinson? Yes, Mr Robinson is marketing manager and as such he will be responsible for these things under my supervision.

Did Mr Robinson tell you about a discussion he had with Aotearoa? Yes.

40

Did you also see telex No. 38 from Mr Teskey? Yes.

And following that, the next telex is 39, what is the basis of that telex? It's just information regarding a promotional freight rate for a certain period of time.

That has Mr Robinson's initials on it does it not? Correct.

In the High
Court of New
Zealand

Was there discussion between you and Mr Robinson about it? Maybe I could explain. ScanCarriers has got a very small team in Wellington and we always discuss daily at meetings what is happening in New Zealand making sure every member of ScanCarriers' team know what is going on.

No. 5.15.

So that telex 39 is outcome of ScanCarriers discussions and decision? Correct.

Defendant's
evidence
Oddvar
Andersen

What was the position about tonnages for shipment from Aotearoa as you saw it at that time? They talked about one shipment, a quantity in vicinity of 1,000 tonnes. Nothing else.

10

Examination
- continued

The freight rate is quoted for a period of six months what is your practice in relation to currency? That is a matter for discussions between the two parties. Some promotional freight rates, most of them, will have a bunker and currency clause. But not all.

20

What is the practice about the duration of promotional rates? In New Zealand it is usually six months.

How frequently do you negotiate and fix rates promotional or otherwise for intending shippers? Most of the cargo ScanCarriers is carrying is as a member of the Conference and any request for a promotional rate has to be accepted or rejected by the Conference as a whole.

30

That is the Conference for the destinations? Yes.

Do circumstances ever arise where the rate is quoted but no cargo is forthcoming? Yes that is very common and usually a shipper asks for a freight rate before he concludes his business. This is business which is sometimes not forthcoming.

40

Did you expect to get more from Aotearoa? No.

Do you know whether a booking was forthcoming for the cargo for Cochin and Madras referred to in telex 27? We didn't hear any more about that cargo and we took that as one of these common trading businesses.

10 The booking procedures used by your company, I want to ask about small quantities say less than 50 tonnes, and ask how bookings for such quantities are handled by ScanCarriers? ScanCarriers itself is not receiving any bookings. These bookings are taken by ScanCarriers agents in New Zealand. When such agent receive a booking he just take it down in his papers and inform us in Wellington once a week.

In the High Court of New Zealand

No. 5.15.

Defendant's evidence
Oddvar Andersen

And they are allowed to book up to some allocation? Yes.

Examination
- continued

20 What if a shipper were to request forward bookings say for three or four months for small quantities of 50 tonnes or less, is that something that often happens? No it hardly happen at all as there is no need for it. The shipping service from New Zealand for most of the destinations are so good, so any shipper don't need to commit itself so far ahead.

30 Coming then to larger volume of bulk cargoes such as paper products from Tasman and Forest Products, what is the procedure followed with them? Its a bit difficult because ScanCarriers ships are serving Conference destinations and any large bookings have to be accepted by the Conference under the special system.

Looking at non conference destinations for a moment? If we had received a large booking we would try to obtain some information as soon as possible and when that is done we advise back to head office.

40 Do you get any advance indication from Forest Products or Tasman of their shipping requirements? ScanCarriers will be their biggest carrier of forestry to the middle east, mainly on behalf of New Zealand Forest Products. In Scandinavia [?as you can imagine] we have excellent information systems in work between us. They inform us on a three monthly basis what they intend to ship, ship by ship, but bearing in mind this information is provided with no commitment between the parties as in a good many

In the High
Court of New
Zealand

cases some of the business referred to by New Zealand Forest are cancelled or delayed by lack of letter of credit.

No. 5.15.

Defendant's
evidence
Oddvar
Andersen

Is any further step taken by Forest Products or Tasman following that? We work very closely with them and as soon as they or we are facing a problem we discuss the matter and in some cases booking to a certain ship is transferred to a later one.

10

Examination
- continued

Following the initial notification you mentioned, do they have another booking? Yes, this especially is information system between ScanCarriers and New Zealand Forest, has nothing to do with ordinary ship by ship bookings. Three to four weeks before ship arrival, and as soon as letter of credit has been received, they book their cargo in the ordinary way.

Does it always happen that the cargo turns up? Not always but in most of the cases we receive it sooner or later.

20

So it might be transferred to another ship? Yes.

Either by you or by Forest Products? Yes.

The Conference has contracts with the Producer Boards? Yes.

30

And large volumes are carried under those contracts? Yes.

That is totally different from what we are talking about now? Yes.

What would be your approach if a shipper wanted to ship as much as 1,000 tonnes a sailing for some months, how would that be handled? I am duty bound under instruction to refer the matter back to my head office for the necessary information that is required for the timing.

40

And depending on the response would you deal further with the shipper? I have been sent to New Zealand and I have not yet received a request for a long term contract.

If your company approved of such a contract how would it be documented? We would draw up a simple contract between us as carrier and the party as the shipper, referring to the commodity, quantity, freight rate, time of shipping, port of loading and I suppose the charges.

In the High
Court of New
Zealand

No. 5.15.

10

How would you regard the commitment either way? In such a contract it is usually a penalty clause, meaning if one of the parties are not fulfilling its commitment in accordance with the contract a penalty clause will apply.

Defendant's
evidence
Oddvar
Andersen

Coming to what happened with Aotearoa, refer to document 42? Yes.

Examination
- continued

20

Is that a telex from you to Norway dated 15th February in which you say you accepted 800 tonnes waste paper? Yes that is correct.

How did you know about that? I must explain that our ships are carrying cargo for several destinations, the Arabian Gulf, Jeddah as well as European destinations. We had to look after all destinations and consequently not in position to accept more than 3,000 tonnes of any cargo shipped for our destinations.

30

How did you know about the 800 tonnes waste paper? We were information by our organisation in Auckland who were responsible for the negotiations and the bookings.

Look at document 43, is that a telex following up on that booking? That is correct. A lot of communications between Wellington and our Auckland agents were on the telephone and not always by telex.

40

After that would you look at document 52, is that a telex to Norway summarising bookings as at 1st March 1982? Yes. That is one of our weekly telexes. Every Monday it is forwarded to Norway.

Looking at the column headed Auckland and down to bottom of page headed Gulf, and general 1350, does that include the waste paper? Yes.

Going back up that column you see 400 tonnes

In the High
Court of New
Zealand

onions there? Yes.

Do you know how long the onions had been booked for? No I am not sure on that point.

No. 5.15.
Defendant's
evidence
Oddvar
Andersen

But they were booked as at 1st March? Onions are usually Conference destinations and onions shipped from New Zealand are negotiating direct with Conference and they do their bookings through the Conference, which is again informing the shipping company.

10

Examination
- continued

Still looking at 52, does that telex also refer to your allocation of cargo for Barranduna voyage 72? Yes as you will see from the bottom of the telex they refer to New Zealand allocation.

Is that for all destinations, Europe, Jeddah and the Gulf? Correct it is all included.

Turn to document 53, would you confirm that you were aware of that telex in which you refer to accepting Aotearoa's cheque for the freight? Yes. I instructed that telex.

20

Turning to document 54, is that a letter dated 3rd March from your Auckland agents proposing an application for freight rate to Europe? Yes. Were you aware of that application? Yes.

Were you aware that about a month later the application was granted and the freight rate set? Yes, the Conference have a special committee dealing with such applications and we have a member on that committee.

30

How do you compare that freight rate with the arrangement made with India as recorded in document No. 39? I considered a freight rate quoted by the Conference to be slightly better than the freight rate we had quoted to Mr Cash due to no transshipment or forwarding being involved in the Conference rate application. As we believe, to India from Dubai we will probably be faced with a transshipment of 60 to 65 United States dollars.

40

How do you compare the two sets of negotiations? In one case it was the Conference as such, and in the other case it was by ScanCarriers.

Is that the only difference? I haven't looked through the details the freight application so I am not in a position to say the differences.

In the High
Court of New
Zealand

Do you know whether Aotearoa ever shipped waste paper to Europe on ScanCarriers ships? To the best of my knowledge they didn't ship on any Conference line ships.

No. 5.15.

10 Turn to document 81, is that telex dated 25th March from East Asiatic to you in Wellington asking for 1,000 tonnes waste paper on the Tarago? Yes.

Defendant's
evidence
Oddvar
Andersen

Did you pass on that request to Norway by telex No. 82? Yes as I am duty bound to.

Examination
- continued

20 You made some comments in the telex about the request? Yes. At that stage I believed it was not possible for us to accept the booking for the cargo. I furthermore made the point to my principals that we may be or ought to be more selective in future. Meaning accepting cargo paying a good freight.

Turn to document 86, is that a response from Norway? Yes.

30 Dated 26th March? Yes.

Agreeing you should not accept the booking? Yes.

That telex in paragraph 3 refers to already established guidelines, does that refer back? It refers back to the guidelines we saw earlier.

Document 48? Yes that is correct.

40 Was that passed on to Aotearoa in any way? As previously informed we didn't communicate direct with Aotearoa but we pass the information to our Auckland agent to tell the shipping company.

At the stage when you received that telex from East Asiatic No. 8? and passed it on to Norway, in your telex No. 82, were you aware of a problem with the waste paper on shipment on Barranduna? No.

In the High
Court of New
Zealand

No. 5.15.

Defendant's
evidence
Oddvar
Andersen

Examination
- continued

However the next day, the 26th, did Mr Robinson get in touch with you about the waste paper? Mr Robinson rang me in the morning from Auckland and he informed me that due to too much cargo or short time we will most likely be in a position to load all the cargo at the end of the second shift at ten o'clock in the evening. I then asked him what cargo he reckoned should be left behind in Auckland of the export cargo and then transported to Napier as the second port after Auckland. He recommended that we short ship the waste paper and transport that by road or rail to Napier. Consequently I ask him to request our agent in Auckland to make enquiry regarding the possibility of sending under shortshipped waste paper from Auckland to Napier.

10

Is this an unusual situation to get into? No, its very common.

The costs of that would be paid by you? Yes that is correct.

20

Did you later in the day speak to Mr Cash about the situation? Yes for the first time I spoke to Mr Cash later in the morning after I had spoken to Captain Robinson.

Looking at document 89, paragraph 6, what do you say about that description of your conversation with Mr Cash? I would say that was stated by Mr Cash as correct.

30

Did you then hear something more about waste paper from Auckland? Later in the afternoon I was rung by ScanCarriers representative in Auckland, David Beecham, who informed me that the loading of the mixed waste paper had to be stopped due to lack of space and poor conditions of the paper. Consequently I cancelled arrangement for transshipment from Auckland to Napier as the paper couldn't be loaded in Auckland it couldn't be loaded in Napier.

40

Did you then --- Was there then some discussion with Mr Cash about payment of freight for these shipments? ScanCarriers as such didn't have any further discussion with Mr Cash, it was conducted

by the ScanCarriers agent in Auckland and Mr Cash. Maybe I should say later Mr Cash approached us for a meeting which was held in Wellington at a later date.

In the High
Court of New
Zealand

10 What took place at that meeting? We discussed the problems we faced in Auckland due to the short shipment, conditions of the cargo, and some discussions took place regarding future freight rates.

No. 5.15.

Defendant's
evidence
Oddvar
Andersen

Did Mr Cash talk to you about future sales to India? He explained to us that he considered India as a good market. But he didn't mention that he had concluded any other sales than that part-shipped on the Barranduna.

Examination
- continued

20 Did he say anything about making purchases in New Zealand? I cannot recall.

Did he refer to his previous request for a booking on the Tarago? That was discussed but we had outlined to him as our local agent in Auckland had done that Tarago was fully booked and consequently no further booking could be accepted with the exception of the short shipment from Barranduna.

30 Was there any discussion about bookings on later vessels? No firm booking on later vessels, but we did discuss future freight rates with Mr Cash.

Going back to document 100, is that a telex from you to Norway dated 31st March passing on a request for 1,000 tonnes waste paper for shipment in June or July? That is correct.

Turn to document 101, is that a response from Norway? That is correct.

40 That says they would not accept further bookings at this stage? Yes.

Was that discussed with Mr Cash when you saw him? Not this telex. The information I received from my head office was certainly used by me when I had the discussion with Mr Cash pointing out why he had to be more selective. Going for better paying cargo.

In the High
Court of New
Zealand

Was there any discussion at that meeting about the packing of Mr Cash's units? That is correct yes, we did discuss that.

No. 5.15.

Defendant's
evidence
Oddvar
Andersen

Recall what that was about? I think it was pointed out to him that we considered the present packing of mixed waste was not suitable for sea transport, but we were more pleased with the magazine and the computer waste. During the meeting Mr Cash pointed out to that he was in position to alter his packing, otherwise I cannot recall anything.

10

Examination
- continued

Later on did you see the mixed waste that was shut out of the Barranduna? Yes I happened to see it during a visit in Auckland the same day it was going to be loaded on Tarago.

Did you form opinion as to standard of the units? It shocked me and I ordered the unit to be loaded and transported on a special bolsters.

20

What are bolsters? Its more or less exactly the same as a bottom of the container.

The dimensions are 8 ft. by 8 ft. and designed to be lifted by forklift? Yes.

Look at documents 128 and 129, are they exchanges between you and Auckland? Yes that is correct.

30

Concerning further attempted by Mr Cash to secure bookings? Yes.

Would you look at document 134, is that a telex from you to East Asiatic dated 29th April saying you won't be able to accept any further bookings? Yes that was to our shipping agents.

That telex refers to transshipment problems, can you explain that? First of all we are talking about Tarago and she was fully booked. We didn't have any more space for any further bookings. Regardless of waste paper or other kind. We had earlier agreed with out head office only to accept at this stage priority cargo, cargo for discharge at Dubai. Are the contents of telex 184 correct? That is correct.

40

Finally, I refer to document 131, is that a letter from Mr Cash's solicitors to you dated 26th April? Yes that is correct.

In the High Court of New Zealand

And seeking space on future sailings? Yes.

And did you reply to that by letter dated 4th May, document 138? Yes.

No. 5.15.

10 Do you stand by what you said in that letter? Yes I do.

Defendant's evidence
Oddvar Andersen

Did you have any discussions with your head office about making space available? Yes I did. Over the telephone. But no space was made available or any alteration in our previous agreed policy.

Examination - continued

AFTERNOON ADJOURNMENT 3.30 P.M.
RESUMED 3.45 P.M.

20

Cross-examined Mr Clark:

Cross-Examination

I think it is entirely correct to say that you did not negotiate the arrangements on behalf of your company with Aotearoa, did you? Any negotiation with that company was with my blessing.

30 But for better or for worse your blessing was given to an agent working at a distance? I am confident that the agents you are referring to acted in accordance with the instructions received from Oslo.

40 If East Asiatic and Mr Teskey worked on a different basis to that which you had surmised, then the contract and the commitment must be that arranged by Mr Teskey and East Asiatic must it not? I find it impossible to believe that East Asiatic or Mr Teskey could act without inside instruction from us.

If you would refer to Exhibit No. 5, sorry, document 5, you offered in the final paragraph there very competitive freight rates with prospect thereof? Yes I believe so.

And then turning to next page sub-paragraph (d), you indicated that your company were confident that the revised schedule would allow New Zealand

In the High
Court of New
Zealand

exporters a closer contact and coverage of deliveries to European markets? Yes I believe that is the case.

No. 5.15.

And you put out one of the reasons in document 10 where you said in the second paragraph that cargo not suitable for containers such as forestry, and would you include waste paper as not suitable for container? If suitably packed I must say.

Defendant's
evidence
Oddvar
Andersen

The question is that waste paper was not suitable for containerisation because of the cost factor? That is correct, yes.

10

Cross-
Examination
- continued

Going back then to document 10, you said that such things as forestry had been seriously affected by the lack of adequate shipping services and went on to say that the group of exporters had not been able to market because "you cannot sell if you cannot obtain a transport service"? Yes.

20

That is what happened to Mr Cash in this case isn't it? Yes I presume that is the case.

Did you ask your agents to tell prospective shippers that you would enable them to build up a closer contact and coverage in the Middle East if they had cargo which you preferred to other sorts of cargo? Yes.

So that you would have expected like Mr Cash to know from the outset that theirs was a cargo that might be refused booking if something that paid better came along later? Our new service was aimed for the Arabian Gulf and not for the west coast of India.

30

But surely the same consideration would apply equally between high and low priority cargoes wherever you took them? Correct.

40

You told us that all negotiations was done as a matter of company policy through the local agent. That is correct.

If the local agent thought that you in Wellington had been fully informed as to an advance programme of 1,000 tonnes per ship, and that unfortunately in this case is news that didn't get through to

you before the end of January 1982? I miss the point, all our Auckland agents are authorised to make negotiations with shippers through Wellington and with Oslo blessing.

In the High Court of New Zealand

Do you expect someone like Mr Cash when he is told something by Mr Teskey to ring Oslo to make sure you or they have approved East Asiatic to do a deal in this case? I don't understand your question.

No. 5.15.

Defendant's evidence
Oddvar Andersen

Putting it another way Mr Cash is surely entitled to work on the basis that he can trust what your Auckland agent and Mr Teskey in this case arranges and says? I would agree with that yes.

Cross-Examination
- continued

Mr Cash not only you wouldn't expect him to you wouldn't want him to ring you to check on Mr Teskey's having passed on his requirements? No I wouldn't expect him to.

Did you refer to that promotional rate of \$120 per tonne agreed at the end of January or early February to Hovik? No I didn't. I didn't see any reason for it because as earlier explained we had received authority which we believed covered the waste paper.

Hovik were very cross when they found out at end of March that rate had been quoted? As representative in New Zealand I speak on behalf of ScanCarriers and from time to time I used as a policy to go back and obtain their blessing, but from time to time due to shortage of time I have to make my own decisions.

The question is one of fact whether or not when Hovik much later on found out what you had done were they not very cross? No they were disappointed but they realise from time to time freight rates had to be quoted by us with the time laid down by them. But I must add too that often the agreement which I make is confirmed.

But this case concerns whether or not you and Hovik did keep to a commitment, that is what the whole case is about? That is probably correct.

Would you come with me to a document not referred

10

20

30

40

In the High Court of New Zealand

to by your counsel, document 103 in volume 2. I am sure you have read that more than once? That I don't know. I have read it, it was sent to me.

Would you expect Hovik were using a work like booked to know what they were talking about? Yes.

No. 5.15.

Booked I think implies a commitment does it not? If it is a firm booking I take it as a commitment on both parties.

Defendant's evidence Oddvar Andersen

You have read the paragraph 5 in this one of the three agreed documents Hovik was saying that at no stage had a rate of US\$120 been mentioned to them? We believed that the freight rate for waste paper was covered in the previous document, the advice of guidelines for freight rate accepted by head office.

10

Cross-Examination - continued

Looking at document it is obviously the position that as at 1st April 1982, Hovik believed differently is it not? I do feel they understand but why this is the understanding I don't know.

20

But as at the 1st April was not Hovik both surprised and disappointed to learn that cargo had been booked at the rate of US\$120 only? Yes.

Is it fair to say that Hovik would have wanted and in fact required a greater freight rate? Yes.

30

When you saw Mr Cash a little time later in Wellington did you say to him without commitment that if he could pay \$150 US per tonne you might be able to provide some space? During that conversation with Mr Cash we talked about freight rates in general and freight rates for waste paper up to \$220 was mentioned.

That was for the immediate future on the transshipment service to India was it? Yes.

40

Had you forgotten about the commitment that you had been talking about of a promotional freight rate lasting to end of July? I am sorry, I was talking of freight rates after the middle of the year.

Mr Cash has said in his evidence that at that

meeting in Wellington he showed you a picture of a new pack, did he? He showed to me as well as to my assistant some photos.

In the High Court of New Zealand

Is that small photo one of the photos? I am not quite sure. It could be.

No. 5.15.

10 It looks like it, can you recall? I know he did show us photos but I cannot recall for certain if it was this one.

Defendant's evidence
Oddvar Andersen

Its a freestanding three bale pack isn't it, did it look OK to you? It looks alright to me if it is placed on a bolster. But we must remember it is a very big difference looking at a photo and transporting.

Cross-Examination
- continued

20 Did you know at that time April, that Mr Cash was already looking ahead for freight on the Tarago and for the Tombarra? And was planning to use that pack in the photo shown to you? I know he had applied for space on the Tarago but I didn't know he intended to use this pack.

30 In your evidence today I think you indicated that right early on five or six weeks before Tarago sailed, from all the New Zealand ports, that you had to refuse to give any space because it was fully booked? Yes.

Is it not fairer to Aotearoa to say that the decision from Hovik and your instruction was not to accept because you might be fully booked with better paying cargo? Tarago was fully booked and we had to stop bookings of waste paper or any other commodities.

40 Would you please look again at your language used in your telex of - document 82? It is only a small point but it does reflect on the accuracy of your recollection, in second to last line or third to last line, said "It seems like we will be forced to be selective"? What I am putting to you is that when Mr Cash was seeking the confirmation of space out of your allocation, at that time you weren't fully booked you only hoped or expected you would be later on, is that a fair statement? That telex refers to two things. First, Tarago was fully booked and committed. The second part

In the High
Court of New
Zealand

of the telex refers to selective shipment allocation.

No. 5.15

Wasn't it the Tarago that was five weeks away at that time and the precise ship that is referred to for future selectivity was required? My telex re future selectivity referred to ScanCarriers' policy and didn't refer to the Tarago.

Court

COURT: See telex 86 from Hovik to you, having read paragraph 1 of that, do you still say Tarago was at that time fully booked? No, not at that time, not five weeks before ship arrived. Tarago left New Zealand full of cargo.

10

Defendant's
Evidence
Oddvar
Andersen

COUNSEL: But that was the time was it not you were refusing space five weeks before the ship was due to sail? Yes.

Turning to a different topic --

20

Cross-
Examination
- continued

Before moving from document 86, Forest Products also get a special promotional freight rate, you indicated in evidence that they give you a lot of good cargo, and I suppose that would entitled them to go in front of Mr Cash when deciding who would have available space? Certainly not.

Isn't that what the second paragraph of document 86 implies? I cannot understand or cannot see Mr Cash mentioned in the second paragraph. Doesn't paragraph 1 and 2 tie in together? When we accept a cargo as an international carrier we never consider persons, we only take into account commercial considerations. In telex correspondence I have asked my people to give Mr Cash the same rate.

30

Did you turn any of Forest Products freight away during the first six months of 1982? Yes that is happening, that cargo from New Zealand Forest Products are transferred from one ship to another ship and the other way round, if letter of credit is not accepted by them cargo is transhipped from one ship to another ship.

40

What if I suggest to you that for Tombarra a short time before she sailed, she didn't go to Timaru in the end, that you had 1,000 tonnes of allocation

which you didn't need and which you returned to Australia, would that be right? Yes I presume that is correct.

In the High Court of New Zealand

But you still wouldn't take anything for Mr Cash or Forest Products? As I have pointed out earlier we had introduced a selective policy and cargo was selected according to the financial support as it could contribute to the voyage.

No. 5.15

Defendant's Evidence
Oddvar Andersen

10 Does that mean you favour the people to help most financially? We favour the cargo best paying.

Mr Robinson as I understand his evidence, said that a memoranda would be sent to shippers regarding any cover booking over and above the normal average size? If I may say so I do believe a misunderstanding has occurred. If I am allowed to explain. When I have marketing people in the city I get a report from them regarding visits and that is done in the port as a memorandum and is for internal use in office and is never forwarded to the customer. It only assists myself with the information.

Cross-Examination
- continued

20 It doesn't matter. What you are saying is it is not your practice to send out memoranda from Captain Robinson to yourself to the shipper to confirm future cover bookings, is that your evidence? Yes, what you have told me is completely new to me and I must deny it, it is not correct.

30 You told us you didn't have any discussions regarding freight with Mr Cash? Not before the meeting in Wellington.

40 But you had had you not told Mr Burton, Mr Cash's solicitor, that the part cargo or part-shipment that was on Barranduna was likely to be removed from the ship at Aotearoa's cost and kept in Timaru? That is correct.

And you also, I think, told Mr Burton that you haven't been able to take the cargo at Auckland or all of it because of Australian requirements? That is not correct. A document in New Zealand was always kept and it always stays in New Zealand.

In the High
Court of New
Zealand

May it be the position your company didn't have a proper stowage factor before Barranduna came and as a result you over-committed yourselves? We didn't have experience in waste paper and I believe that is the case with Mr Cash as well.

No. 5.15.

Did you have plenty of space on the Tombarra? Not plenty.

Defendant's
evidence
Oddvar
Andersen

Could you have offered 500 tonnes to Jeddah almost immediately before the ship sailed, about ten days before? Are you talking of sailing from New Zealand?

10

Cross-
Examination
- continued

Could you have offered to allocate 500 tonnes of cargo to Jeddah from New Zealand before ten days approximately the ship sailed? My answer is yes.

So that to say the ship was fully booked was simply not true? She was fully booked for waste paper. That is the expression used. Meaning that the waste paper didn't have any priority for the freight rate.

20

You wrote to Mr Burton's firm in May didn't you? Yes.

Would you look at the letter you told us you still stood by, and that is document No. 138? Yes.

In paragraph 3 you said that because of pressure on space we have been unable to confirm subsequent bookings? Yes.

30

This is in May, I put it to you that in respect of the Tombarra where you gave away space in May, that you had no pressure on space when you wrote that letter to Mr Cash's lawyers? I presume that Tarago was under pressure and that the same situation would apply when I wrote the letter. As I pointed out here.

40

Either Tarago had sailed or was on point of departure was she not? I haven't got the date.

Tarago left Auckland on 11th May if you accept document 140 as indicating that cargo had been shipped on board: in document 138 you were

obviously speaking to the future when you said in paragraph 4 "the space available for New Zealand cargo is fully committed to other shippers, but we are making urgent representations with our principals, in Norway, to see whether there is any way in which space which would normally be used by Australian shippers can be made available"? Yes.

In the High Court of New Zealand

No. 5.15.

10 Is not the truth of the matter that the ship in respect of which you were then taking booking, the Tombarra, was not fully committed to other shippers? Excuse me, I didn't take any bookings for Tombarra.

Defendant's evidence
Oddvar Andersen

20 I am not asking whether you took bookings but whether or not you know Tombarra was fully committed? Are you asking spacewise? I am asking whether the ship was fully committed in space? It was not fully committed.

Cross-Examination
- continued

These urgent representations that you were about to make or were making, is there a single document or telex record either between Norway and New Zealand or New Zealand to Norway to confirm what you have said, or was it all done on the telephone? That was done on the telephone.

Re-examined Mr Broadmore:

Re-Examination

30 No questions.

COURT: You mentined the Tarago being fully booked for waste paper and said that was the expression used? She was fully booked for cargo not waste paper. She was fully committed to uplift cargo from New Zealand on Tarago for European destinations, all types of cargo.

Court

Cross-examined Mr Clark:

40 When do you say Tarago became fully booked as matter of precise date? We have two days to serve Australia and New Zealand but with the other factors after these ships had been dawdling in New Zealand they go to Australia and complete the loading before they go overseas. When they are leaving New Zealand we have very little knowledge of what is happening in Australian ports and the space available.

Cross-Examination
- continued

In the High
Court of New
Zealand

MR CARRUTHERS CALLS:

DAVID JOHN ROSS (Sworn):

I reside at 9 Upland Road, Remuera, Chartered
Accountant in private practice in Auckland.

No. 5.16.

Defendant's
evidence
David John
Ross

Are you a member of the N.Z. Society of
Accountants? Yes I am. I hold Degree of Bachelor
of Commerce and I am a cost and management
accountant.

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Examination

Have you lectured at the University of Auckland on
accounting matters? Yes I have.

Have you been an examiner for the New Zealand
Society of Accountants? Yes.

Were you for 15 years a partner in accounting firm
of Ross, Melville, Bridgman & Co.? Yes I was.

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Some four years ago did you establish your own
specialised practice as an accountant? Yes I did.

At what particular areas of speciality are you
involved in in your practice? I have been heavily
involved in export transactions and with taxation
matters including those relating to exports. Also
I have had extensive experience and involvement
with financing matters. And as a director of a
number of companies I have had experience on
general trading matters both domestic and
international.

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Were you instructed by the Defendant's solicitors
to investigate the plaintiff's claim in this
case? Yes I was.

Will you tell us what documentary material you had
access to for purposes of your investigation? To
prepare my reports I examined the documents made
available from the Plaintiff under the order of
discovery. I examined documents made available to
me by the Defendant's counsel. I made enquiry and
inspected certain records held by the Plaintiff's
accountant. And I made independent enquiry into
matters relating to the business of exporting
paper.

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To identify Plaintiff's accountant was that Mr Watson? Yes it was.

In the High
Court of New
Zealand

Did you also have access to certain bank documents? Yes I examined the diary notes made available from what was the Commercial Bank and is now Westpac.

No. 5.16.

10 Have you prepared a summary and a number of schedules for the purposes of reporting on the Plaintiff's claim? Yes I have.

Defendant's
evidence
David John
Ross

Is the copy now shown to you your report on the Plaintiff's claim. Yes it is.

Examination
- continued

I want to go through your analysis and explain precisely what you have done.

20 ADJOURNED 5 P.M.
RESUMED WEDNESDAY, 15TH JUNE, 1983, AT 10 A.M.

DAVID JOHN ROSS (Continuing to Mr Carruthers):

REPORT PRODUCED AS EXHIBIT "F".

We had reached the point where I was asking you to explain the summary that you prepared and the schedules which support your summary? Yes.

30 If I commence with the Schedule 1 which is a summary relating to all the other schedules. In item 1 I have made an assumption that the tonnage that may have been carried on the three vessels after Barranduna but before the end of the agreed promotional period, would have been same volume of paper as was presented for shipment on the Barranduna. And later on I will explain how each of those figures come about. The second item
40 relates to the gross margin and tax incentives earned on the paper that was shipped within that period but on vessels other than those owned by ScanCarriers. The third item is somewhat of an assumption insofar as Mr Cash stated in evidence that he would have to go to India to arrange orders and Letters of Credit for future shipments. I have taken a somewhat arbitrary figure of \$7,000, with this figure being intended to cover overseas travel expenses, hotel

In the High
Court of New
Zealand

No. 5.16.

Defendant's
evidence
David John
Ross

Examination
- continued

accommodation, meals etc. while overseas, with some allowance for telex and telephone communication and salary costs while Mr Cash was overseas. Because of the way the tax incentives work the Company would have received a tax credit equivalent to $67\frac{1}{2}\%$ of this total. So I arrive at a figure of \$2,275 as being a figure that will not be suffered as a disbursement by the Company. Item 4 is a summary based on the assumption that there would have been 919.4 metric tons on the three voyages and I have deducted from that my calculation of earnings on the other shipments made and a saving in export market development costs. And this arrives at a total loss of margin and incentive of \$56,554. Perhaps I should stress that this figure is before any reference is made to the normal ongoing overheads of the Company which were running at a substantial level during the year ended 31st March 1982. During that year the total overheads were running at approximately \$26,000 per month. The calculation below that relates to the paper presented for shipment but which was either shipped on the following vessel or not shipped at all. So I have calculated the margin and incentives as if the paper had not been shipped and it becomes relatively easy to make an adjustment ultimately as to what allowance should be made. The 271.12 tonnes of mixed paper was I understand shipped on the Tarago but I am not aware as to what happened to the relatively small tonnages of hard white paper and white ledger paper. If these were subsequently sold and there were papers of this type exported on the non ScanCarrier vessels then presumably there would be no loss in respect of those tonnages.

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Turning now to Schedule 2(a), this is a simplified summary including the Barranduna and the three subsequent shipments. The tonnage shown for each type of paper agrees with the tonnage presented for shipment on the Barranduna and the margins and incentives on each type of paper are clarified in subsequent schedules. I have used the same basis for the next three shipments; and the reason that the "total" column differs for each shipment although the same selling price and cost structure is applicable, is that there are changes in exchange rates on a month by month basis that had

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some significance on the conversion of United States dollar transactions into New Zealand currency. To clarify the exchange situation all shipments would have shown the same total margin of \$34,009 if exchange rates had been constant and the product mix had been constant. The total on the bottom of the "total" column of \$130,250, represents the total earnings from the four shipments and from that total a deduction has to be made for the profit actually earned on the Barranduna. It is the individual amounts shown in that "total" column that are transferred to the Schedule 1, so that the Tarago shows a total of \$28,291 and this is transferred to item 1 in my summary schedule. The calculation of the actual gross margin per ton will be referred to in subsequent schedules.

In the High Court of New Zealand

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Defendant's evidence
David John Ross

Examination
- continued

Turning now to Schedule 2(b), this really comprises a series of notes of explanation and possibly the only comments required that I have not already referred to is item 6. In document 191 evidence was given as to the tonnage available on a monthly basis. And I have prepared four definitive calculations based on shipment of that volume and product mix as an alternative calculation to the 914.4 tonnes presented for the Barranduna. And I will refer later to the calculations arising from that alternative.

Schedule 3(a), headed up "Schedule of Paper Costings-March 1982", is a series of detailed calculations relating to paper shipped on the Barranduna in March, and I will explain item by item how these figures are obtained. The top column shows the selling price in US currency which was referred to in evidence, or which I obtained from inspecting Letters of Credit, correspondence and other documents of the Plaintiff. (I will come back in a few moments to explain the basis of the exchange calculations). From the selling price I have deducted the cost of freight, which was US\$120 per tonne, together with a loading applicable in shipping matters to an amount of a further 1.46% known as a CABAF adjustment. This is a loading relating to currency and bunkering adjustments and this loading of 1.46% was applicable on the Barranduna shipment and from enquiries I have made that

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Zealand

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Defendant's
evidence
David John
Ross

Examination
- continued

particular surcharge remained a constant throughout the promotional period. I have made a deduction for commission first in respect of commissions payable to the Plaintiff's overseas agent. Evidence was given as to the rate of commissions payable and I have also examined other documents which refer to the same commission rates. I have set out in notes to Schedule 3(e) the basis of the commission calculations, but basically these are 3% of the C & F price, other than in the case of mixed waste where evidence was given that commission rate would be 3% of US\$180 plus a further amount of \$9.50 per tonne. So in the case of each paper product there is a different amount of commission directly related to the selling price column. The second commission item relates to payments due to Nigel Wilson's Company which I understand is Fairhill Enterprise, and evidence was given that commissions were payable at the rate of US \$10 per tonne for all shipments other than mixed waste. I have included magazines in the same category as they are clearly a very low product profit. The next deduction is for the cost of the paper itself. Again I have examined suppliers' invoices, and evidence was also given on the price the Plaintiff was paying for paper, so in the case of the CPO or computer printout the price paid for delivery on the wharf was, in New Zealand currency, \$212 per tonne. Similarly hard white \$280, mixed waste \$70, and white ledger \$147. I will comment shortly on the paper costs assumed for magazines. The next item of \$2 per tonne is a somewhat arbitrary estimate which covers a number of cost factors including from time to time fork hoist charges on the wharf where trucks of paper have to be unloaded, there are weighbridge charges to confirm the tonnage, there are cargo certification charges as certificates have to go with the shipment, and there are other charges such as the normal bank charges on transactions and I have included all these in a blanket figure of \$2 per tonne. The next figure shows as gross margin before overheads and that is my calculation of the profit per tonne before consideration of taxation incentives.

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It is now appropriate perhaps to refer to Schedule 3(e) item 1. This shows a table of exchange rates which have been obtained from Westpac Banking

10 Corporation and are the exchange rates appropriate to the days identified. There are four columns and as the exchange rates differ in each I will clarify what each exchange rate represents. The first column, the TT buying rate, is the exchange rate used by the Bank where the bank is buying foreign currency. The second column is where the bank is selling foreign currency. The third rate is the figure used by the Bank when converting sight transactions or sight Letters of Credit and it has a built in interest factor because it takes normally 10 to 15 days for the Bank to receive reimbursement under a Letter of Credit recovery. This is a standard rate applicable to all normal transactions. The fourth column, which is particularly important in this case, is the bank's rate for in effect discounting term Letters of Credit. The majority of transactions to India were clearly on the basis that extended credit was given to the purchaser and the Letters of Credit were on basis of payment within 180 days. For this reason the exchange rate builds in an interest factor to take account of the fact that the bank is effectively out of pocket until it can draw on the purchaser and be reimbursed under the Letters of Credit. Again this is a standard rate that was applicable on each of the dates that I considered appropriate, and again I will explain the relevance of the dates shortly.

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40 Returning now to Schedule 3(a), but perhaps keeping an eye on Schedule 3(e), the selling price for CPO paper at \$360 per tonne has been converted at the 180 day rate because this was the term of sale. Right across that first column I have used the rate of .8264 other than in the case of magazines where the transaction was on a sight letter of credit basis. In that transaction the exchange rate is .7764 which again agrees with Schedule 3(e).

Dropping down one more line, the exchange rate I have used for freight is based on the bank selling rate for United States currency, as effectively the shipper is placed in the position of having to buy foreign currency and pay the equivalent in United States currency. The same rate is applicable for commissions paid overseas and this goes right across the page, as where commissions

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Defendant's evidence
David John Ross

Examination
- continued

In the High Court of New Zealand

are payable overseas the Plaintiff would have had to purchase United States currency on that basis.

So, making the conversions as explained in New Zealand currency, I arrive at the column of gross margins.

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Defendant's evidence
David John Ross

Examination
- continued

The next calculation is headed up "Taxation Incentives". The effective basis of taxation incentives for the Plaintiff is based on the FOB value of exports made. The Inland Revenue Department accepts a conversion rate based on the TT buying rate which gives the exporter a significant advantage over the New Zealand currency amount he receives where there is extended credit. So I have calculated the value of an incentive which works out at 11.25% of the FOB value and you will see I have calculated that on the selling price less freight to give the FOB figure I have used the conversion factor appropriate to the bank buying rate. So that in the case of CPO paper the maximum incentive that the Plaintiff could have obtained is \$34.75. Because the Plaintiff was in a loss situation this tax incentive would have been paid by way of a tax credit cheque i.e. a non taxable payment to the Plaintiff. If there had been taxation payable by the Company it would have been offset against any taxation liability. As shown in some of the notes attached to Schedule 3(e), and as referred to by Mr Watson, the calculation of tax incentives has to be considered in relation to what is known as a base period, which is the first three of the seven prior years. I have set out examples of this type of calculation in item 10 of Schedule 3(e). Because the Plaintiff does not have a base period it becomes quite difficult to identify the exact amount of tax credit that would be receivable, because the tax calculation in each year will relate to a different base period. Again I have made an arbitrary decision of allowing 90% of the incentive as being likely to be the approximate amount that the Plaintiff would receive. So that instead of the maximum amount of \$34.75 I have assumed 90% of that which is \$31.38.

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Summarising the position on a paper by paper basis, with CPO the ultimate cash available to the Plaintiff would have been the gross margin of

\$34.35 plus the incentive of \$31.28. These are of course New Zealand currency amounts. Going across the page it is evident that there is a significant contribution from the three expensive types of paper, CPO, hard white and white ledger, whereas the contribution from mixed paper and magazines is understandably rather low.

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No. 5.16

10 Bearing in mind these margins it becomes very clear as to what the situation would be if freight rates were changed. In other words if a freight rate was increased by say NZ\$30, it would eliminate the total potential margins on mixed and magazines and would substantially affect the bottom line for the exporter.

Defendant's evidence
David John Ross

Examination
- continued

20 Schedule 3(b), the next page, is exactly the same calculation but prepared on the basis of the exchange rates applicable at the date of loading of the Tarago. Again Schedule 3(e) showed the exchange rate on the 11th May which is the date that the Plaintiff could have been expected to present his bills of lading to the bank and all the exchange calculations would start to take effect at that point of time. Again it is the calculation per tonne. Perhaps just comparing the figures of Tarago with previous schedule, the effect of the exchange rate variations was to reduce the gross margin on e.g. CPO paper from \$34.35 to \$24.47. I do not think any further
30 comment is required on the May shipment which was the Tarago. Every other calculation is on exactly the same basis.

40 Schedule 3(c) is the June shipment, the Tombarra. Again I have made exactly the same calculations based on exchange rate of the 8th June which is the date that the transaction would have taken place. Again it is significant to note that the margin had increased once again closer to the Barranduna margin because of exchange rate variations. So that we now have an improvement from the Tarago of approximately \$7 per tonne.

The next schedule, which is 3(d), is exactly the same calculation as if the same values per tonne would have been shipped on the Barranduna in its July voyage with the operative date for exchange calculations being 5th July. Because of the New

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Defendant's evidence
David John Ross

Examination
- continued

Zealand dollar dropping further in relation to United States dollar, the profitability per tonne at that date would have been higher than was the case with the first Barranduna shipment for the Tarago or Tombarra. So that there is a range of gross margins over those four assumed shipments and this is the basis of a calculation of Schedule 2(a). Perhaps if we turn for a moment to Schedule 2(a), I have multiplied the margin and incentive on the detailed Schedules 3(a), (b), (c) and (d), by the number of tonnes shown to arrive at the total profits shipment by shipment. So that any change in the calculation of costings per tonne would obviously affect the summary to some extent.

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Perhaps I should now refer to the Schedule 3(e) which are merely notes identifying how I prepared these calculations. Item 1 I have already referred to. Item 2 relates to the dates that bills of lading should have become available for presentation to the bank remembering that it was from the proceeds of discounting the Letters of Credit that the Plaintiff was able to pay suppliers and possibly freight. Items 3, 4, 5 and 6 have also been referred to already and item 6 on commissions I have already referred to.

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Item 8 is quite important. I had no difficulty in identifying the cost of paper because suppliers were transporting paper on to the wharf at agreed prices, but in the case of magazines it is my understanding that there was no outside contractor and it was the Plaintiff that acquired and prepared the magazines for shipment. In the absence of any other figures although Mr Cash gave evidence referring to the price he paid charitable bodies and others that delivered paper to him and I recall I think the figure referred to was \$20.00 to \$30.00 per ton delivered to the store. Regardless of that, Aotearoa would have had to sort these magazines, bundle them, bale them, strapping, palletising, overwrapping with plastic to keep the bale together, and the Plaintiff would have had to bear the freight cost for magazines. I think it is relevant to comment also that from my scrutiny of the documents made available under discovery, there has not been a huge volume of magazine shipments. It seems that the lower grades tend to be the mixed waste. But having

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regard to the very low margins that appear to be available with magazines I can understand that situation. In the case of the Barranduna the magazines were actually shipped to Karachi. So presumably the Indian buyers were not so interested in this particular item.

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Court of New
Zealand

No. 5.16.

10 Item 9 I have referred to as being a global allowance for sundry direct costs. This is intended to be costs other than the normal overheads of the Company. Item 10 I do not think there is any need to refer to. It is purely a detailed calculation to illustrate the peculiar manner in which tax incentives are calculated, and I have also attached a copy of a form used when submissions are made to the Tax Department for these incentives, and this clarifies the calculation basis.

Defendant's
evidence
David John
Ross

Examination
- continued

20 Item 11 is extremely important as I think the only real reference made to new market export incentives was in relation to Exhibit 12, when Mr Watson made reference to it. In my opinion this incentive ceased to be available as from the year commencing 1st April 1980. The whole concept of the new market incentive was to encourage exports into new defined areas. And the Government revoked this type of incentive as set out in my note. It appeared that Mr Watson may have been somewhat confused on this item as I did discuss it with him prior to the commencement of the case and he certainly was not sure whether or not it could be claimed. Evidence was given that forms were submitted to the Department of Trade and Industry for certification but quite frankly, regardless of what Trade and Industry put their stamp on, it is the Income Tax Act that defines whether or not a new market incentive is payable.

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40 Who at the end of the day makes a decision as to the new market export incentive? It can only be paid out in accordance with Income Tax Act and although I am aware that many people consider this a grey area, most people finished with the new market scheme many years ago and it would really have little relevance to any exporter these days. I have shown the effect of a new market incentive if it had been operative, with a rather peculiar calculation on the bottom, whereby in the first

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year of exports into the new market, the tax credit receivable would have been equivalent to 6.75% of the FOB value of exports.

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Defendant's
evidence
David John
Ross

Examination
- continued

If I now turn to Schedule 4. Schedule 4 is to some extent an alternative calculation where the tonnage is 900 metric tonnes rather than the 919 tonnes that had been shipped on the Barranduna. My reference to 900 tonnes relates to Mr Cash's evidence as to the availability of paper. The product mix of this 900 tonnes is somewhat different to the Barranduna, so that if reference is made to Schedule 2(a), it shows that 136.3 tonnes of CPO went on the Barranduna, whereas the alternative calculation on Schedule 4 shows 100 tonnes, and going across the page there are variations in each case, not huge variations, e.g. mixed waste for Barranduna was 551 tonnes and on the alternative calculation it is 600 tonnes. I think it is fair to acknowledge the evidence given by Mr Taylor who was a supplier of mixed waste where it may well have been that a greater volume of mixed waste could perhaps have been made available. But it is the other grades of paper that produce the significant margin so that the shipment of 100 or 200 or more extra tonnes of mixed waste would not have a very material affect on the total bottom line if I may use that expression. So again Schedule 4 has been calculated (using CPO as an example) by multiplying 100 tonnes at the rate per tonne that I showed in Schedule 3(b) under the May shipment, so I multiply the amount of \$24.47 shown in Schedule 3(b) by 100 tonnes to arrive at a total of \$2,447 which is the first figure in Schedule 4. All the other calculations are on the same basis. It was particularly interesting to me that on Schedule 4 the potential profit available to the Plaintiff was \$99,992 which compared very closely to the figure on Schedule 1 of \$96,241. And that is in spite of a modest variation in tonnage and a significantly varied product mix.

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Schedule 5: this is a calculation summarising the margin available to the Plaintiff from paper shipped on vessels other than ScanCarriers', during the same promotional period of April to July. There may have been additional paper shipped out in that period, but the only tonnages

I could find out about were from my examination of the discovery documents and I think that the total I have used of approximately 332 tonnes was close to Mr Cash's estimate when he was asked the same question. There were three separate vessels during that period, the Vishva Asha, the George and Xinhua Long. I have prepared calculations on the same basis as all the other calculations and these are summarised at the foot of page 2 of Schedule 5. I think it is very relevant to note that the total margin for this tonnage is relatively high compared to the other figures I have been referring to. The reason for this is that the paper shipped is primarily hard white and CPO paper which are very high margin paper sales. I could not identify any mixed paper waste or magazines being shipped out on those vessels. The total at the foot of page 2 of Schedule 5 of \$37,412 is the figure transferred to my Schedule 1 and I have deducted this margin on the summary from the potential profit on the three Scan vessels. On the understanding that it was the hard to get expensive paper it would probably have to come from the tonnages available to the Plaintiff referred to in document 191. There are two matters that should be referred to still on Schedule 5, and that is the George and Xinhua Long where I could not find specific documents identifying sale prices and terms, and I have used a proportional basis on the assumption that the margin per tonne would have been exactly the same as that shipped on the Vishva Asha and I could identify the exact figures that should be used. Again any variation is not likely to be particularly significant.

Schedule 6: That is on a completely different matter. This relates to my consideration of the solvency of the Plaintiff at the end of March 1982. The basis of my calculations were the Company's balance sheet as at 31st March, 1982, and my examination of documents held by the Plaintiff's accountant. I also inspected income tax assessments held by the accountant as a number of adjustments were specifically referred to in the tax assessments. I paid particular attention to the accountant's schedule of creditors or unpaid expenses as at balance date. When I examined that list I was looking for specific

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Defendant's
evidence
David John
Ross

Examination
- continued

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Defendant's
evidence
David John
Ross

Examination
- continued

items. Such as an accrual for freight and any other items which become obvious to the Plaintiff subsequently that should have been taken into account in that particular balance sheet. If I refer now item by item, the amount of PAYE of \$12,472 was identified on the income tax assessment and in fact was deducted from tax credits paid to the Plaintiff. The amount of PAYE accrued by the Plaintiff's accountant was \$1,155. So I have assumed that the accountant's accrual would have been deductions for the month of March whereas clearly the Income Tax Department were referring to a much greater figure obviously relating to a considerable period of time. There was a separate accrual made by the accountant for wages unpaid at the end of March, but because he identified PAYE as a separate figure it appeared to me that he was not aware of the arrears of PAYE when he prepared the accounts. The second item is accident compensation levy, and again this amount was deducted from the income tax assessment. Mr Watson in evidence stated that perhaps this amount would relate to the 1982/83 year but having regard to the timing of the assessment I would expect that amount to be for a prior year. The reason for this is that at the date of the assessment, which was June 1982, the accident compensation levy was not yet payable, so I am very happy that it was an under accrual expense. The next item of bonus issue tax can produce little argument. Mr Watson said that there was some dispute as to whether or not bonus issue tax was payable when the proceeds of a tax credit were used to increase the Company's capital. In my opinion the law has always been that the bonus issue tax arose as soon as a bonus issue was made out of revenue reserves; and when ultimately this amount was deducted from the tax credits the Plaintiff had accepted the situation. The next item has also been referred to by Mr Watson. When he prepared the 1982 accounts there was certain estimates as to the quantum of tax credits that could be expected, and the amount included in the 1982 accounts was overstated by \$45,432. I accept that the reason for this was probably the haste in which the accounts were filed in an attempt to get an early refund, with full knowledge that some of the original calculations would have to be amended.

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I examined the schedule of creditors for both 1982 and 1983, to ascertain what amount of freight had been provided for in these accounts on the understanding that there was still outstanding freight on the Barranduna shipment. As at 31st March 1982, there was an accrual for freight of some \$19,933 but it is my understanding that there were amounts payable by way of freight on shipments other than the ScanCarrier shipments. My reasoning on this is justified perhaps where in the 1983 accounts, presumably prepared on the same basis, the total amount accrued for unpaid freight was \$2,005. For this reason I have made the adjustments on the basis set out in the pleadings of \$71,685 as being a liability that should have been taken up by the Plaintiff because in the accounts he had taken up the profit on the Barranduna shipment without bringing in the necessary part of the transaction which was the freight cost.

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There is one further item not identified on that schedule and that is commissions payable to Nigel Wilson, Fairhill Enterprises, insofar as the commission accrued in the accounts at March 1982 did not include any amount in respect of this commission. A rough estimate of the commissions owing at that time would have been in the region of NZ\$10,000 to NZ\$12,000 which is primarily US\$10 per tonne on paper shipped on the Barranduna other than the mixed waste and presumably magazines where the commission rate had been reduced to US\$5.

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So the impact of the calculation shown on Schedule 6 was to show that even after the Barranduna shipment was taken into account there was a substantial deficit as regards the Company's shareholders funds. In other words there must be considerable doubt as to the solvency of the Company at 31st March 1982. Because there was a significant contribution to profits on the Barranduna shipment, the solvency of the Company prior to the Barranduna shipment must have been substantially worse. In giving further consideration to solvency, I had regard to the relationship between the current assets and the current liabilities of the Company at March 1982. The relationship between current assets and

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In the High Court of New Zealand

No. 5.16.

Defendant's evidence
David John Ross

Examination
- continued

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Defendant's
evidence
David John
Ross

Examination
- continued

current liabilities is a significant ratio from a financing point of view, as there is an assumption that current liabilities can be met from a normal realisation of current assets during the course of normal trading. Even after reducing the accrued tax credits by the \$45,432 over-statement, there was approximately \$108,000 of current assets that represented cash credits. And in terms of examining insolvency one would have to have regard to the likely dates when tax credits would be received. In this particular year the tax credits were received in my opinion at a relatively early date with \$26,000 being received in June and approximately \$45,000 in August. The reason that these amounts did not total the full amount of the tax credits relates to the fact that the Tax Department always takes the opportunity to deduct anything they can find that might be owing such as in this case bonus issue tax, accident compensation levy and PAYE.

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In further considering the solvency of the Company I had examined the bank diary notes which identified that there had been serious problems with the bank account with cheques being return unpaid on a number of occasions. From the bank diary notes the bank were clearly concerned about the solvency and the entire financial position of the Plaintiff.

The solvency question is even further complicated by the fact that a significant proportion of the Company's assets were locked up in the Marine Parade house that was tenanted by Mr Cash. The bank obviously were happy that the assets was owned by the Company because it gave them access by way of security, but perhaps it also identifies that the normal personal assets of a guarantor would not be available to the bank unless the guarantor had substantial private investments or other assets. And in evidence Mr Cash commented on the fact that virtually all his assets were in the Company. The problem of having such a large proportion of assets in the form of a property was identified when attempts were made to sell the property and I have been advised that ultimately the Marine Parade house was brought in by the bank at a mortgagee sale.

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10 Lastly, on the matter of solvency, I examined the files of the Plaintiff and found many letters from unpaid suppliers such as The Shipping Corporation, the Yard Wire strapping, American Express and a number of other important companies as far as the Plaintiff was concerned, where they were threatening to cut off future supplies or in some cases they had actually advised that no further supplies would be made until payment of overdue accounts were met.

In summary, in my opinion it is clear that the Company was under a great deal of pressure at the time of the first shipment on the Barranduna and that in attempting a large scale export operation it must be anticipated that there would be problems.

20 The last schedule, Schedule 7, is not of any significance other than perhaps relating my calculations to what was identified in Exhibit 12. I have shown on Schedule 7 what I believe to be the correct FOB figures for income tax purposes on the various shipments. And I have explained how I have arrived at that. It is perhaps also relevant to note that in my opinion some of the claims submitted by the Plaintiff to the Tax Department, and on which the Inland Revenue Department paid out tax credits, were overstated as the accountant used the figures shown on documents known as export entries. Although this is commonly done the Tax Department will not accept this if they are aware that the FOB figures are from the export entry as the exchange rates used on export entries are on an arbitrary basis and are set out by the Custom Department on a month by month basis with frequently considerable variation from the true exchange rate that should be used at the time that an export shipment is made. I have not endeavoured to calculate tax credits that may have been overclaimed but on some examples I examined the tax credits were probably overpaid to the extent of 10 to 20% of the actual credits themselves. I consider that this overstatement was probably not relevant in this case but regardless of the correctness or not the Plaintiff had received these monies. It is of course always open to the Inland Revenue Department to re-examine the situation which would

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further damage the solvency of the Company

MORNING ADJOURNMENT 11.30 A.M.

RESUMED 11.45 A.M.

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Examination
- continued

If I may continue, during the interval I have checked one matter of significance relating to the CABAF adjustment on freight. From time to time this is a plus and on other occasions the shipping is a minus. And although the CABAF adjustment changes from time to time in my calculations I have incorrectly assumed it was a plus whereas it was a minus. I have recalculated the effect of this error and it does have a small effect on each Schedule and perhaps I could identify Schedule by Schedule what the effect is.

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In Schedule 3(a), the gross margin on each product should be increased by \$4.55 per tonne, but to explain where the error comes from, on the second line where I have shown freight as \$121.75, which was a product of \$120 plus the CABAF adjustment, the extra \$1.75 should have been deducted not added. So the effect is on all the freight calculations, the profit is understated by US\$1.75 per tonne. Unfortunately because the exchange rates are difference on each Schedule the effect varies from Schedule to Schedule. On Schedule 3(a), the Barranduna shipment, converting that to New Zealand currency the gross margin should increase by \$4.55 per tonne and the tax incentive by 46 cents per tonne. That will be constant right across the page. On Schedule 3(b) the adjustment is \$4.54 per tonne and the bottom line incentive to nearest cent would also go up by 46 cents. On the June Schedule, Schedule 3(c), the gross margin should go up by \$4.63 and the tax incentive by 47 cents. And on the July shipment gross margin increases by \$4.75 and the incentive by 48 cents. The total effect on the summary which is perhaps the important one, if I take an approximate average of say \$4.60 per tonne, would increase the first total of \$96,241 by \$12,688 and a further \$1,285 for the extra tax incentive, so that the new total would become \$110,214. That would also change item 4 - the \$96,241 also becomes \$110,214 and the total loss of margin becomes \$70,527. On Schedule 4 which was the alternative basis of shipment, again if I take the

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average of \$4.60, each of those separate for the July Tombarra and the second Barranduna trip would increase by \$4,059, and the figure down the very bottom would change from \$99,992 to \$113,699. So the relationship between the two stay relatively constant.

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Examination
- continued

10 At the bottom of Schedule 1 which are amounts that may not be relevant anyhow, perhaps it should be noted that the total should increase by (again using average figure) \$5.06 per tonne, so that, using that, the first amount of \$5,832, that would increase by \$1,371, to a new total of \$7,203, \$714 would become \$745, and \$253 would become \$270, so the grand total would become \$8,218.

20 There is no adjustment to Schedule 5, because the freight rates or the freight costs in that were calculated on a different basis, because the Plaintiff was shipping on different lines which were charging freight in New Zealand currency, and I picked up those actual freight costs on the bills of lading.

30 I want to cover several short miscellaneous topics with you, were you present or did you hear Mr Cash's evidence concerning the activity of the Company in stockpiling waste paper to protect against an increase in freight rate? Yes I did.

40 From your investigation what comment do you have on the ability of Company to stockpile? To be able to stockpile there would be substantial holding costs and you could only finance the build up of stocks if the margins on what was being shipped out was sufficient to finance what would have been a very considerable monetary value of stocks. Again taking account the whole effect of stockpiling there would be substantial storage costs unless the paper could fit within Plaintiff's warehouse and on the evidence given there would be a severe limitation on the tonnage that could be stockpiled without incurring outside storage charges. On the basis that the total margin per shipment in very round figures is \$30,000, and that again generalising, about half of this represents tax credits that could take up to 18 months to receive. E.g. for an export made

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Ross

Examination
- continued

in April 1982 you could not get your tax credit until after you filed accounts for 1982 year, so that tax on that shipment could be expected to be received say August/September the following year. So out of the margin excluding tax incentives we have somewhere around \$15,000 per shipment gross margin. This would clearly not enable stockpiling especially when one contemplates the level of overheads being incurred by the Company.

10

In the accounts for the year ended 31st March 1982, total overhead expenses - and this excludes freight, storage, strapping and the purchase of stock itself - the total overheads were \$324,553. Dividing that by 12, gives an average monthly overhead cost of \$27,046. From the bank diary notes the bank were concerned at the level of overheads and wrote to the Plaintiff on this particular matter referring to specific overhead items. And the Plaintiff replied stating that some action had been taken to reduce or eliminate certain of these costs. But even if the Plaintiff had reduced the monthly overhead costs from \$27,000 to say \$20,000, there would still be very little available monthly to enable a stockpile to build up. Its just not realistic. At the same time with creditors pressing for payment around March 1982 any surplus would probably have been absorbed either by bank reducing their exposure or by reducing unpaid creditors.

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I think Mr Cash also stated that the purpose of stockpiling was to overcome the likely increase in freight. If freight increased by say US\$30 or US\$40 per tonne, then taking perhaps \$40, we are talking of a New Zealand cost increase per tonne of somewhere in excess of US\$55. And the effect of that additional cost would wipe out the margin, ignoring tax incentives, on every product other than hard white paper. So that in my opinion the whole concept of stockpiling to be able to face a substantially higher freight rate is economically not possible. Again storage costs would also have to be taken into account. There would be extensive costs in freighting paper to a store and then back to the wharf, and I just cannot foresee that being successful unless there was a huge injection of capital into the Company so that

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interest costs did not become a major factor.

10 What is the relevance of stockpiling in relation
to the freight rate? My understanding of the
position is that if one could amass sufficient
paper which of course involves having a customer
at the other end with Letters of Credit
established, then it may be possible to charter a
vessel or negotiate a special agreement with the
type of vessel that tends to be known as a tramp,
where they will negotiate on a contract basis for
specific types of cargo. Again I cannot see this
actually happening because of the particular
market in India that has been referred to where
timing appears to be critical. Obviously if paper
is to be stockpiled there would have to be
tremendous co-ordination with a large number of
buyers and remembering that the mills in India
20 buying this paper were relatively small by
international standards, there must be some doubt
as to whether they would wait for months and
months and then absorb a large shipment. I would
agree that it would be realistic for an exporter
of this type of product to at least carry out the
arithmetical exercise of stockpiling and if the
product had been one where there was a very high
margin with perhaps less bulk, it would be
feasible. But even the major companies would find
stockpiling a product like this a very expensive
exercise. The bank had made it fairly clear in
30 their diary notes that they were not altogether
happy with the Company and these comments were
made well before the Barranduna shipment. So in
summary I believe it is very doubtful that paper
could be stockpiled for future bulk shipments
after the end of the promotional period. I cannot
comment on likely freight rates on a charter
basis, but a charterer would require first class
financial guarantees before sending a ship to New
40 Zealand and I would be very surprised if a charter
shipment could be arranged where payment could
only be made for freight after a Letter of Credit
was discounted, i.e. after the paper had been
loaded. Because if there was a problem at that
stage you would have a charter vessel in New
Zealand with a load of paper with the alternative
of offloading the paper or incurring a very large
economic loss if there was no cargo.

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Defendant's
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David John
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Examination
- continued

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Examination
- continued

You mentioned the likely delay with payment of export incentives. From your investigation what would be significance of that delay on the financial position of the Plaintiff? Although it is normal accounting practice to bring the tax incentives into a profit statement, the cash is definitely not available within a short time of each transaction. As I have explained there can be a maximum delay of up to say 18 months after a particular transaction although at the other end of the scale if there is an export in March the delay in waiting for the tax credit might only be 5 or 6 months. And in respect of the 1982 year for the Plaintiff the tax credits were received in two payments, one in June and one in August, obviously with the more easily verified payment in June relating to certain types of incentive and perhaps the one in August relating to more complex issues as far as tax is concerned. My own experience is that the Inland Revenue Department are becoming more and more difficult because of political pressure on the tax structure and they tend to examine export transactions very carefully. I believe that the Plaintiff did extremely well to obtain his tax credits as fast as he did and I believe Mr Watson referred to the fact that Mr Cash himself kept dealing with the Inland Revenue Department to facilitate the payout.

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Have you examined the relationship between gross margins and net profit of the Company? Yes I have.

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What comment do you have on that in relation to shipments of waste paper? I believe the overheads were running at an excessive rate up to March 1982, and that under pressure from the bank and unpaid creditors overheads were likely to fall as some costs were eliminated. In round figures the average monthly overheads for 1981/82 financial were about \$27,000, and even allowing a significant reduction to say \$20,000 per month, if you subtract that from the expected gross margin on a monthly shipment there would not be a great deal left over. And, especially as the incentives represented such a large proportion of profits, the Company could well find itself in a position where it endeavoured to expand its level of

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trading but would just run out of money. This is a major problem faced by most New Zealand companies as most failures are due to a lack of working capital. It is a common problem with exporters where they cost into their calculations the tax incentives, and when they come to pay the bills they have not got the incentives.

In the High Court of New Zealand

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No.5.16.

Defendant's evidence
David John Ross

Examination
-continued

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From your experience in export matters do you have any comment on a company trading into one major market? With a product such as waste paper, a prudent trader would obviously be looking at a number of different markets. Evidence was given of other markets with the Plaintiff had exported paper in the past. In particular Indonesia, Thailand, Japan and others. From my own experience and from discussions with exporters, it would be reasonable to classify India as a difficult market, because of Government restrictions, problems with fluctuating credit arrangements and the general nature itself of business in India. For this reason I would expect a company such as the Plaintiff to be endeavouring to built up markets in more than one geographic area. Remembering that waste paper is available from other countries than New Zealand, with I understand the largest exporter being the United States. At any time a change in the United States market could result in surpluses being dumped elsewhere, and India is a logical market as it is well known that the smaller paper mills in India have this problem of acquiring sufficient raw materials. It tends to be in countries where labour costs are perhaps lower than ours that the economics of a small paper mill reprocessing waste is more practical. But I could not contemplate a long term objective of building up India as a sole market for this type of product especially where the shipping line that discussed promotional rates would have to change at the end of the agreed period. This would put an exporter very much on alert.

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As to the potential problems that might be encountered if the new freight rate made that market uneconomic, in my understanding the level of freight rate that became applicable after the end of the promotional period would have made it impractical to arrange major shipments.

In the High Court of New Zealand Remembering that it is the expensive papers that produce the highest margin and that the access in New Zealand to that type of paper is severely restricted, as was identified in document 191.

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No. 5.16 Have you considered the likely profitability of the Plaintiff after the expiration of that period for promotional freight rate? Yes I have.

Defendant's evidence
David John Ross
Examination -continued

What comment do you have on the assumption that freight rate would increase to a figure of say US\$180 per tonne? If I refer to Schedule 3(d), which is the July shipment, and which of course is the largest shipment, if the freight rate increased by US\$60, this is equivalent in New Zealand currency to approximately NZ\$81.50. Looking down at the total margins available it is clear that hard white paper would be the only product to show any profit at all and white ledger paper would show a few dollars per tonne profit. And this is after taking into account the adjustment I referred to after the morning adjournment. Obviously there would be no prospect of trading at this selling price structure because if the increase in freight exceeded the gross margin ignoring tax incentives, then the Company must just run out of money. Remembering also that the margins shown are before the normal overhead costs which were considerable.

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I want you to assist us by perhaps taking a freight rate between US\$180 and US\$120, and explain the impact that would have? If it was a midway figure which is US\$150, this would increase the New Zealand costs by approximately \$40.76 per tonne. It would also have the effect of reducing the tax incentives because these are calculated on the selling price less freight. Again referring to the July Schedule, there would be nothing to make a contribution towards overheads from any papers other than hard white and white ledger, and clearly there would be major losses on the mixed and magazines. One could perhaps make a very modest operation if you were operating without any overheads from picking up occasional orders of this high quality paper, but again when there is a severe limitation on the quantities the whole question of exporting to India becomes almost unrealistic. And in my opinion unprofitable.

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Did you hear Mr Watson comment on the time which you spent with him in examining the records? Yes I did.

In the High Court of New Zealand

Comment quite shortly on purpose of visit and the reason for it. At the time I saw Mr Watson he had not been briefed by the Plaintiff and had little knowledge....

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No.5.16.

Defendant's evidence
David John Ross

Examination
-continued

10 Explain the purpose of your visit? I requested to see the working papers for the preparation of the annual accounts and copies of the forms submitted to the Inland Revenue Department. He did not know what I was looking for, but I did. And basically two pieces of paper provided the key to most of the information I wanted and these documents were the actual assessments from the Tax Department which identified the overclaimed tax credits and the underprovided expenses as at 31st March, and the other document I examined which was only three or four sides in length, was or were the journal entries used by the accountant to prepare the accounts; and I was particularly interested in the journal entry relating to creditors, where I was looking for accruals for commission, freight, PAYE, Accident Compensation Commission levy, and any other items that I thought might be relevant. Again Mr Watson produced his file of papers and because of the way in which the accounts were prepared, there were no significant other working papers because it was more or less Mr Cash's figures in respect of debtors and creditors that were used to prepare the accounts by the accountant.

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CROSS-EXAMINED Mr Clark:

Cross-
Examination

40 You told us that your major thesis on the Plaintiff is based on the assumptions and generalisations? There are assumptions, they would not affect the major calculations because most of the figures in the key schedules were identified costs and selling prices. Taking it quietly, if you had made assumptions that will effect the validity of your appraisal? Very much so but I accept there must be assumptions in this part of the exercise.

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In the High Court of New Zealand Mr Watson also made assumptions and Mr Cash has, particularly in regard to the assessment of Indian market? Yes.

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No. 5.16 Have you not in all your workings made an assumption that during the agreed promotional period prices for waste paper in India would be static? Yes that is correct.

Defendant's evidence
David John Ross
Cross-Examination
-continued
If the court were to accept evidence from the Plaintiff which was given which you heard to the contrary, and the later assumption based on your evidence would be incorrect? There was a factor other than just assumptions. I searched for internationally recognised data relating to world prices for waste paper, and I did consider the effect of either reducing or increasing the potential selling price over the promotional period. I was aware that some letters of credit had been established subsequent to the Barranduna and I was also aware that in some cases paper was being sold or being negotiated at prices less than those used in my calculations. So with very few alternatives available I decided that a reasonable basis of calculation was to work on the known facts with an effort to reduce the level of assumptions. 10
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But did you hear Mr Cash say in evidence that he was put over a barrel when he went to India in March and had to accept lower prices than had been tentatively agreed by Nigel Wilson and that subsequently he was able to get much better prices in India for waste paper? I could not comment on the timing. I recall that Mr Cash stated that prior to finalising the orders for the Barranduna he had to take reductions, which is merely a normal negotiating position. 30

Surely you heard him refer to a schedule as to increased prices and the result thereof, and you choose to ignore that? No, the only specific prices that I believe were acceptable in my exercise would have been where specific orders existed, preferably where negotiations had reached the state where Letters of Credit were being established. 40

Would you look at Exhibit 5? I have never seen

that piece of paper. Do you ignore Mr Cash's evidence or disbelieve it with regard to price increases achieved by him after Barranduna first promotional shipment? No I would not argue with him, as obviously he would be the only one to know what orders he had specifically.

In the High
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Zealand

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No.5.16.

10 COURT: You would want to see specific orders with Letters of Credit established? To be definite yes. Obviously he negotiated whatever prices he could obtain for Barranduna, and I would expect on future shipments there would be variations, possibly some up, some down, but the whole key to what he was trying to achieve was product mix.

Defendant's
evidence
David John
Ross

20 COUNSEL: Will you accept that bunkering prices went down in 1982? I do not know but that sounds reasonable with your price list. Bunkering prices had actually gone down? Yes. But you chose not to accept evidence that waste paper prices in India in certain grades went up? I saw plenty of correspondence in the discovered documents relating to fluctuations in pricing with some prices being significantly less and others being higher.

Cross-
Examination
-continued

May be Mr Cash knows his trade though, he has survived hasn't he? Yes he has survived.

30 If Mr Cash be correct then you have been guilty of a false assumption? I think Mr Cash also made the comment that he had not taken into account these higher figures when he prepared his calculations, and if he was of the opinion that these were perhaps not so definite as to justify specific calculations in the early stages, then I believe likewise it would be difficult for me to make raw assumptions about price increases or decreases. I would certainly agree that if he could have sold 40 the volume of paper that is being discussed at higher prices, then my bottom line calculations would understate the potential loss of profits. That is obvious.

Materially? Depending on the figures you are talking about. On the evidence before the court I put it the understatement of your figures would be very material? I would think you would have to quantify the changes you are talking about.

In the High Court of New Zealand

Accepting for the moment the prices and quotes referred to in Exhibit 5 would there be any change needed to your calculations? The largest item on Exhibit 5 says 400 tonnes mixed white at US\$448.25. Referring to my Schedules I have made all my calculations for that grade at \$451.50, which is some dollars higher than this figure. \$3.25 per tonne higher.

No. 5.16

Defendant's evidence
David John Ross

With reference to Exhibit 5 the largest monetary figure states: "400 tonnes mixed white at US\$448.25 equals an increase of \$3.25". In my calculations I have used a constant price for hard white paper of US\$451.50 which is \$3.25 per tonne higher than the amount referred to in Exhibit 5.

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Cross-Examination
-continued

LUNCHEON ADJOURNMENT 1 P.M.
RESUMED 2.15 P.M.

Cross-examination Continuing: 20

In regard to Exhibit 5, the example of hard white that you chose is the last on the exhibit? Yes.

And the result of your analysis of that would indicate the difference is small and unfavourable to Plaintiff as it is a decrease? Yes.

In regard to the first item of the increased price Mr Cash said was offered under contract, is that the same situation? Clearly not. 30

In that instance you would agree that difference is very considerable? That is right

Another of the assumptions that you made I think in your exercise was that there were severe limitations on quantities available in New Zealand of the higher grades of waste paper? Yes.

Did you hear the evidence of Mr Taylor in that regard? As far as I am aware his evidence related to mixed waste, the product he was supplying. He referred specifically to that type of paper. 40

If there be evidence in this case acceptable to the court that as regards all grades of waste paper in 1982, there was a condition of

oversupply, and not a severe limitation, then I think you would have to agree that is another assumption which would result in material alteration of the result? Except it is not entirely an assumption as in document 191, and to the best of my understanding of Mr Cash's evidence, there was a reference to the tonnages which were spelled out quite clearly to the bank that was available, surely Mr Cash's estimate, and in the early stages of this case I noted down the specific references to those types of papers, but I certainly concede that if there were unlimited supplies that could be sold this would certainly be profitable.

In the High Court of New Zealand

No.5.16.

Defendant's evidence
David John Ross

Cross-Examination
-continued

Another general assumption you made was that the prices paid by the Plaintiff to its suppliers would remain throughout the period to end of July? Yes.

If there was evidence or a finding of fact that the suppliers or an important group of suppliers would have taken a lower price but still a better price than offered by Forest Products, if that were accepted as a matter of fact once again your study result would have to be altered would it not? Yes.

And very materially as it goes to very essence of the margin extending both during promotional period and thereafter? Obviously I cannot comment on materiality without knowing the figures, but in the same way you are talking about a commodity where prices will fluctuate.

We in New Zealand have to sometimes take what we can get? That is right. You as an experienced exporter would know that what is paid to the grower or supplier often has to be directly related to what the entrepreneur is able to obtain as a price? Yes. Another assumption that you made can be referred to as that of there being three ships only in the five months March, April, May, June and July of collection of waste by the Plaintiff? That is not correct.

If I could clarify. As far as I am aware having confirmed this with the shipping line there were three vessels after the Barranduna so if you

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Zealand

include the Barranduna there were four shipments. The point of my question was that the Barranduna was here on its first visit about the middle of March, the 25th? Yes the 25th was the bill of lading dates.

No. 5.16

Defendant's
evidence
David John
Ross

Would you accept as being reasonable that a good deal of what was put aboard Barranduna would have been collected prior to that calendar month of March? No I would not.

10

Cross-
Examination
-continued

How long did the paper spend on the wharf before the ship came to New Zealand? There was reference made to five days. I do not know if we are talking of the same thing but the real answer to your previous question is that the confirmations of orders from India were received during March and by memory, I have copies here, the confirmation dates go as far forward as 30th May - Letters of Credit were established after the dates of the paper confirmations, and I do not see any way in which the Plaintiff would have taken delivery of the paper prior to a few days before the vessel date, as I have seen a number of invoices which by memory charge for a deliver to wharf basis which means you cannot have the paper before that.

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At the moment I am asking whether or not there could have been paper assembled by the Plaintiff or his suppliers in five months as I spelled out for shipment before 29th July excluding the Barranduna which we know went in March? Quite possibly - I cannot comment. I think that you made a general assumption in every case that there would be extended credit for 180 days? I used that credit term other than for the magazines and the reason I used the 180 days was because I have sighted the Letters of Credit relating to Barranduna shipment which quite clearly spelled out 180 days terms. Since the luncheon adjournment I have shown you a Letter of Credit dated 28th September 1981, which you agree was at sight? Yes.

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I then showed you a Letter of Credit dated 22nd December 1981, which was also at sight? I should point out that in this Letter of Credit there is also an obligation to pay insurance. (This answer

relates to the previous Letter of Credit referred to).

In the High
Court of New
Zealand

I think it is only right for me to comment on each Letter of Credit as they relate to different shipments and different dates. But the Letter of Credit does provide for insurance to be paid for 50% over the CIF value and the Letter of Credit expired in October 1981, which is a long while before the Barranduna.

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No.5.16.

Defendant's
evidence
David John
Ross

The second reference to a note of 22nd December 1981, was that also at sight, and would you comment? Yes. It is dated December 1981, the price is \$190 per tonne compared with the figures I have used of \$220.35, it expired in January 1982, that is what it states on the Letter of Credit.

Cross-
Examination
-continued

Another Letter of Credit I show you dated 15th February 1982, is that also at sight? Yes that is at sight; It refers to an insurance policy to be valid for 60 days after it reaches the mill. And the average price is only \$150. The total amount is US\$22,500 and the merchandise is 150 tonnes mixed waste which is only \$150.

And finally, a Letter of Credit dated 28 February 1982, is it also at sight? Yes, this is a sight Letter of Credit again with paper prices significantly less than what I have used. I think to some extent the price has a relationship to the credit terms because any trader is able to calculate those interest charges so I have used a better price or extended credit. And in other cases? I am familiar with the documents. In other cases the Indian customer agreed to accept an obligation to pay interest? I have seen some such transaction, although I have no knowledge whether it actually happened. After that, will you go along with me that to say by way of generalisation that long term credit was the rule is taking matters a little far? I think the only way one can look at the problem is to examine a specific set of transactions that took place, and I went to a lot of trouble to ensure in my own mind as to the terms established by the Plaintiff's agents for the Barranduna shipment and that is why I have used the same assumption

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In the High Court of New Zealand throughout - that product mix, price, credit terms, paper supply costs, would be relatively constance, otherwise I could not have done this type of calculation.

Mr Watson showed us and produced monthly schedules for the period in question rather than three further shipments, that was his line of approach? I think he stated that he thought there were four ships after the Barranduna.

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No. 5.16
Defendant's evidence
David John Ross

If he later corrected himself and said he based his calculations on what I said, monthly figures rather than per shipment figures, that is all right isn't it? It is just a bald calculation.

Cross-Examination
-continued

But if your quantities begin to vary enormously between say 900 tonnes on three ships makes 2,700? That is right. And the larger quantities I think that Mr Watson's Schedules give, you have a very very different basis of assumption do you not? Yes there would be one more shipment but it is a question as to whether if he had known there were only three vessels he would have amended those figures, I do not know.

20

Before I start to get away from generalities there is one I would ask, you said that when talking of Company's solvency or lack of same, it was better off after the Barranduna shipment? Yes, in terms of the figures but the accounts themselves brought in as a debtor the amounts receivable or estimated to be receivable; obviously for my calculations there was a profit.

30

So one would assume the Company must have had less shareholders funds prior to the transaction.

I suppose that takes into account what you know, that Aotearoa has never been paid for 500 tonnes of paper that was sent down to the Barranduna? You know that don't you?

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MR CARRUTHERS OBJECTS.

You know something of the receipts of Aotearoa after 31st March 1982? In general terms yes.

You have heard that 250 tonnes short shipped paper went on Tarago to Scandinavia, my question is

whether or not the Plaintiff ever received any payment in respect of that 250 tonnes? No, as long as this is not the same bundle of paper where the bank discounted a Letter of Credit and then reversed it.

In the High Court of New Zealand

10 I think but perhaps you do not know that the reversal of the Letter of Credit covered part shipment of mixed waste, about 250 tonnes, which actually went forward on the Barranduna? I am confused as to which bundle is which, that is right.

No.5.16.

20 In regard to that second lot of 250 tonnes, the position appears to be a credit was passed by the bank on a Letter of Credit and then reversed. The actual accounts would not show that because all the accountant did was to bring in a figure that would be receivable at end of March and if the paper had not been shipped then presumably one thing would be for it to be included in stock, and there were stock figures at the end of March.

Defendant's evidence
David John Ross

Cross-Examination
-continued

30 If, and I put it hypothetically, at the end of the day the Plaintiff has not received payment for 500 tonnes mixed waste as the result of the events of March, then would you qualify your statement that as a matter of reality the situation was improved as the result of the Barranduna? If that tonnage was excluded from the annual accounts and if the costs related to it were also excluded, it would have little effect because of the reasonably low margin on that paper. However, if the liability for freight and the purchase of the paper were taken up as a liability but nothing was brought to account as expected proceeds, then your comment would be correct.

40 I think another of your assumptions was that the only grades or types of waste paper that actually went on the Barranduna would go to the Indian market during the promotional period, is that not right? Yes I have worked on that assumption.

So that if there was on the next time ship was available the market for newspaper, old newspapers, Mr Cash frequently referred to as ONP, or old cardboard cartons, referred to as OCC, then once again an amendment would have to be

In the High
Court of New
Zealand

No. 5.16

Defendant's
evidence
David John
Ross

Cross-
Examination
-continued

considered would it not? I recall Mr Cash after an adjournment stating there would have been no profit on OCC other than a tax incentive, so assuming that is correct and because of a gross error he may have made in respect of the bank discount rate ... Interpolating there, he was asked about the effect of the extended credit and he stated that he thought the cost was around 6% per annum. In reality over the period we are talking about the effective interest rate charged by the Bank on United States currency transactions varied from 13.25% to approximately 18.5% and where you are in a low margin product that difference is crucial. So if the cost of OCC to only show a tax incentive, then I cannot believe there would be a marginal adjustment unless you are talking huge volume. If Mr Cash was talking about 5% covering 180 days only that would be exactly the same interest superstructure you were talking about? I do not believe that is so. If it is relevant it would be. In regard to old newspapers is that disposed of in the same way as old cardboard cartons are disposed of, prime kraft? No, the only comment made by Mr Cash I think related to OCC. And again I should stress that I regarded document 191 as a realistic starting point both in respect of types of paper and quantities. And to be fair to everybody I have tried to prepare my calculations so that if it were decided that my assumption on tonnage is incorrect then it becomes reasonably straight forward to make an adjustment. Obviously you would never ship 919.4 metric tonnes every shipment.

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Equally obviously there would be the likelihood of variation in types of grades of material being exported from time to time to different markets? When you say different market are you referring to India?

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No? In that case the answer must of course be yes. You have analysed sales and you know of sales to south India involving different problems from sales to west India? Yes. And Mr Cash you would expect him to be chasing the market that he knows? Correct.

And selling any product that he could at a

profit? Yes. In fact in my perusal of documents he had made sales of fish and other products, but not to this market. Have you assumed Mr Wilson received a commission in Pakistan and if so why? Purely an assumption.

In the High Court of New Zealand

No. 5.16

You cannot recall anyone else saying a commission to Fairhill Enterprises COURT INTERPOSED. You have assumed a commission to S. & H. Industrial of US\$14.90 is that on the basis of a telex that passed before Mr Cash went to India and negotiated an increased prices in March? That is for mixed.

Defendant's Evidence
David John Ross

You have assumed that have you not? There was a document put in that Mr Cash gave evidence on.

Cross-Examination
- continued

But I am just asking whether you think that the document antedates the actual sales made by Mr Cash when he was there in March, and I think you will find it does? This is dated February (Exhibit B) and if those figures had not been correct I would have assumed Mr Cash would have clarified. Don't we know that the actual commission paid to S. & H. Industrial was a little over \$6,000 in New Zealand currency? No sir. Would you help us then? In the Schedule of Accrued Expenses of March 1982 the accountants return a figure of \$10,696 and I sighted at least one cheque for a significant amount. I cannot recall the date of that cheque.

The accrual could be correct and cover S. & H. and Fairhill? I did ask Mr Cash's accountant that question. By reason of my enquiries I believe the accrual related only to S. & H. Did you ask Mr Watson if it related only to Barranduna as we know other stuff was going to India about this time? No I did not ask. But I did ask whether any amount had been accrued for Fairhill and he stated that he had not even been aware of that arrangement when the accounts were prepared.

Your assumption is that throughout the promotional period there would be a continuing commission entitlement to S. & H. Industrial in respect of mixed waste of \$14.90? Yes. Would you be prepared to agree then that negotiation of a different commission, a lesser

In the High Court of New Zealand

one is always on the cards in this sort of exporting enterprise? It works both ways in practice. New market incentives - I think Mr Watson's thesis was that India was separately designated new market area and was likely to be treated differently for its first 12 months, is that his basis of approach and it is different from yours? No it does not differ. Once you get your new market status then the clock starts to run from when you make your first sale into that market.

10

No. 5.16

Defendant's evidence

David John

Ross

And were we not in our first 12 months? Yes it was.

Cross-Examination
-continued

Mr Watson obviously had different views to yourself in regard to the base period of the tax incentive calculations? Yes. Am I correct that he prefaced his approach on that topic on the basis that continuing trade to other markets altogether would use up the impediment to receipt of the full 100% incentive in regard to his trade whereas you have chosen to make an arbitrary assessment of 90%? I found it hard to follow Mr Watson's evidence on that particular point because you take the total FOB sales regardless of the market and it is the total FOB value that is relevant. I have checked back to see the effect on my calculations if there had been no base period at all. On the assumption of no base period the item on Schedule 1 would increase by \$5,508 and on Schedule 4 it would increase by \$5,711. But I went one step further having ascertained what the base period was, and that base period has to be deducted from something. It is hard to identify that \$1 exports is penalised for the base period and another dollar is not. So I worked out that if one took the base period into account as being \$20,000, then there would be a further offsetting amount of \$2,250, and also in the calculation where I gave a credit for what was actually shipped, that would also have to be adjusted, and the net effect of all that within \$100 or so, would be around \$1,900 as a net variation to my two summary figures. Is this very much the same as the almost philosophical problem that if you add another wagon to a train pulling five wagons, one way of looking at it the cost of engine driver should be divided into six instead

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of five, and another way of looking at it, the base has been paid for, the engine driver service costs no more for six or five, is that how you apply your base? I guess so yes.

In the High Court of New Zealand

Would you agree a matter where a broad assessment has got to be made by the court if damages are to be assessed? Yes as long as you offset the calculation the other way around, which was the Vishva Asha etc.

No.5.16.

Defendant's evidence
David John Ross

The three ships not the ScanCarriers, but the Vishva Asha, the George and Xinhua Long, have you assumed that the products exported by Aotearoa have got to be deducted from the market that Aotearoa hopes to service by ScanCarriers' service? Yes and no. The vessels I believe went to a different part of India and to different customers. And the other side of the coin is that there is an assumption that because these were the high priced papers and I had understood there were limitations on supply, it could reduce the potential shipment to the ScanCarriers area.

Cross-Examination
-continued

That is vastly different from being an identity of market is it not? I am not sure what you mean.

Do you know if any of those three ships service Pakistan? I do not know. Would you expect Indian Shipping Corporation to service Pakistan? I think the Letter of Credit from India banks said the vessel must not call at Pakistan ports. So it seems unlikely that those ships would have been going to Pakistan? I would have thought so.

I am not sure whether Xinhua Long was a Shipping Corporation of India vessel. Then if it is, your comment is right, but if not it may call at those ports.

It is only a small point, but, magazines, didn't your research indicate a quantity of magazines being collected in the region of 75 to 85 metric tonnes per week? Where would I have seen that evidence.

Did you not see what magazines were being sold, you have to collect them to sell them? In terms of buying, its very difficult because through the

In the High Court of New Zealand

No. 5.16

Defendant's evidence
David John Ross

Cross-Examination
-continued

cheques there is an awful lot of paid cash and that I think most of the people who would be collecting paper and delivering it would probably be paid in that manner. I looked at great length through all the files trying to become more familiar with magazines and I could not find a great deal of export volume and I came to the conclusion that the reason was probably a low margin of this type of waste. If I told you that there was FOB value of the magazines at \$113 per metric tonne, is that consistent with what you have been telling us, New Zealand equivalent of \$145? It just does not make sense at all because if you add to the FOB figure mentioned in the United States currency an amount of say \$130 for freight, you get to something like \$233 C. and F. United States, which is 34% higher than the selling price of what was shipped on the Barranduna in magazines.

10

But if that was a Mauritius sale as it was, it would be profitable if there was no transshipment and a lower freight obtainable than the rate Scancarriers could have been giving? Well if you can get that price in Mauritius it confirms my comment about other markets.

20

Mr Cash still was working on the markets during year ending 31st March 1983? Yes he was.

30

But instead of doubling as was the custom his turnover was halved, is that fair comment? Without checking the figures, probably that is about right.

But if Mr Watson supposed to have referred in that respect, his overheads did not come down proportionately to his reduction in gross turnover, he had an increased overhead consideration per unit of turnover? This is the whole problem with the Company. It had high costs and they are very hard to delete, and that is why in all my calculations to be fair to the Plaintiff I have ignored overheads and said whatever the calculation would be from a particular tonnage would be available towards overheads and profit. You have made a moderately generous assumption on a theoretical basis that the loss of gross profit may be much closer by way of consequential loss to

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a head loss than trying to assume the overhead would proportionately reduce if turnover increased, is that a fairly generous assumption? Yes.

In the High Court of New Zealand

Rate shaving does sometimes assist in some of these financial charges in a position to do a bit of volume trading and have a bit of muscle, would you agree? It is something the banks participate in on a deal by deal basis.

—
No.5.16.

Especially if the likes of Broadbank as they do enable to some extent to enter into competition? Yes.

Defendant's evidence
David John Ross

However the rate shaving would not be available to Mr Cash by way of bargaining power if his turnover had begun to fall, he would have a much reduced bargaining power? Firstly the practice of rate shaving which is the way the bank gives you a slightly better exchange rate on volume, you normally have to have a six figure sum before they look at it. I recall on the bank diary notes Mr Cash had requested a rate shaving and there was no real answer in the diary note but in view of bank's attitude I would suspect he did not actually get a rate shaving. If he did we could be talking of something like a quarter or a third of a per cent, and that would only apply on the discounting of the C. and F. sale or on the basis of discounting the Letter of Credit.

Cross-Examination
-continued

You do not think Broadbank if banking had been excess of the turnover of six figures, they might have given a rate shaving closer to 1%? The six figures I referred to is a transaction by transaction arrangement. With a maximum of 1% between the bank buying and selling rates, I cannot see continued generosity of Broadbank in giving virtually the entire margin away, although from time to time they may wish to balance their books so to speak in terms of foreign currency transactions.

But would you be prepared to concede that with a much higher turnover a rate shaving might have been achieved by the Plaintiff? Yes, even with the trading banks they can have their arms twisted to disgorge some of that excessive margin. We have been talking of over 100,000 tonnes per month if the Plaintiffs had shipment? It would be per

In the High Court of New Zealand shipment not necessarily per month, and with the volume involved, with a slightly better relationship with the bank I would agree that the Plaintiff should eventually have got benefits of rate shaving.

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No. 5.16
Defendant's evidence
David John Ross

Do you recall Mr Cash saying he had gone to considerable expense before he sold a thing to India by way of visits or specifically to that Continent and also to the United States where he thought there might be a switch combination deal? Yes I heard that. 10

Cross-Examination
-continued

Would you agree that the expenditure of monies to build up a market is a common enough phenomenon by the promotional exporter? Yes I do.

Would you agree that if he is effectively shut out from a market, then his promotional expenses are likely to be lost and never recovered? That is an obvious risk for an exporter, and that is why the tax incentives are designed to minimise that loss because 67¹/₂% of that cost would be reimbursed ultimately by way of tax credit. 20

What allowance have you made if any for the remaining one third of expenses promoting India market which would appear to have been largely dissipated? No adjustment is made anywhere for the costs prior to the Barranduna. 30

If Mr Cash's business had remained on foot he might have been able to start making some profits and have recovered it above the line might he not? Well that is exactly why I ignored the overheads because any profits he makes automatically go to cover that type of expense.

But Mr Cash or his company was in a singularly favourable position so far as having to pay income tax for a while, so he would have been favoured had he made a recovery of that sort of previously incurred expenses? It would merely be profit with limited expenses. 40

Profit which in the event seems unlikely or didn't flow and unlikely to flow in the future? Yes.

AFTERNOON ADJOURNMENT 3.35 P.M.

RESUMED 3.50 P.M.

10 I think that during the break at my request you looked at various drafts, Letters of Credit and sight drafts referred to early in cross-examination, and that it would appear on the face of them that none relate to Barranduna, but all relate it would seem to what was intended to go in January or February some to India and never went? Some were earlier than the date of Barranduna. Part of the problem of all the Letters of Credit in the file is that a lot of Letters of Credit get sent up and the product doesn't get shipped so they expire. And those that we are presently discussing appear to fall exactly in that category? Some were shipped. The Bank of Baroda were definitely shipped. They appear in the main to relate to cargo bearing a different non-transshipment freight rate? Yes
20 its a different vessel completely.

So in fairness to everyone the price of the southern cargo would be expected to be different to the price to the west coast of India and Pakistan would it not? I think that ties in with your statement before about what New Zealand exporters can get.

30 To get the maximum price it is up to you how to get it there. If no transshipment was envisaged to southern India however, the margin to the exporter would be much greater in those cases than in the cases that you have analysed in your report? That is an over generalisation because with the one I referred to which I was believed the Sun Opal was never shipped but at a price of \$180, whatever the freight rate was the margin would only have to be a few dollars per tonne.

40 Reverting further to matters discussed already, the commission receivable by S. & H. Industrial Corporation could have been limited to \$10 per metric tonne with no overpricing as regards Barranduna shipments without your having anything to indicate to the contrary from your research? Well, the problem is in my research I became aware of that document that was discussed in court. I also found in the interval my reference to the other payment to S. & H. Industrial when in

In the High Court of New Zealand

—
No.5.16.

Defendant's evidence
David John Ross

Cross-Examination
-continued

In the High Court of New Zealand
February 1982 they were paid a further \$6,279.
Now the cheque has no details other than commission.

—
No. 5.16
Defendant's evidence
David John Ross
There are three invoices from S. & H. Industrial that have a pencil annotation on them "No OP", you are a commercial man, if that was Mr Chopra's annotation and not Mr Cash's, would that in commercial language be no overpricing? I have never seen that expression before.

10

I turn finally to the comments made by someone on your assessment and you have heard of this before lunch I think?

Cross-Examination
-continued
Dated 14.6.83, subject to His Honour's direction I want to put a general proposition of accountancy, namely, I see it as a criticism, that the assumptions and methods involved produce potential gross margins of only about a third of margins historically by Aotearoa, is that correct? I haven't tried to check the calculations in that manner but it is obvious that the margin is less than the company accounts indicate in other trading periods, which doesn't surprise me.

20

Why doesn't it surprise you?

The reason why I believe the gross profit percentage cannot be compared with that of earlier years is the fact that it is a new market. In the past I understand the Company was exporting primarily with direct shipments, to Indonesia and other areas, India is clearly a difficult place to get a product to at a reasonable price and unless there is a basic error in my calculations in terms of matters of principle, I really see no relevance between a gross margin made in respect of trading to other territories. I can understand why the question is asked.

30

40

Mr Cash's evidence if accepted in preference to yours indicates that he was anticipating similar margins to those that he had achieved and is still achieving? I find that a little puzzling because almost every figure in my calculations has been referred to in the case, with seemingly no real issue being taken as they came to light. They also coincide to a great extent with document 191

although there are obvious variances.

In the High
Court of New
Zealand

10 Would it not if I suggest to you that Mr Watson in
reaching a different result made a number of
different assumptions to those we discussed in
cross-examination this afternoon? I think his
assumptions had to be very simplified, because I
don't think that he investigated the matter, nor
did he have the information available that I
had. I think its only fair to him to accept his
role as primarily bookkeeper from information
given to him and I would not expect him to have
perused the vast pile of paper I have had to go
through.

—
No.5.16.

Defendant's
evidence
David John
Ross

20 Whether it was 2,700 metric tonnes in toto, or a
considerably larger quantity being sold and
collected over the months I talked of, it would
make an enormous difference would it not - the
tonnage is basic to the whole method of
calculating damages for promotional period? I
think what mix and what tonnage. If you ship vast
amounts of magazines there is nothing in it to
survive.

Cross-
Examination
-continued

30 But on tonnage is it not a fact that Mr Cash's
assessment is different to yours so that the court
has regrettably got to make its assessment of Mr
Cash's prediction of tonnage? Yes, but also I
don't think there was very much said about actual
tonnages that would have been shipped. I think
its an area really left up in the air. Schedule 7
of Exhibit F gives us a gross FOB value of
\$651,220 does it not? Yes that is correct
including the Barranduna.

40 I put it to you that Mr Watson's value FOB is
considerably greater than that? His figure is
\$658,000. That is what it says. I was very
pleased when I saw how close they were.

Does Mr Watson then really say that he accepts Mr
Cash's view of the matter of profitability, gross,
being higher than you have analysed it? I think
Mr Watson found it difficult to comment because he
seemed confused as to whether they were Mr Cash's
figures or his. But my impression is definitely
that he could not have done the same detailed
exercise and I really don't know how he got his

In the High
Court of New
Zealand

No. 5.16

Defendant's
Evidence
David John
Ross

Cross-
Examination
- continued

Court

Cross-
Examination
- continued

figures.

Point 2 starts off by the suggestion that you have used deductions of FOB values and exchange variations to reduce taxation incentive entitlement by approximately 10%? Yes I think this is the point where I actually calculated and gave in evidence the effect of virtually ignoring base period situation.

So you accept Mr Watson's point there? That is what I have done clearly.

And Mr Watson obviously has a different view as to the propriety of the 10% reduction having regard to the actual 1982 and '83 incentive claims of \$19,981 and \$34,888? I think those figures cause confusion. I believe that is the base period, it is not a refund or tax calculation. But the figures I did refer to after the luncheon adjournment you will note showed the calculations on the basis he would prefer of absolutely ignoring a base period although he concedes there is one, albeit a small one.

Carrying on down I think that you don't think there is any significance as to COURT INTERPOSED.

In regard to shareholders funds, for the period ending 31 March 1982, would you agree with me that the company would have continued to trade between the months of February and July and in point of fact did so? The first part of the question would it have continued.

Could it continue and did it continue during period in question? It certainly did continue but if it had had to pay what I assume are alleged costs such as freight there would have been problems.

As I see it fortunately for Mr Cash those problems are extra ones to what he experienced, they never occurred, and the continuancy of not making a profit doesn't concern us? I have never said the company is going out of business. I think it was in a terribly precarious situation and it is hard to be a trader, with bouncing cheques, unpaid

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freight bills, to do a wonderful thing, but all you can really say the company was in a very weak financial position and a multimillion dollar trade just has to be optimistic. Full marks for someone who can do it. Most people can't.

In the High
Court of New
Zealand

I am instructed that on this question of unpaid freight which you put considerable emphasis on, the income from that Letter of Credit isn't on either side of Balance sheet either MR CARRUTHERS OBJECTS

—
No.5.16.

Defendant's
evidence
David John
Ross

You have seen the Balance sheet for 31st March 1982? Yes.

Is there claimed as an asset the receivable due in respect of the consignment on which freight is not entered? I have no idea. I asked Mr Watson if he could give me a breakdown of the debtors figure, and he could not.

Cross-
Examination
-continued

If the receivable is not there then it would be in accordance with accountancy practice not to include the debit would it not? Yes, that would be reasonable.

The accruals of tax - you heard Mr Watson say that they were still under negotiation and \$6,650 or something like that relating to 1982 having been received after the next balance sheet for year ending 31st March 1983? He did not refer to that figure but he did state that there was another small payment received recently. If the figure is correct, and I assume that it is, then you could reduce the deficiency shown in my Schedule 6 by \$6,667, but I think it clearly illustrates this very very big problem of waiting for your tax credits.

And again for all I know there may be other adjustments but on enquiry I was told that no formal objection had been lodged with Inland Revenue Department so that technically they were probably under no obligation to pay. That is pinpricking.

Have you seen the list of debtors as at 31st March 1982? No. There was only one figure in Mr Watson's records, other than the tax credit which was included.

In the High Court of New Zealand

If I show to you a list of debtors as at that date, would you check whether or not your researches with Mr Watson extended to that degree? Well, these are creditors and not debtors. Have you seen it? No.

—
No. 5.16

Does it show as credit for amounts receivable for the freight in respect of goods for which freight incurred? I think you have it the wrong way round. That is what was owed. This is the list identifying all the money that the Company owed. 10

Defendant's evidence
David John Ross

Is it a list of the debts rather than the debtors, you are quite right? Well there are items called freight but to be fair you are asking is there money showed owing to ScanCarriers.

Cross-Examination
-continued

It is obviously not on that list? Not at all which confirms what I understood when I prepared my schedule. 20

The main freight items here relate to Dalgety and internal freight. Dalgety being the agents for the Indian Shipping Corporation.

There was provision for money due to the Inland Revenue Department as the first item of the Company's debts at that time? May I see the document. There is an item there but it has been crossed out. And the reason again making a very bold assumption is that alongside it has "PD cheques" which I assume that amount would have been paid perhaps before the end of March, but I have no idea what it relates to. 30

Might it not be that there was provision made for tax liabilities as they were then known to Mr Cash? I cannot really comment.

You are not suggesting he is deliberately understating? No it is just this schedule has that top figure in as Inland Revenue, then it is crossed out and what seems to be in different handwriting someone has put what I read to be paid cheques or paid in some form. It is postdated, but that is for \$6,595 whereas the amount deducted by the Taxation Department is \$12,472. 40

But the Taxation Department make sure that they get their full pound of flesh as at the time they

pay? Not entirely. They try to.

Re-examined Carruthers:

From your investigation were you able to ascertain the method by which the Plaintiff paid its suppliers? Yes, they were paid by cheque from time to time. But I suspect that the smaller suppliers who brought paper to the factory door would also have been paid by cheque as just cash cheques.

No.5.16.

Defendant's
evidence
David John
Ross

Were you able to identify the source of funds for major suppliers? On the whole cheques were normally only written when cash was available, but until Mr Cash gave evidence I did not understand that he actually gave out open or postdated cheques to suppliers who would then present these when they anticipated that the Letter of Credit had been drawn on and funds banked in the Company account.

Re-
Examination

Do you remember being asked about the assembly of paper from suppliers at about the time of Barranduna shipment? Yes sir. Having regard to the method of payment and the general financial position of the Plaintiff what do you say as to capacity to generally pay in manner suggested? On the evidence available I do not believe they could have stockpiled if that is what the question is. Turning now to the grades of paper described as ONP and OCC, have you not made any examination of analysis of their profitability? No I have not.

From what you have ascertained are you able to express a view as to their profitability? The only reference I can make to OCC was Mr Cash's statement that there was no profit other than tax incentive. As regards the other grades I do not think I have seen anything, in fact I am not sure exactly what grade that is.

I want to come to the new market incentives, if India had status as a new market, and if it qualified on the basis as supply for first 12 months, are you able to summarise your view as to why you say the new market incentive was not payable? There was a statement in the Budget, I think in the 1979 Budget, that changed the whole basis of what was known as new market

In the High
Court of New
Zealand

No. 5.16

Defendant's
Evidence
David John
Ross

incentives. This covered a basis of funding development in new markets and in respect of incentives on sales achieved in new markets. The change in legislation seemed to me to make it quite clear that the whole concept of new markets ceased to exist. There was obviously a time span for completion, but having examined the two sections of the Act that are relevant, and there seems to be only two sections involved, these are Sections 156 and 157, it seems quite clear as I have detailed in Schedule 3(e), that you could not get the new market tax credit as well as the ordinary export incentive on which there is no dispute.

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Re-
Examination
- continued

In the accounts for 1982, document 223, where would the receivable for Barranduna shipment appear? In the first item, sundry debtors - deposits.

Is that an amount of \$309,205? Yes.

20

Do you know how that amount is made up? Not specifically. Other than approximately \$150,000 represents tax credits, and the balance is presumably the debtors figure.

No. 5.17

KAARE MOEN (Sworn):

Defendant's
Evidence
Kaare Moen

I live at Asker, Norway. I am the Deputy Managing Director of ScanCarriers at Hovik, Norway.

30

Examination

Do you have a B.Sc. degree of naval architecture and marine engineering? Yes.

In the period 1969 to 1970 were you the project engineer with the Shipping Research Institute of Norway? Yes.

In 1970 were you employed by Wilh Wilhelmsen? Yes.

40

Which is one of the partners of ScanCarriers for the Ro-Ro project, leading to the ordering and delivering of the Ro-Ro vessels operated by ScanCarriers in New Zealand. Yes.

Were you personally responsible for operational and cargo handling side of that project dealing

with matters such as unitisation, handling and stowage methods, evaluation of pieces of equipment, and establishing routines? Yes I was.

In the High Court of New Zealand

On delivery of the vessels did you then work for a period of a year to assist in their running? Yes I did.

No.5.17

10

Were you then involved in planning the general operational follow up with the vessel? Yes I was.

Defendant's evidence
Kaare Moen

Between 1976 and 1979 were you involved in the Middle East and were you responsible for sending out or setting up stevedoring and transportation companies at that time? Yes. Between 1979 and 1982 were you a director and general manager of Scandinavian East Line operating RO-Ro vessels between Europe and Middle East? Yes.

Examination
-continued

20

Did that Company operate a feeder line between Dubai, Bombay, Karachi until late 1981? Yes that is correct.

And since the 1st January 1982, have you held your present position at which time the Scandinavian East Line became part of ScanCarriers? Yes.

30

I want to deal briefly with composition of ScanCarriers, is that a jointly operated company by three Scandinavian companies including Wilhelmsens? Yes.

Have the partners been trading to Australia and New Zealand since the turn of the century? Yes.

And has ScanCarriers been a member or the Conference from Europe since 1908 and New Zealand since 1946? Yes.

40

Does the Company currently operate 8 Ro-Ro vessels in two services, six between Europe, Australia and New Zealand and two between Europe and the Middle East? That was the situation in early 1982. At present we are operating five vessels to New Zealand, Australia from Europe, and three vessels between Europe and Middle East.

What is the position on the trade as between Australia and Europe and New Zealand? Our vessels

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trading between Europe, New Zealand and Australia are loading in Europe and proceeding straight to Australia for discharging and they then carry on to New Zealand and discharge and load, and then back again to Australia, for loading, then to Dubai for discharging Dubai cargo, and cargo for other Arabian Gulf destinations, and some cargo is also for Bombay and Karachi.

Then the vessels proceed to Jeddah in the Red Sea, and then back to Europe.

10

Does every vessel on that service come to New Zealand? Every second vessel comes to New Zealand. It then gives a frequency about one vessel each month.

Leaving aside ports of call, was that the schedule that applied prior to introduction of Middle East service in 1982? Yes, that is so.

20

But as far as number of ships and method of operating between Australia and New Zealand? For some years since 1979 ScanCarriers operated five vessels in this trade and then the south bound cargo increased considerably during 1981, and it became necessary to put in a sixth vessel. It was the Tarago owned by ScanCarriers but which for three years had been operating in another trade.

ADJOURNED 4.58 P.M.

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RESUMED THURSDAY, 16TH JUNE, 1983, AT 9.15 A.M.

During 1981 was ScanCarriers considering new areas for trading? Yes that is right.

Was the Middle East one of those areas? Yes.

What was the reasoning for considering Middle East?

Several. First of all we notice due to presence in Middle East that the trade with Australia, New Zealand and Middle East was increasing and then due to the Middle East we had to revise our thoughts for the Red Sea and Saudia Arabia and ScanCarriers had the first shipping line to start serving Jeddah in 1979.

40

In addition to that Wilh Wilhelmsen the main

shareholder in ScanCarriers were already heavily involved in the Middle East through all shipping agencies in all the ports and we were participating in four shipping lines into the Middle East from various shipping areas like United States, Europe and Far East. When you talk about the growing trade to the Middle East and starting a service to Jeddah, were you talking about from Australia and New Zealand? Yes.

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Examination
-continued

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Would you outline briefly the steps taken to investigate and establish the service to the Middle East? The evaluation during autumn 1981, we had some discussions with our representative in Wellington and in Sydney to get a brief outline of the expected cargo movements and secondly what would be the average freight level which could be secured. As from that we proposed the scheme to our board and in early November 1981 at a board meeting we got the formal approval in such a way that we were allowed to go into a deeper aspect and start discussing potential shipments and what interests in Middle East would be and if the final meetings from such discussions proved to be on the same line as our anticipations then we were free to start the service.

20

If the final details were not approved then we would have to go back to the board.

30

The main object to the service was to the Arabian Gulf ports first of all Dubai would be the direct port of call, and secondly that we would serve the other ports in the Arabian Gulf through vessels owned and operated by Wilh Wilhelmsen by other trades.

40

And the distances within the Arabian Gulf is rather small and varies if we are talking about Bombay and Karachi. We had realised it was quite a distance from Dubai to that area and it takes five days to get a vessel from Dubai to Bombay. But of course the Indian Continent was considered as a possibility to get some cargo but due to the geographical situation that we have, as part of that there was no regular feeder service for unitised cargo.

You have heard previous witnesses tell us of the

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steps that were taken to evaluate the possibilities? Yes.

And as a result of that evaluation was approval given to the service going ahead? Yes.

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I want to turn to the organisation of ScanCarriers, is head office at Hovik responsible for the overall activities of the Company? Yes. 10

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And is Wellington responsible for New Zealand activities reporting to head office? Yes that is so, within certain guidelines for their responsibility.

Examination
-continued

And as far as Australia is concerned does the office at Sydney perform an equivalent position? Yes they do.

As far as European trade is concerned is that handled by head office itself? Yes. 20

You mentioned guidelines to both Wellington and Sydney, do they work in guidelines on both commercial and operational side? Yes. If its necessary for New Zealand in particular to depart from the guidelines what steps does it take? MR CLARK OBJECTS.

What steps should it take? Well according to the guidelines which have been laid down they have to take up such matters with ourselves at Hovik either by telex which is the most usual way of communication or by telephone conversations for special reasons. 30

Dealing with the question of management at head office, can you explain how that is dealt with on a routine basis? Well, every morning at Hovik we collect all the telexes which we have got during the night from Sydney and Wellington and compile those together in a list of telexes and we show on the list as well all the telexes which we as head office have sent out to Sydney and Wellington during the last day. 40

So that could be expressed as a log showing all the information back and forth. And then the management of ScanCarriers which consists of the managing director, myself and the managers of the

various departments meet at 11.00 o'clock in the morning, where we go through the various telexes of importance and discuss actions to be taken, decisions, and what we should answer to Wellington or to Sydney. And of course we are touching upon other issues as well regarding the European situation, conference matters, and all matters which pertain to a shipping company.

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10 What are the main topics which you usually discuss at a meeting such as this? It could be matters of more general information about wool sales, general development of the trade, it could be requests for special rates, from shippers asking for rates below the internal tariff which we have established, it could be questions of allocation, where for instance Australia would like to have more space available than New Zealand or vice versa. It could be operational matters if a vessel has been delayed in a certain port, what effect will that have on the schedule, to try and speed up at the other ports and the delay of the vessels.

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Examination
-continued

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40 Coming now to the allocation of space and the procedure for that, as far as Australia and New Zealand are concerned, is there usually an initial allocation of space on Scan ships? Yes there is. What is the initial allocation based on? The initial allocation is based on space requirements which we get from Wellington and Sydney two months prior to the loading. This is space requirements expressed both in weight content and the cubic volume of the cargo for the North Continent, for Jeddah, and for the Arabian Gulf. So we are getting six sets of figures, and then the vessels of course have a loading capacity and then it is up to us to decide on that capacity between Wellington and Sydney based on the requests, based on overall priority and we then send back one set of figures to Wellington which cover their allocation expressed in dead weight and cube for all these three areas together. Why do you use the two alternatives of dead weight and cubic space? First of all we have to remember that neither operation is a sophisticated operation. When we decide to put a vessel on the berth two months ahead we do not actually know how much cargo we will get and what the cargo composition

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will be. Of course we have some experience of approximately what it will be, the situation will be, but that can as well change quite a lot from vessel to vessel. On some voyages we can get a lot of very light and bulky cargo which takes a lot of space, and then we can fill the cube of the vessel, the volume of the vessel and not utilise the dead weight capacity. The dead weight capacity is defined by weight of cargo if we can load to the plimsoll line of the vessel. And on the other service we might get a lot of heavy cargo which means that the dead weight capacity is utilised but we still have a lot of cubic space weight on board the vessel which is not used. The ideal situation is when you both use dead weight capacity ad cube weight capacity to the maximum but it is very seldom that happens in the way the shipping is operated.

10

As far as operation of ship is concerned what is the importance in balancing dead weight capacity and cubic space? As I said the optimum is to get 100% utilisation of space but in addition we have other factors to take into account as well. And one major factor in addition to the two previous ones I mentioned is the stability of the vessel. If we have got very very light cargo the stability will in most cases be very poor, and in such circumstances we will be in a situation where we cannot utilise the dead weight capacity nor the cubic capacity, as if during such circumstances we put more cargo into the higher situated decks like level deck, then the vessel might capsize.

20
30

Once you have determined the initial allocation and advised the regional offices such as Sydney and Wellington, who determines the composition of the cargo? Well, first of all, we know about the procedures and the commercial aspect of the activities, when Wellington has got the allocation they distribute that to the various agents, of course the larger ports are getting more allocation than the smaller ports, and then it is up to the agents to accept bookings of cargo according to the general guidelines, and refer bookings to Wellington when larger volumes are concerned, for instance like 200 tonnes or 250 tonnes.

40

10 They have to refer as well to Wellington if any shipper would like to book cargo which has a very low priority, as each agent is of course only knowing what is going on in his area, whereas Wellington will have the full picture of the bookings for New Zealand as a whole. And then one month prior to loading we get the first detailed report from Wellington that comes on a Monday, giving a breakdown of cargo booked on that specific voyage broken down on port of loading, port of discharge, and types of cargo. At that stage we can follow from the detail what is going on and we ask specific questions about some of those entries. For instance, if it is limited cargo booked for Europe, which is a Conference destination, we ask why is that.

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Examination
-continued

20 After that report one month prior to loading, how frequently do you receive reports from e.g. Wellington? We have the standard report every Monday, but in between we get as well telexes on special bookings, for instance if you have a booking of 500 tonnes of forestry products, or whether we have got a lot of wool for instance, and we are as well in frequent contact with Sydney on the stowage planning on the northbound vessel as we have done previously. The stowage planning of the vessels both regarding New Zealand and Australian cargo is taken care of by Central Planning Office in Sydney.

30 It is essential that the stowage planning is done centrally and by one man which is the cargo superintendent who will be in charge of the actual stowage operation in the ports concerned.

40 To identify that person, is that Mr Anvin? It is four cargo superintendents in Sydney and Mr Anvin or Captain Anvin is one of those four. And then he is travelling and attending another vessel and that could be the case of course one month prior to the specific vessel starting, then the information is collected by central planner who is all the time in office and in this case we communicate with Captain Anvin by telephone or telex.

Do you continue to receive those weekly reports up to the date of loading? Yes we do. And then in

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-continued

the course of those two months it could of course be quite some changes on the expected cargo composition, on the capacity of the vessel, on the stability, and it might even be changes on the schedule as we know that vessels might be delayed in other ports and in Europe or especially in Australia where there are frequent strikes at the waterfront. On some vessels we might lose 3 or 4 days prior to coming to New Zealand. On other sailings we might be lucky and stick to the schedule.

10

Broadly speaking how much space was available on each of the vessels northbound? As an average figure it will be a total of some 15,000 deadweight tonnes.

And how is that divided between Australia and New Zealand? New Zealand will generally get approximately 6,000 weight tonnes, and we will as well set a limit on the cubic which might be about 11,000 cubic metres or 11,500 that depends again on the season and the types of cargo we expect to load.

20

Are they fixed amounts of availability as between Australia and New Zealand or do they change during the course of planning? It is most important that the cargo vessel is utilised as good as possible so we have to change allocation if we feel that Australia is not performing too well or special reasons why, and we try to get more cargo from New Zealand, and vice versa.

30

And then in many cases Wellington for instance accede to give an allocation away to Sydney and the reasons for that could be that the wool sales in Australia have been pretty good when it comes to European destinations, that the buyers have bought 50% of the wool for sale, then we would like to lift more wool than usual, and it takes place prior to the sailing then we go immediately to Wellington and ask if they can give Australia a bit of their allocation, depending on their booking situation and depending on what types of cargo are expected to book during the last 14 days prior to the vessel arriving.

40

I want to come to some of the practical aspects of

the planning and loading. About how many shippers are you dealing with on northbound and southbound trade? Well that will of course depend from vessel to vessel but I would say on average approximately 2 to 300 shippers from the southbound link and northbound between 100 and 150, and the reason for the smaller amount northbound is that we have a lot of cargo from the various producer boards, the export trade from New Zealand as well as Australia is primary products like wool, meat, and dairy products. And shipments of those are controlled by the various producer boards. The vessels southbound is a larger variety of cargo.

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Examination
-continued

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How is space acquired by shippers on your ships? Most of our business so to speak is done on the ordinary practice of line shipping. We as a line have our freight tariff which for the Conference destinations is published to the trade by the Conference. For the part of our activities where we are not operating in Conference as to the Arabian Gulf, we have internal tariff which is distributed to the agents. And then if a shipper has a certain volume of cargo he would like to ship on the next vessel or next 2nd vessel he approached the agent and make a booking, and then of course the freight rate in most cases is known to the shipper as he has been shipping that commodity previously. Or if he has not been dealing with us before then the agent has to look in the tariff and give the rate which in most cases the shipper accepts and the booking is made.

40

Apart from ordinary terms for liner shipment what other methods are available? If the shippers are shipping regularly to our destinations either they have secured a long term contract of sale or for instance like the producer boards they know that they will during the course of the next year ship a certain quantity of their products to Europe, they will then enter into a contract with the Conference if this is within the Conference area or another line if outside the Conference area. And that contract is then negotiated some time prior to the first shipment and it could be rather detailed and lengthy negotiations. And such contracts will involve several separate components like the period, the freight rate, the volume,

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ports of loading, ports of discharge, the currency situation, and also an arbitration clause in order to deal in an efficient way with any dispute. And there might be other elements as well which I don't remember by heart, but of course any contract will have the same basic elements that we have although contents will be different depending on the trade and commodity that will appear.

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Would you look at the contract which I now show you? Is that a copy of a contract of affreightment for the movement of forestry products from Finland to Australia? Yes that is right. These contracts will I hope be treated confidentially by the Court. 10

Examination
-continued

Would you identify the contract? This contract is a contract for shipment of forestry products from Finland to Australia and it covers the total volume of cargo to be shipped with with ScanCarriers and the Conference during the year 1982. This contract was negotiated by ScanCarriers on behalf of the Conference as we are lifting most of the cargo from this shipper, which is a company owned by the major Finnish paper mills. One entry covers the volume which has been agreed, the shipping line accept to lift or agrees to lift up to the maximum, and the shipper is obliged to ship a certain minimum per annum of some 20,000 tonnes below the maximum. 20 30

What do you say as to the terms of that contract as compared with other contracts of affreightment? MR CLARK OBJECTS.

In your experience what are the matters normally covered by contract of affreightment? The duration, which is item 1 here. The ports are covered, there are two in this contract. And there is a volume which will be shipped and the shipping line accept to carry. It gives the rates they are writing for, and writing also a description of the cargo which of course is very important. Different types of cargo and the allocation between cube and weight. It gives the unitisation, the quality of the cargo which is covered under item 4(3). It states the units to be of sufficient strength and utility to withstanding the ordinary risk of strain for 40

10 overland and sea transport and permits picking up
of cargo and storage. It covers as well the
special cargo carrying commitment to be used for
the cargo. It states that containers will be used
for some of the cargo. It states that bolsters
will be used. What I ask is what are the normal
terms in a contract of affreightment? It normally
covers whether special carrying equipment should
be used or not as that in a very important cost
element for the line. It covers currency and
bunkers and any contract will have a clause
referring to the stipulation in the lines below
deck as those will apply which are inconsistent
with the terms in the agreement. And then every
such contract will have an arbitration clause as
the line is giving commitment that they will lift
the cargo during the period, the shipper has given
an undertaking that he will ship the cargo, and
sometimes things develop differently than expected
20 in a business venture, and then we would like to
have an agreed pattern for such disputes to be
sorted out.

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-continued

30 Is the Finnish paper contract - the Finnish
Forestry Products contract - similar or dissimilar
with other contracts of affreightment? Of course
we have various types of contracts with the
various New Zealand producer boards which are more
detailed due to various reasons.

30 Dealing with the essential features of the Finnish
Forestry Products contract, what do you say as to
it being similar or dissimilar to other contracts
of affreightment which you are familiar with? As
far as I can recall the Forestry contract
conditions are the same as the contracts with the
producer boards, but it might well be that the
latter has additional clauses which is very
40 important for that specific commodity.

40 Is the document now shown to you a contract
between the Conference northbound and New Zealand
Apple and Pear Marketing Board? Yes it is.

As part of the northbound conference do
ScanCarriers carry cargo in terms of that contract
just shown to you? Yes, we are participating in
movements of fruit, apple and pears to Europe and
Scandinavia.

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-continued

Without going into the full detail of the contract, can you tell us whether that is similar or dissimilar to contracts of affreightment you have come across? Well, the special in this one is item 6 which stipulates that the vessel shall have a maximum length of 511 ft and the reason for that is probably that the port has something special and in order to lift or discharge the cargo ports are included which is not familiar over normal schedule. Under item 5 I notice that Helsingborg Malmo and even Jama in Norway, which is a small port, is included.

10

That is a more detailed contract than the other one you discussed? Yes, very much so, and the reason for that is I think that the overall fruit trade, fruit export, fruit sales, is a more sophisticated business than the forestry business.

20

Apart from those special provisions does it cover the main features of a contract of affreightment? Yes it does, and on the rate side I would like to highlight that this is a free-in contract which means that the shipper pays for the loading expenses, whereas most other contracts are made on Liner terms which means that the shipping line pays for most loading and discharge.

During the course of the case we have heard reference to onions from Australia? Yes.

30

Tell us the position concerning the carriage of onions from Australia? The carriage of onions from Australia in ventilated space is a transportation method which is engaged and developed some years ago. Prior to that all onion exports to Europe had to go into containers, a rather expensive unit. Every year the Conference is having negotiations with the onion shipper organisation for the 1982 season, there was a part of the negotiations in Australia and those negotiations usually take part during June early July every year, and covers the subsequent year.

40

And the shipping season of onions which is from Tasmania the main producing area, is from late summer early January until May or might be

sometimes depending on climate even June, and we are then discussing overall volume at an early stage and then usually during November we are discussing the amount of cargo to be shipped on these specific vessels. So during the 1982 season I think we had 7 vessels calling especially for lifting onions, and the Barranduna was either No. 4 or No. 5 of those seven vessels.

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10 Coming now to priority of the Cargo, to achieve profitability does Scan have a set of rules for priority of cargo? That is right. In a commercial entity one of the main objects is to try to earn money to try and make a profit and in Liner operation the important thing of course is to have the maximum contribution, financial contribution, per sailing. What factors we decide for the financial contributions, the freight rate is obvious. Secondly, the port of destination if
20 that port is a port directly called by the line, and the elements are included, if we have to call at another port there are additional expenses to the Line. The third factor is cargo handling expenses, for loading and discharging. Each system is different depending on the commodity. The 4th major element is whether special equipment like containers, flats or bolsters are needed, and that means additional cost to the line. As an example the dry container cost for ScanCarriers is
30 US\$4 per day. For example each case, the containers are spending one month in the port prior to the loading at the port, and that means if that container is supplied it means an additional cost of \$400.00 to the line which is an important cost. The last factor is the stowage factor. What specific cargo will take what overall space. We can have a very good freight rate per tonne but if the cargo is bulky we cannot
40 get the money on that over the financial business.

Some time prior to the middle east service was the priority list made up? Yes that is the case, based on what we felt was the general prospects of that trade and based on contribution for each type of cargo in relation to freight rate. But calculations of course can never be exact as what happens in the port regarded expenses, the stowage picture is when the cargo as and when the cargo is loaded, and before we start lifting we have to get

a certain experience perhaps.

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Look at document 48, is that the priority list for the middle east service? Yes that is one of the first priority lists for that service. And it highlights first of all the important of the port of destination. It says in point 1 of Issue (a) concentrate on Dubai, and Sharjah markets.

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The reason for that is Dubai is called direct by these vessels, and Abadubi and Sharjah is served by truck as those places are very very close to Dubai. Sharjah is just a couple of hours by truck. 10

Examination
-continued
Can you tell us as far as India and Pakistan are concerned how they rank for priority? They have a very low priority, first, due to the transshipment element, no regular feeder service for unitised cargo, and very high transshipment costs as well. Scandinavia Middle East Line which I was myself responsible for, did run our own feeder service based on container shipments between Dubai, Bombay and Karachi for some three months. We closed that down during November 1981, as it was not profitable, so we had some experience with difficulties. 20

During the course of a service are priorities reassessed as you get more experience with the cargo? Yes that is right.

I want to move to some of the relevant events; was the first time that Hovik heard of waste paper for middle east trade the report in document 10? Yes that is right, the connection with this trade.

Is waste paper mentioned in the body of the report? To my knowledge it is not mentioned as a commodity in the report and is never mentioned in the survey showing the prospective shipment and commodities. 40

Would you look at appendix 10, does that mention the rates? Well that shows a survey actually made by Wellington Office on the freight rates being offered for Arabian Gulf ports. It shows ScanCarriers' rate to Jeddah where we operate to

that destination, and it shows the proposed rates to Arabian Gulf ports, and I would like to point to that mentioned here, the Arabian Gulf ports.

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Was head office aware of Aotearoa as a shipper at that time? No we were not.

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As far as you are aware was there any other reference to waste paper apart from that reference in appendix 10? No, to my recollection, there was no other reference to waste paper nor to the company of Mr Cash. And the appendix not included here is a reference to a large number of New Zealand shippers which might have cargo to the Arabian Gulf.

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Examination
-continued

Look at document 27, was that the first request that head office received for space for Aotearoa? Yes it was, for space on the Barranduna.

The subsequent telexes set out the history of the matter? Yes I think they illustrate the normal way in which we are handling such requests.

Look at document 42, as you recall it is that the first request for a booking which you saw? I think this is a telex and as the 2nd is mentioned - it is the 15th February. It comes from Captain Andersen more on the general space in question, where he understands that New Zealand will be restricted to 6,000 weight tonnes. And then he goes on giving some comments on the Arabian Gulf service. He says that at that stage one and a half nights [/ months prior to] loading has passed 2,000 tonnes and he says we have accepted 800 tonnes waste paper from Auckland, Napier, Timaru, to Bombay. I think that was the first advice we got on that booking.

Turn now to document 82, was that a request by the Plaintiff for a booking on the Tarago? Yes that it right.

Was that received on the 25th March 1982? That is correct.

At that stage what was the position concerning support for the middle east service? The support

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-continued

for the first vessel was very good. This telex was sent just prior to the loading of the Barranduna which was more or less full, and the booking situation on this vessel which was to be loading next or early May would at that stage be very good, and Captain Andersen said we have already accepted 1000 tonnes from New Zealand Forest Products and we are prepared to accept waste paper. You have to realise that 1000 tonnes is one sixth of 20% of the total allocation. Therefore he referred to the guidelines.

10

Was that request considered and is document 86 your reply? That is right.

At the time that reply was sent from Hovik did you have any knowledge of any difficulty with the cargo for the Barranduna? No we did not. We knew that waste paper was booked on that vessel in the advice form. No one expected that we should have any difficulties. We were not aware of any difficulties until a couple of days after the loading, with the weekend in between.

20

At that stage did you know what freight rate the Plaintiff was being charged for Barranduna cargo? The freight rate which we had considered was fixed was \$150 per tonne.

Did you know what freight rate the Plaintiff was being charged for the Barranduna shipment? Some days afterwards we realised that the freight rate quoted was a bit low than the \$20 more which was allocated for the Arabian Gulf.

30

The reason why Hovik agreed that the Tarago booking should be declined?

First of all, it was cargo to Bombay in this case. Secondly it was the type of cargo which is bulky in a lot of respects, and so as previously explained waste paper to India had a low priority and the booking situation, on the first vessel [which] would start loading the next day, and the subsequent vessel [which] could load early May which was the Tarago, was very good.

40

Give us some indication as to the position for bookings on the Tarago at that stage? I believe

that the booking situation was between 4,500 tonnes, 4,700 tonnes, from New Zealand which of course was very good for a vessel which could be offered to the trade for one more month until she sailed.

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10 Look at document 87, was that the first advice that there was some problem with the Barranduna shipment? It was the first advice on telex that Captain Andersen told or Captain Raaum our operations, or traffic manager sent the evening or the Monday morning.

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20 What was your understanding of the position as far as the problem with the Barranduna cargo was concerned. My understanding was that a great part of the waste paper had been loaded but it was a consignment or volume of 500 or 550 weight tonnes, which was badly unitised and because of that required much more space than assumed and due to that fact and as the vessel was fully booked, not all cargo could be loaded and more or less half of it had to be left behind in order to be picked up by the next sailing. The shipper faced problems relating to negotiating that left behind and we understood that his sale was based on the letter of credit arrangement and as we only could issue on board a bill of lading of the quantity we had loaded, he could not due to the letter of credit stipulations not cash the payment for the amounts which actually was shipped.

Examination
-continued

30 When talking about the 500 tonnes are we referring to the mixed waste? Yes.

Did you understand there would be any problem with any other grade apart from mixed waste? No.

40 Because of that difficulty with the letter of credit in relation to mixed waste, what decision was taken at head office? We believe that MR CLARK OBJECTS

What decision was taken at head office in relation to the mixed waste cargo? We tried to sort out the problems. We believe that a solution would be that we discharge the mixed waste already on board in Timaru and that the mixed waste, or half of it was kept at Timaru and half in Auckland, until the

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next vessel and that all the cargo of mixed waste be loaded on the same vessel with the separate bills of lading, for the ports of loading, and as the shipper had bills of lading matching with the Letters of Credit.

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-continued

Would you look at telex dated 14th April, 1982, was that the advice which you received concerning the arrangement for payment of freight, release of bills of lading, and loading of cargo on Tarago? That is right.

10

Do you produce as Exhibit G? Yes. We were of course very pleased to receive the telex and thought we had solved the problems.

Coming now to the Barranduna cargo, of mixed waste, when did you receive advice that the freight had not been paid on that shipment? According to the agreement, which is referred to in that telex Exhibit G, we understood that freight for the whole of 550 tonnes mixed waste should be paid three days after the departure of Tarago from Auckland which would be around the middle of May.

20

Do you recall receiving advice shortly after the middle of May that the freight had not been paid? Yes, I think we heard on the phone or by telex, we got an advice on the 18th or 19th May.

30

As a result of that advice did you make enquiries of Scan's Bombay agents concerning the possibility of claiming a lien? Yes, we discussed with our Bombay agents the Barranduna, it called at Dubai late April, and we had already made the necessary arrangements for Bombay and the cargo left Dubai I think it was the 8th or 9th, and the vessel arrived in Bombay on the 19th May. She serviced other ports in the vicinity. As usually happens in Bombay there was problems to get a berth for the vessel. I think she had to wait outside for 7 days approximately so at that stage when we approached our agent in Bombay I think the cargo had not been discharged but I think it was discharged on the 25th May.

40

Was there quite an exchange of telexes with your Bombay agent about the question of lien? Yes, it

was. That is the normal way of dealing with such a matter when you have not got your freight. Then you must try to cover your expenses by exercising a lien on the cargo.

In the High Court of New Zealand

Look at document 156, is that a telex to your Bombay agent authorising delivery of the cargo to the consignee? Yes it is.

—
No.5.17

10 Look at document 174, is that advice from your agent that the clearing agents had returned the documents to the consignee? Yes.

Defendant's evidence
Kaare Moen

And document 177, is that a telex from your agents in Bombay - is that a telex to ScanCarriers in Wellington advising them of advice from the Bombay agent that the lien was not taken but the cargo had not been accepted? That is correct.

Examination
-continued

20 Would you look at document 182, is that a letter from your agent confirming that the bill of lading for the cargo was never presented to the consignee? Yes.

Look at document 226, is that advice from your Bombay agent that the cargo remains undelivered? Yes.

30 Look at document 226, is that advice from your Bombay agent that the cargo remains undelivered? Yes.

To your knowledge where is the cargo now? To my knowledge the cargo is still in the port of Bombay.

40 I was to come now to the Tarago cargo, you told us that payment of freight was due in terms of agreement 3 days after sailing from Auckland? Yes.

And the Tarago sailed on 11th May? Yes sir.

Are you aware that after the freight fell due there was contact with the Plaintiff to obtain payment? Yes, we learned that from our agent, more or less on the day.

Look at document 171, look at the document at the

In the High
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Defendant's
evidence
Kaare Moen

Examination
-continued

bottom of page that shows 111 with a circle beside it: Is that notice to Aotearoa from East Asiatic that the paper will be sold? That is right. As the vessel was approaching Dubai and she was estimated to leave Dubai on 11th June, so we ScanCarriers had to take a decision. This was close to one month after payment should have been received. We realised that a first shipment which had gone on the Barranduna still was not collected by the receiver, it seems to us to be very unwise to bring this cargo forward to Bombay and accrue the transshipment expenses which was \$60 per tonne measurement. Secondly, we decided against storing the cargo in Dubai as then we would accrue heavy storage costs and shipment costs, and if we did not get a firm advice that freight had been paid on the whole lot which should have been done according to the agreement, we would take the cargo on to Europe. As by that we would then be in a position to charge the additional expenses. That is the reason why the 10th June is mentioned in the telex as a date by which we have to be advised.

10

20

In the event you took the cargo on from Dubai having received no advice of payment? That is correct.

Look at document 175, is that an enquiry to your agents at Flushing, Hamburg, and Gothenberg, for prices for the cargo? Yes that is right.

30

Was there any offer which resulted from that telex? Well what we realised was that we would [be unlikely to get] an offer to discuss a possible [sale] until the cargo had been surveyed. And the survey was carried out as soon as the vessel had arrived in port.

Look at document 178? Yes, that is a telex from our agent in Gothenberg in Sweden, advising us about a possible buyer.

40

Document 180A? Is that another enquiry? No that is a report from our agent in Flushing, and it gives the report from the surveyor.

So in the end was the cargo carried through to Gothenberg? Yes, that is true, We had not

obtained any firm offers in Holland. We did not get any firm offers from Germany, possible buyers, and the cargo was then carried to Gottenberg which is the last port of discharge and we then start loading again southbound for New Zealand.

In the High Court of New Zealand

Look at document 183, is that the invoice relating to sale of the paper? Yes it is.

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No.5.17

10 Is the currency expressed there Swedish Crowns? Yes that is correct.

Defendant's evidence
Kaare Moen

Would you look at this document now shown to you, is that an affidavit from a man named Gunnar Mile? Yes it is.

Examination
-continued

Do you know who Mr Mile is? Yes I do.

20 What is his position? He is the secretary of a Norwegian organisation dealing with re-cycling of paper. And he is, on behalf of the various companies, collecting waste paper, negotiating with the association of paper mills in Norway.

You have read the affidavit by Mr Mile before? Yes I have done.

30 What do you say as to whether he should have knowledge of the contents of the matters that he talks about in his affidavit? Well I assume that based on his position with the re-cycling industry in Norway as well, as a representative in that and dealing with the association of paper mills, he should probably be one of the best people in Norway to express an opinion on waste paper. Would you look at Exhibits A.1 and A.2 to the affidavit? Yes.

40 Are you able to identify that document? Yes it is a tariff for or issued by the Association of Paper Mills in Norway, which contains the prices to which paper waste should be bought, and it gives the various qualities and the price per thousand kilos.

Coming now to Exhibits B.1 and B.2, are you able to identify those? Yes I can.

What is it? It is a letter from the Association

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of Paper Mills to the Association of Recycling Paper, which is translated from Norwegian into English, and the shipping of waste paper to the paper mills.

Do you know the signatory to the letter B.1 and B.2? Yes I do.

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evidence
Kaare Moen

Is he a person who should have knowledge of the contents of the letter he wrote? Definitely. As Mr Lie Nielsen is responsible among other things for negotiating the prices on waste paper supplied to the Norwegian Mills.

10

Examination
-continued

Can you give us some indication of the expense involved in travelling from Norway to New Zealand? Well, first of all the price for my own ticket coming down on this occasion was close to 30,000 Norwegian Crowns which is approximately NZ\$6,000. That is the air fare, and return air fare. That is on the business class ordinary ticket. Then you have to add of course the accommodation and hotel expenses. So the direct costs would be some NZ\$7,000 or NZ\$8,000 depending on the length of time I stay here. That of course is in addition to salary.

20

Do both Mr Mile and Mr Lie Nielsen reside in Norway? Yes.

30

MORNING ADJOURNMENT 11.45 A.M.

RESUMED 12 NOON.

I want to come to utilisation of the vessels, you told us the position regarding the Barranduna and Tarago, what was the position concerning Tombarra? We were very pleased for the cargo support for the new service, and the Tombarra and the Barranduna sailing for the new service were reasonably good. As I mentioned earlier we first get the booking report one month prior to sailing and both these sailings were very encouraging for bookings. There were very good bookings for the 10,000 tonnes compared to our allocation of 6,000 tonnes for New Zealand.

40

When the vessels sailed from Australia after completion for loading, the Barranduna first

sailing and the Tarago was full. The two subsequent vessels had some vacant space of approximately 5 to 7 1/2%, which is not enormous. It is very very seldom we receive 100% utilisation due to the way the business is operated. The bookings mean that some people are not coming forward with the cargo.

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Examination
-continued

10 In relation to Tombarra what position had been reached with bookings by mid May? By mid May I think it was on the 17th May when New Zealand Forest Products advised us that their shipment on that vessel would be 1,000 tonnes less than they indicated, and as Australia were allowed to have a bit more space, some of the other space was handed over to Australia. In the first booking we got in in early May showed a figure a bit more than 4,000 tonnes confirmed. The agents could offer that
20 vessel one more month for the trade as we expected to get more bookings in the same way.

Would you look at documents 100 and 101, do they record first the request from ScanCarriers Wellington for space for the Plaintiff and in 101 your response? Yes. And the situation which is covered in 101 is exactly the same as the basis for our decision based on telex of 25th from Wellington on the Tarago. In 101, bearing in mind
30 prospects for cargo movements, we are not prepared to accept any further waste paper bookings at this stage. Coming to the second Barranduna shipment, what was the utilisation of that? That was more or less the same as on the Tombarra. I think she had approximately 5% of the space waiting.

You mentioned the question of contribution earlier, without going into a lot of detail; just explain how the concept of contribution is related to waste paper? I have already mentioned the
40 basic elements which go into the calculation of the contributions. As far as I can recall our basis for striking \$150.00 was a contribution figure approximately over NZ\$40.00 per weight tonne of the cargo, and when we included the stowage aspects we assumed that the waste paper would stow in the high decks approximately two tonnes per square metre, which meant it would give a configuration of that cargo of approximately NZ\$80.00.

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Zealand

In relation to the cargo on Barranduna, the first shipment, do you recall receiving a report from Captain Raaum in relation to the state of the cargo at Dubai? Yes we did.

—
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Defendant's
evidence

Kaare Moen

Examination
-continued

When was that? The Barranduna was at Dubai at 25th April and by coincidence it was at Dubai and on its way to Australia and we got the telex from the Captain advising the units did not stand up too well, and it continued from Dubai to Australia afterwards.

10

Did you also receive a report from Captain Anvin in relation to the state of the cargo at Auckland prior to loading? I think we got two reports from Captain Anvin, one is the ordinary report after completion of the loading, and in addition to that he made a special report on the waste paper.

And approximately when did you receive those? It must have been late April early May.

20

Coming to the topic of bookings, are you familiar with New Zealand practice in relation to booking cargo? Yes I am.

Are you familiar also with European practice? Yes I am.

Explain the purpose and the status of a booking? Well the purpose of the booking is that the shippers are allowed to ship on a specific vessel at the time they believe its relatively sure that they will ship the cargo and they approach the agent and advise them that they would like to ship so much cargo, and then the agent either accepts that booking and says that is o.k. or he just does not accept that booking.

30

Once the booking has been accepted what is the position concerning responsibility to present cargo for the shipper and the responsibility for shipping? As far as I can see it asking for space and accepting a booking is first of all a commercial practice, a system of convenience. But in my opinion it does not give any legal obligations on the parties. In my opinion the shipping company takes over that responsibility

40

when the cargo is loaded. This is in this trade a commercial arrangement for a particular vessel in Auckland when waiting for cargo to go forward. We need a system so that we can pre-plan facilities, stowage of vessel, utilisation, bringing the cargo to the wharf and loading the vessel. From your experience what has happened in practice with the cargo not presented for shipment but where a booking has been made under ordinary terms of liner shipment?

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Defendant's evidence
Kaare Moen

Examination
-continued

MR CLARK OBJECTS.

You told us that you were familiar with the New Zealand practice in relation to booking cargo? Yes I am.

Do you have any knowledge or experience of the consequences in New Zealand of not keeping to a booking? Yes I do.

Outline the background of your experience? It happens that quite often a firm booking is not followed up with the amount of cargo for which the shipper booked space. That happens very very frequently, and the shipping line is of course trying to protect its situation so to speak and checking the shippers to see if they will present the cargo as it has a major affect on the financial result of the vessel, e.g. if 20% of the cargo will not turn up.

And we have as well been in the situation where we have asked shippers who have a firm booking whether they would split that booking on the vessel and another vessel, if we are space pressed or we could get some better cargo.

As a matter of practice if cargo is not presented does the shipping company take any steps against the shipper? No I have never experienced, as far as I know, in accordance with the standard practice, in the shipping lines and the tariff or if a special rate has been given for that cargo.

Looking at it from the shipping company's point of view, have you had any experience in New Zealand apart from this case of short shipment. I cannot recall any special case but vessels when they are

In the High Court of New Zealand

fully booked sometimes have to leave cargo behind and this is a situation which happens very frequently internationally, as every day a shipper is in this situation. And it has to be realised when the situation is operated, it is not a matter of when sending ships to New Zealand that there could be an overloading of a commodity.

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Defendant's evidence
Kaare Moen

From your experience have there been practical consequences of short shipment in shipping companies? No this is the first time in my time in shipping that a shortshipment has been done for a company and they are asking to have the subject raised with the court.

10

Examination
-continued

Did you receive a report from Captain Raaum on discharge at Dubai? Yes we did, first by telephone and then by a report.

What did he report concerning ...

20

MR CLARK OBJECTS.

Cross-examined Clark:

Cross

-Examination

Have you a copy of Captain Raaum's report? I don't think so but it might be on my file.

Would you search for it over the lunch hour? I certainly will.

30

You were not referring to document 49, have you seen that? Yes.

When did you first see that? I think I first saw that telex when it was included as part of the documents pertaining to this very case.

You never saw it at the stage when all the arrangements were made to dump cargo at timaru, or to Sweden? No, I consider this is a normal telex exchange between ScanCarriers' agent and the shipper, or ScanCarriers' Wellington Office and the agent concerning shipment. The rate was included, so at Hovik we are not seeing such a telex, as it lies between Wellington agents and is not our concern.

40

Am I being fair that you did not see it until some

time after the litigation commenced in this court? I would say so.

In the High Court of New Zealand

Is it usual for your company to ask for a higher freight during a period when it agreed to a specific freight? Well we are not asking for increased rates, if we have agreed to a special rate for a certain period. But it might happen that a shipper in order to lift his commodity a bit on the priority list could be prepared to pay a higher rate. And such a special rate has no other status than a rate included in other tariffs.

—
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Defendant's evidence
Kaare Moen

May not the status of the rate be that agreed by your Auckland agent in this case, is that a possibility? This rate which is mentioned in document 39 is a rate agreed by ScanCarriers. And we stand by the obligations which we have undertaken. That is whether the decision is taken by the agent or in Wellington.

Cross-Examination
-continued

I am sure you heard your Captain Andersen say under cross-examination that Hovik wanted a higher rate for waste paper than US\$120? As I said when we looked through some of the other documents relating to the first time where we were asked to reduce the rate for waste paper we advised that the rate should be \$150 per tonne.

You have told my learned friend that you are familiar with the arrangement of booking? Yes sir.

There is another telex you were not referred to, 103 in the second volume, the word booking does imply some obligation to ScanCarriers? Yes it does. When we have accepted a booking we are to do our best endeavours to try and carry the cargo.

Looking at the last five lines, you heard me read them out more than once in this case, are you still surprised and disappointed to learn cargo had been booked at that promotional rate? I would say that I am still disappointed but based on the explanation which I believe Captain Andersen gave later by telex. I think that was the reason for the mistake as well, and in that respect I refer

In the High Court of New Zealand

to the schedule mentioned in document 10 stating these are proposed rates to Arabian Gulf ports.

And that I accept from Captain Andersen as the explanation as to why the wrong rate was quoted for waste paper to Bombay.

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Defendant's evidence
Kaare Moen

Court

Cross Examination
-continued

COURT: Do you mean that Mr Andersen inadvertently quoted the Jeddah rate instead of Arabian Gulf rate? No, these rates which were proposed by Captain Andersen in middle of December, it is mentioned proposed rate to Arabian Gulf port, and that is not Bombay and Karachi, and what happened after we got this report was that a telex was sent by ScanCarriers at Hovik to Wellington about the middle of January that we agreed to work on the rates which had been proposed, but again proposed rates to the Arabian Gulf ports. 10

You have sat throughout the case and you told us your company is owning many ships each of which would be worth many millions of dollars? Yes. 20

And you have the power and strength to make decisions like taking cargo off at Timaru or anywhere else regardless of the consequences? I think the other power and other strengths have to be judged, judging on standard practice and standard contracts.

It was however you in Hovik that decided to advise Mr Cash that apart from what had been shortshipped you would take off more cargo at Timaru unless he agreed to your demands? Well, I would not state it that way. We definitely realised that we had a problem and that problem first of all related to the letter of credit which the shipper held, it is not standard practice for shipping companies to go into arrangements between the shipper and [/consignee in] New Zealand. We realised it was a problem between split bill of lading and it would be solved by moving the whole lot on the next ship. 30 40

Apart from that it is standard practice that freight being paid is paid when the vessel has left the port and a bill of lading has been signed by the shipping agent.

Am I right that normal bill of lading does not have anything written on its face in regard to freight other than the rate? What do you mean by that, explain.

In the High Court of New Zealand

I suggest to you that a normal bill of lading does not have anything on its face in regard to freight, whether it is "freight paid" or "freight unpaid", the normal bill of lading will say nothing? No, the normal bill of lading will say freight prepaid or freight paid.

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Defendant's Evidence
Kaare Moen

Look at your normal bill of lading without any typewriting on it, No. 83A, its nowhere there is it? No.

Cross-Examination
- continued

That is merely the place where the amount is customarily put in? That is right.

And when you look at the bill of lading no. 83 which has all been filled in, it is one of yours? Yes.

You are the shipping expert, tell me where the normal clausing is? Where is that phraseology or reference to condition of freight payment paid or unpaid on document 83? That is not mentioned on these specific forms and you have to remember that these bills of lading refer to a very special situation. Where the shipper was not in a position to pay the freight it is as a result of various negotiations that we or our lawyers of our company and the shipping company arrange, and as I understood we accepted the bill of lading did not need to be stamped freight prepaid.

COURT: The question you were asked is, is there anything in bill of lading either on its face or under the conditions relating to freight paid or unpaid? Not on the face of the bill of lading at least.

Court

What about the conditions, do you know or not? I assume that is not included in the clauses either, as the normal practice is to stamp the bill of lading in the way relating to that shipment if paid is freight by the shipper it should be stamped paid, and if not received it will be stamped freight collect. That is the standard

Cross-Examination
- continued

practice.

In the High Court of New Zealand
LUNCHEON ADJOURNMENT 1 P.M.
RESUMED 2.15 P.M.

Re-examined Carruthers:

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Defendant's evidence
Kaare Moen
Re-Examination
-continued

I asked you about contribution in relation to waste paper, and you explained part of the calculation, did you want to give us an example to put that in context? Yes. The contribution from waste paper based on the rate of US\$150 per weight tonne was approximately \$80 per square metre inside the vessel. If we then compare that with other commodities it is certainly no figure, as for instance forestry products from New Zealand to Damman in Saudi Arabia and based on a freight level of US\$140 per weight tonne, gives a contribution per square metre of approximately \$150, and furthermore wool to Europe will be a contribution of at least double over the last figure. But these figures which I mention are not profit, it is just the contribution of the cargo which then has to cover port dues, canal dues, bunkers, running of the vessel itself, and ScanCarriers administration and capital costs.

10
20

Cross-examined Clark:

Cross-Examination

In exchange for getting a contribution as you call it, am I correct that sometimes or even usually you would give to the shipper a bill of lading? I cannot see the question of a bill of lading is a contribution.

30

Could you answer the question whether you see the reason or not, do you give a bill of lading? Yes that is standard practice to give a bill of lading.

40

But you did not give one to the Plaintiff in respect of stuff taken on Tarago? The usual practice in New Zealand is that the shipper works out the bill of lading personally, the details of the cargo, and gives that to the shipping agent and that is signed and the bill of lading is issued.

I know that, but you have not answered the question, in respect of the Tarago ScanCarriers never gave over a bill of lading to the shipper did they? Well we did that at a later stage, we did not give it immediately as we understood the shipper could not pay the freight and in the trade to Arabian Gulf as well as to India we do not accept freight collect.

In the High
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10 If I understand you say you did give a bill of lading later? That is right.

Defendant's
evidence
Kaare Moen

Mr Cash's evidence was that he never got a bill of lading from your company of any sort in respect of Tarago? Well if Mr Cash required a bill of lading on that shipment we presume he would act in the ordinary way as I said before, that he entered the relevant details into bill of lading form and give it to agent and it is stamped and signed. To my
20 knowledge no one has rejected, or signed a bill of lading on the Tarago shipment.

Cross-
Examination
-continued

A bill of lading represents the goods does it not, it is title to the goods in the commercial world at Hovik? That is right.

Would I be correct that prior to the calling of the Barranduna at Timaru no bill of lading had been issued to Mr Cash in respect of the part
30 consignment that you were threatening to take off the ship? Mr Cash had not paid the freight and I cannot see how in the circumstances we could issue a prepaid bill of lading to him. We realised that that was the problem and that was the reason why we suggested to short ship the cargo at Timaru.

The bill of lading that was finally issued after the ship sailed from Timaru was not a freight prepaid bill it was merely a specially cloused
40 freight unpaid bill am I not right? No.

I refer you to the bill of lading actually issued and given to the bank, and I put to you that have you seen the bill of lading that was issued in respect of the mixed waste some 250 tonnes, that was sent aboard the Barranduna? That may be the case but I am not sure.

I show to you a bill of lading marked A.57, or a

In the High
Court of New
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copy thereof, it appears to be a ScanCarriers' bill of lading covering 238 pallets and 249.660 metric tonnes, and I ask whether or not you wish to correct your earlier evidence? Is there not a clear notation by the carrier about freight being unpaid on the face of it? It is stamped freight prepaid but it states as well freight not paid. Then it is stamp which is usual one which says freight prepaid (Exhibit 16).

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Defendant's
evidence
Kaare Moen

Cross-
Examination
-continued

If we accept that as being freight unpaid clausing, will I be correct then that as your ship went towards Timaru Mr Cash had no bill of lading at all not even one marked freight unpaid, would that be right? As I said before, the usual practice is to stamp freight prepaid or freight collect and this booking was accepted on a freight prepaid basis and the shipper gets the bill of lading signed by Each Asiatic in Auckland that freight is paid.

10

20

In many cases the bill of lading is issued and delivered by the shipping agent a couple of days after the vessel has sailed. Did not Hovik instruct your Bombay agents to claim a lien on that cargo when it arrived in Bombay and not release it to the consignee? When the cargo arrived in Bombay freight for the whole parcel of 550 tonnes should have been paid according to the agreement which in this instance the shippers and shipping company had entered into and which should have been paid on 14 May. It is quite normal practice for the shipping company when freight is not paid to protect their interest by exercising a lien, and this shipment was discussed with our Bombay agent in two or three days on telex and by phone.

30

And based on recommendations from our Bombay agent we decided against it and presented the cargo to the receiver or the consignee.

40

My question is whether or not you instructed your agents to claim a lien on this cargo in May 1982? We did not claim a lien on this cargo but we had discussions with our agents whether we should do that. At that stage it was not expressed in that way, but I believe it is the final result that is relevant to this case, and

not only internal discussions between Hovik as ScanCarriers and their agent.

In the High Court of New Zealand

To refresh your memory would you look at a telex from ScanCarriers Oslo to Bombay dated 25 May, would you confirm that begins "You are hereby instructed to withhold this cargo"? Yes, this is a telex sent by ourselves during discussions with our agents and the conclusion was we should not exercise a lien on the cargo, but not due to the fact we did not feel we had a right to do so but conditions in Bombay are very difficult in Bombay.

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Defendant's evidence
Kaare Moen

Cross-Examination
-continued

Your company is seeking in these proceedings a security over the Plaintiff company for what it claims to be freight that it has earned? Yes that is so. If I could refer to our standard bill of lading message. It is "Freight shall be deemed [fully] earned on receipt of the goods by the carrier and shall be paid and non-returnable in any event".

There is nothing in that clause that entitles you to a lien until you earn it? I think that clause speaks for itself. It is one of the clauses in the bills of lading which we issue for cargo.

Do we get to the position then that if you or any other carrier does not do what it is contracted to do by taking stuff from New Zealand to India, that the freight is still payable nevertheless, and the party who considers himself aggrieved has then to try and seek repayment of the freight, is that your analysis? No, my analysis is that we carried the cargo to Bombay, and sent that to the consignee, and we have so far not received any payment for freight on that parcel.

You would say you could have it both ways, that you can have a security for the freight and a lien for the freight? No.

Are you seeking in this instance? No, in this very instance according to the agreement that freight should be paid at the latest 14 days.

COURT: Which agreement is that? The agreement between the solicitors or the agreement worked out

Court

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Zealand

between the solicitors or Mr Cash and ourselves. When we started discussing the possibility of taking a lien that 10 days after the freight should have been paid based on that agreement. In other terms the freight should have been paid just after the vessel left Auckland on the 26th March.

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Defendant's
evidence
Kaare Moen
Cross-
Examination
-continued

But all that you have been saying is hinged on the premise that Chapman Tripp arranged a concluded agreement in settlement did it not? No it is not. If that settlement had not been entered into then the freight should have been paid when the cargo had been received on board the vessel which was on 26 March, and I refer to that clause in the bill of lading.

10

Would you not go further and say that the freight on the Tarago should have been paid when you received the goods for shipment on Barranduna regardless of whether Mr Cash ever got paid or even got title to the goods? The shipper is certainly entitled when the shipper has a title on the goods, and the shipping company takes over the title when it is board and gives the shipper the bill of lading.

20

We have never requested any payment before the bill of lading should be handed over to the shipper which happens on the day the vessel leaves the port or within a couple of days after.

30

This arrangement was a special one as we realised the shipper regrettably could not pay the freight.

Would you look at document 180? Yes.

It refers to full discussions with our Head Office, is that with Hovik? Yes.

40

Does that telex fairly represent the company's position as late as 28 June 1982, in relation to the cargo that was held in Bombay? I think it is a bit short and brief in order to represent the full view of ScanCarriers on that matter. But is it accurate as far as it goes? At that stage, 28 June, the cargo was still in Bombay. We did not credit anything of this for the receiver and I

suggested that this telex as well be sent in a way that it should be understood that we felt at that time and still feel that the shipper had not fulfilled the obligation which it had entered into with reference to the agreement worked out by the solicitors.

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10 That would come if on the receiving end as a form of economic pressure? Well in such a case as we are discussing these days, both the shipper and the shipping company has been under pressure. We loaded the cargo and did not get payment of freight. Already the shipping company was under pressure.

—
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evidence
Kaare Moen

Cross-
Examination
-continued

20 If this happened again how would you assist Mr Cash to pay your freight at say Timaru when he did not have bill of lading or even know the weights that were aboard the ship, how would you help him? If Mr Cash had this happened next Monday so to speak, he would have recourse to pay the cargo on board, there would not be any problem as we would issue freight prepaid bill of lading, but this is the normal course of work.

And this is what happens in all similar cases.

30 Then the shipping line offers to ship the cargo which has been left behind on the next sailing at the same terms and conditions which were agreed to for the initial shipment or for the shipment.

Do you have empty ships sailing from this country and Australia? No, we might have empty space or so.

40 Is it usual to refuse space when you have some space, say 1,000 tonnes spare capacity, is it usual to refuse that to New Zealand exporters? We never know whether the vessel will be fully utilised or not until it has left the last port of loading.

And when you are considering the possibility of sailing a vessel at an early stage we might have quite large volumes of firm bookings and we expect quite some cargo in Australia and believe we have a right of reaching full load, which happens on the Barranduna and next load, and during such

circumstances we will not accept a booking of a very large volume of cargo which has very very low priority.

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Defendant's
evidence
Kaare Moen

Cross-
Examination
-continued

Re-
Examination

Court

After that can I take it that it is unusual when you still have space to deny access to that space to an exporter? I can advise that for instance on the Barranduna 74, it sailed from Fremantle the last port of loading with vacant space. We had denied for example shipping space for New Zealand Forest Products, due to the fact that at Fremantle we had firm bookings and expectations that proved the vessel should be full, so we turned that cargo away and some of the bookings in Australia did not come forward and the vessel sailed away with some vacant space. 10

Re-examined Carruthers:

Turn to document 83, do you know whether that is in a form in which it was when released to the shipper? Well I believe so, but I did not really know, I assume that it is relating to the shipment. 20

Would you turn now to document 130, is that a report made in relation to the first Barranduna shipment? Yes that is right.

Are you able to put a date on that report? It is 26th - it started on 25th April and the operation was completed on the 26th April. 30

Is that a report you have seen before? Oh yes, this is a usual report which the cargo superintendent presents to the management and for internal purposes within the cargo handling department.

Do you know when that would have been received in Hovik? I would think that this would have been received one week after the operation. As Captain Brekke would either have gone straight home after Dubai or gone to Jeddah and thereafter straight home. 40

COURT: You at one stage said that the Tarago freight was due three days after the Tarago sailed? Yes according to the arrangement which

the solicitors and ourselves had arranged.

In the High Court of New Zealand

Is that again the arrangement made between the solicitors? Yes.

AFFIDAVIT TENDERED AS PART OF THE CASE (AFFIDAVIT OF MR MILE).

No. 5.18.

EMMET JOHN HOBBS (Sworn):

Defendant's evidence
Emmet John Hobbs

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I reside at 27 Hampton Drive, Kohimarama. Shipping and marketing consultant.

Examination

Do you practice on your own account as shipping and marketing consultant? Yes I have been a shipping and marketing consultant and in business exporting on my own account since 1978.

20

Between 1972 and 1978 were you employed by Union Steamship Company at its head office in Wellington? Yes I joined the company in 1972 and shortly after was appointed commercial manager which gave me responsibility for the revenue of the company earned from shipping activities. This responsibility required me to supervise all sales staff throughout the company's areas, set marketing policy, negotiate major contracts, and be responsible for the results that came from revenue.

30

In 1976 I was given the additional responsibility of development manager for the company which meant that I was responsible in addition for new shipping developments as project leader for the company.

40

On leaving the Union Steamship Company in 1978 did you then set up your present consultant business? I did. I have worked since that time for all the major New Zealand shipping companies which wished to established services to and from New Zealand.

As well as the activities relating to international shipping companies I have formed a business exporting a wide range of commodities but largely in the agricultural and fishing areas and have acted as the chief executive officer for a number of New Zealand companies in establishing

In the High
Court of New
Zealand

joint ventures or running divisions of their companies until they can be taken over by their own staff.

No. 5.18.

Defendant's
evidence
Emmet John
Hobbs

What do you say as to your familiarity with New Zealand practice relating to shipping and export contracts? I have had close familiarity as a shipping company person representing shipping companies and as an exporter shipping on my own account for or on behalf of companies I am representing.

10

Examination
- continued

What is the most common arrangement for the export of goods from New Zealand? By far the most common arrangement is by liner terms of shipping under the bill of lading conditions.

What alternatives are available for that method? If we confine it to liner shipping at this stage, a contract of affreightment.

20

In liner shipping is that the only alternative? Yes.

I want you to explain briefly the procedure which a shipper must go through in order to ship goods? The first enquiry is of the shipping company that it can carry his goods and at what price. And then he will tell the shipping company broadly the volume of cargo he can ship. This exercise is normally begun by verbal conversation. And in some cases does not proceed beyond verbal conversation until the shipper presents a bill of lading. When the cargo is on the vessel.

30

This document is then signed in New Zealand practice if all is in order by the shipping company's personnel responsible, and the negotiable and invoice copies are normally given to the shipper.

40

Can we deal with each of those steps in more detail, first explain the freight rate for us? In liner terms a freight rate would be part of an issued schedule not necessarily public but given to all staff acting for the shipping company in their marketing and selling activities. At the request for a freight rate the staff will refer to

that schedule and if the goods requested to be shipped are listed in that schedule, they will quote the appropriate rate. If the goods are not listed they will refer to the person who has the authority to issue a freight rate for goods not listed. There are a number of names given to goods which are not listed in those tariffs. Generally at the end of the tariff there are the terms NOE, which means not otherwise enumerated, or there are promotional rates, development rates, special rates, or terms of a similar nature. These are to give the shipper the means by which he can ship at an affordable rate to sell his cargo.

In the High Court of New Zealand

No. 5.18.

Defendant's evidence
Emmet John Hobbs

Examination
- continued

Once the freight rate has been struck by one of the methods you told us about, in practical terms what is the significance of the freight rate? That freight rate is then binding on the shipper and the shipping company under the terms in which it is quoted. For a period of time either decided by agreement, which would be explicit or under terms by which the shipping company increases upon proving cost increases to an authority, or by simply raising its freight rates at the end of a period of elapsed time.

What significance does the freight have in relation to a commitment to bring goods forward for shipment? The only significance it has is if those goods are accepted by the shipping company for shipment, that that is the price at which they will be charged.

Have you had any experience of freight rates being agreed upon but no goods coming forward for shipment? In liner services that is a very common experience, possibly covering 30% of all enquiries.

Coming forward to the next stage after freight rate has been agreed, what system is adopted for or in relation to space on the ship? If the freight rate is acceptable between shipper and shipping company the client will normally indicate the volume he intends to ship. If it is a significant volume there may need to be considerable liaison between shipping company and shipper right up to the time when cargo is called

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In the High
Court of New
Zealand

on to the wharf. In any of these discussions or negotiations there is no commitment on the part of either the shipper or the shipping company to ship the volume that has been discussed.

No. 5.18.

It is part of the normal negotiation and information exchanged leading up to shipment of goods on liner terms.

Defendant's
evidence
Emmet John
Hobbs

After those initial negotiations and indications, if cargo is to come forward what is the next step? The shipping company will gather together all the cargoes for all the ports and a short time prior to the vessel's expected arrival in port of loading it will call down by direct contact with the shipper his cargo for pre-assembly at the wharf. The shipper at that point will be far closer to his known desired tonnage to be shipped.

10

Examination
- continued

In my experience it is again unlikely even to three to four days before shipment that the shipper will know precisely how much he will ship. And if he does know how much precisely he will ship he only knows that insofar as his own loading area is concerned. It may sound trite but he has still a long way to get to get it to the wharf in New Zealand experience and I say that because of the industrial disputes that constantly affect New Zealand in the transportation industry.

20

30

Taking us to the next step? The shipper arranges for delivery of its cargo to the wharf where it is received by tally clerks in the case of Auckland generally representing the Auckland Harbour Board, and they then direct the cargo to a safe storage area close to where the loading vessel will be. When the vessel arrives the stevedores who are engaged by the shipping company and are quite separate from the receiving agents, will examine the cargo with the officer in charge of loading the vessel and what is commonly used in international shipping, a cargo superintendent who frequently flies between ports in advance of vessels to assist in the loading plan. Generally the cargo that has been called to the wharf is expected to be shipped. However it is understood in common New Zealand practice that there is still

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no obligation on the part of the shipping company and no contract has been formed to ship goods which have been received on to a wharf area. In common practice in New Zealand I have found that the accepted time with limitations which I will explain, at which cargo is contracted to be carried is the time at which the ship instructs the stevedore to pick up specific cargo for loading into the ship. That means in the case of roll-on roll-off shipping that the watersiders operating equipment will pick it up and drive it into the ship where it will be directed to a stowage point on the decks. The limitations that I would refer to are to damage that has been seen after the decision is made to bring it on to the ship or damage that is done in the course of taking the cargo on to the ship, or movement of the cargo or instability of the cargo as it is being stowed. I should refer to another function that occurs between the receipt of cargo on the wharf and the decision to load it in the vessel. In viewing the cargo on the wharf the ship's officer has authority to refuse cargo on behalf of his shipping company because of the safety or the stowage pattern that that will have. If he believes it will be unsafe for a wide variety of reasons he may refuse on behalf of the shipping company to load that cargo on the vessel and thereby again no contract is entered into.

Are you familiar with a system of booking the cargo? Yes, I was responsible in my service with the Union Company in 1973 and 1974 of trying to liaise between about 2,000 customers in Australia and New Zealand who deliberately overbooked cargo on almost every sailing because there were insufficient ships to carry the cargo. They knew that they were not bound by any contract to produce the goods but they also knew that if they did not cover themselves for the space they may find later when they made a booking that the ship was already full.

In the narrative that you gave us, where does this stage of booking fit in? Prior to the decision to call down the cargo and at the completion of the normal negotiations between parties on freight rates ports of discharge and volume.

In the High
Court of New
Zealand

No. 5.18.

Defendant's
evidence
Emmet John
Hobbs

Examination
- continued

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In the High
Court of New
Zealand

Is it part of what you describe as indication in negotiation re space and cargo? It is.

Explain how that booking system operates?

No. 5.18.

Defendant's
evidence
Emmet John
Hobbs

Examination
- continued

The booking system normally operates by the client requesting a specific tonnage to be shipped on a specific vessel calling at a specified time. The shipping company will either accept the booking and note it in a booking form in the company's log and pass them onto the central office so that loading plans can be assembled for cargo coming in and out of all ports along the route. If the booking is not confirmed by the shipping company there will continue to be an exchange of information initially verbally and finally for significant tonnages by some written communication that a booking has been accepted.

10

Once the booking has been accepted what is the position ...

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AFTERNOON ADJOURNMENT 3.32 P.M.
RESUMED 3.50 P.M.

After the booking has been accepted what is the position between the exporter or the shipper and ship owner? At this point there is still no commitment either by shipper or shipping company under normal bill of lading terms.

30

In practical terms how would you explain the position as it exists between them at that time? In practical terms it is an evidence of good will and best endeavours by the shipping company and the shipper to meet the level of cargo that the shipper wishes to ship and to provide the service that the shipper wishes to purchase.

From your experience what sort of events occur which make it impossible to keep the commitment on either side? On the shipper's side they can begin in his own factory or his supplier's factory with production difficulties. They can also be caused by failure to establish a letter of credit on the buyer's part in terms which are acceptable to the exporter. They can also be industrial disputes which affect ability of exporter. They can also be transportation difficulties in transfer from

40

his storage area to the wharf. On the ship owner's side they can be caused broadly by industrial disputes, difficulties that affect time tabling of the vessel, damage to the vessel, and other conditions which on both sides would broadly be called in commercial terms force majeure.

In the High
Court of New
Zealand

No. 5.18.

10 What are the practical consequences in your experience in failure to keep a booking first by a shipper. If the shipper has got to the point of requesting and wishing to keep to a booking, he will normally advise the shipping company after the ship has left in many cases, and he has failed to present his cargo, that he still wishes to ship and he will explain the difficulties he has encountered.

Defendant's
evidence
Emmet John
Hobbs

Examination
- continued

20 In the case of the shipping company the problems will normally be all too evident if the cargo has been called to the wharf either because the ship is not there or there is industrial dispute or some other cause by which he cannot meet his acceptance of the booking. He will also in terms of goodwill attempt to meet that booking at a later time.

All other beings being equal.

30 Are you aware of claims being made on either side by shipper or ship owner arising out of failure to keep a booking? It has been a constant source of joking between people on shipping side and on the exporting/importing side that millions could be made if deadfreight were paid on cargo promised but not delivered.

Are you familiar with expression cover booking? I am.

40 Would you explain how that fits into concept of booking you are telling us about? The term cover booking normally applies in a position where a shipper does not have sufficient knowledge at the time bookings are made, to know precisely what he wants to ship. Therefore he will give an estimate for which he seeks to be covered up to the time of the shipment. However, cover bookings normally are in the contract of affreightment form where a commitment has been made either to give the cargo

In the High
Court of New
Zealand

to the shipping company or group of shipping companies for a brief period of time and the cover booking is part of what is called the trafficking notices.

No. 5.18.

Is that at a stage prior to formal booking or later? At a stage prior to formal booking.

Defendant's
evidence
Emmet John
Hobbs

You told us the other alternative in line of shipment is contract of affreightment? Yes, the contract of affreightment to refer to the counsel for Plaintiff's opening address is really the contract to carry from which the bill of lading which is contract of carriage applies later, and it is entered into by parties who wish to have an assured movement of cargo and in seeking that assurance they are prepared to make commitments which have penalties attached to them and they would also seek penalties for non-performance by the other party to the contract of affreightment - the ship owner. The most obvious case in contracts of affreightment is an exclusivity given to the carrying company or companies providing the liner service. And in that commitment the shipper is prepared to put all his cargo with that company or companies.

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Examination
- continued

How usual are contracts of affreightment for shipping from New Zealand? They are standard practice in the Conference service which is a larger area of volume from New Zealand to Europe and the U.K. They are to a much lesser degree in Asian and Australian areas and exist to a limited degree in the North American and Latin American trading.

30

Is the document now shown to you a contract of affreightment which you negotiated but which has had names of parties deleted and all information as to bargain between the parties, on amounts and monies values deleted? Yes it is. I produce that as Exhibit "H".

40

Briefly, would you point up the distinctive features of contract of affreightment from one put in? On page 1 in clause beginning "whereas and have agreed subject inter alia", there is the exclusivity between the parties.

On page 5 the freight rates are set out for destinations with a weighting method for different volumes and different tonnages.

In the High Court of New Zealand

On pages 6 and 7 a sliding scale is developed which offers reduction in rates as the volume increases.

No. 5.18.

10 On page 8 there is a commitment on the part of the shipping company to meet certain costs after a specific tonnage has been shipped.

Defendant's evidence
Emmet John Hobbs

On page 10 there is an agreement between the parties on other cargo shipped than in the main trading area.

Examination
- continued

20 On page 11 there is reference to the normal bill of lading as evidence that the contract to carry still requires a contract of carry.

On page 11 again the term of the contract.

On page 12 the terms of force majeure.

On page 13 the terms of arbitration.

On this particular contract that is between Australia and New Zealand? Yes.

30 Is that a conference area? No it is not.

40 What do you say as to the formality required to complete a contract of affreightment? The formality required arises as the result of one or both parties requiring a commitment more than is covered by the bill of lading and therefore they proceed to define the terms of that commitment by negotiation. And define the penalties or the benefits which will accrue to either party as that commitment increases.

I want to turn now to letters of credit: have you inspected the letter of credit in this case relating to 250 tonnes mixed waste? I have inspected Ex. 85 or document 85, which is a letter of credit established on the ANZ Bank in Auckland and I note that the letter of credit is explicit for 100% value of 250 metric tonnes paper waste (mixed weight) at the rate of US\$220.25 per metric

In the High
Court of New
Zealand

tonne packed in fully pressed bales, shipped from
New Zealand to Bombay transshipment allowed.

No. 5.18.

Defendant's
evidence
Emmet John
Hobbs

What do you say as to whether the credit is that
form? My immediate concern would be that it would
be impossible for me as an exporter to be able to
ship exactly according to those terms, because
until the paper was properly weighed and I assume
and I would have to assume that its water content
would be constant, I would have to know that I
would be shipping exactly that amount to meet the
terms of the Letter of Credit.

10

Examination
- continued

I have had a number of letter of credits
established in different parts of the world where
the banks attempt to insist on a specific volume
to be shipped. And in every case I attempt or
require that that be set at an upper limit so that
the bill of lading and the shipment while not
meeting it exactly does not exceed it. I have had
explained to me by banks on occasions that an
allowance of plus or minus 10% can sometimes be
negotiated, under reserve, but that is at the
discretion of the buyer. And I have also had the
experience of attempting to sort out for companies
problems where the buyer has almost received the
goods and refuses payment because that item is not
clearly met. Even though the banks have released
payment in some cases under the reserve.

20

The letter of credit in relation to one of the
shipments we are concerned with required shipment
by 31 March 1982, and it was 6 days after the date
the cargo was due to be loaded: what do you say as
to that as a provision in a letter of credit and
timing for shipment? In relation to this
particular service which I understand was monthly
I would be very concerned as an exporter that I
would be able to meet those terms because in
normal shipping experience there can be a wide
range of delays that can prevent either the
shipper or the shipping company meeting those
dates.

30

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Cross-
Examination

Cross-examined Clark:

Would you agree that in this country it is open to
parties to agree to anything they want over
shipping arrangements? Yes.

And that variations are almost infinite? They are.

In the High Court of New Zealand

So that to say that there is something on liner terms or a contract of affreightment is the only alternative is a very arbitrary way of approaching the full gamut of shipping practices? No, I do not agree.

No. 5.18.

10 By terms, apart from those expressed on a bill of lading, where have you got all your knowledge from as to what they are? From experience.

Defendant's evidence
Emmet John Hobbs

The unwritten law of the port of Wellington or trans-Tasman service? No unfortunately it is not the unwritten law, it is the case by case study that is written in reports or from the experience of being an exporter.

Cross-Examination
- continued

20 Is it possible for people with experience to have differing views on the sort of topics we are discussing this afternoon? Certainly. As an example in this case someone said they would never cancel a cover booking without first getting in touch with a shipper? I think that would be a reasonable thing to suggest.

30 And the emphasis we both take it is on the never? Yes it would be unusual practice I think for an arbitrary decision to be taken and not passed to customer because the shipping company one would expect would wish to preserve its good name in the community. And some shipping companies would [?not] enjoy being subject to ...

COURT: That is a comment

Court

40 If another person in this case said it was usual practice that in preliminaries, when asked when discussing preliminaries if a commitment on either side, they answered usually (p.76) we agree there is space available? Would you agree with that? Yes there is an acknowledgement before a booking is made that there is space available. It becomes extremely difficult for a shipping company if they confirm bookings beyond the space they have available. Were you agreeing with me that the party usually agreeing as to space being

Cross-Examination
- continued

available? Yes I do.

If there is space available would you agree that in practice it is to give it to those persons who want it more especially when there is a cover booking? I would agree in the broad way in which question is given, subject to limitations described of ability of shipper and shipping company to meet the terms of acceptance of booking on both sides.

10

You describe those as force majeure? Some of them are force majeure.

Would you expect a shipping company having agreed a promotional rate to give space to enable the promotion to proceed? If it had the space I would expect a shipping company if it gave a promotional rate to also advise the shipper or discuss with the shipper that this is what it says, a rate to promote his cargo and sell it at a level at which it can make a profit and that it can contribute to the ship operating costs. However, it reflects no priority and no commitment on either side.

20

Is that not a matter for the [parties] to reach some understanding between themselves rather than for you to tell them what they mean to agree? I come back to the same practice in shipping that an exporter may take a booking and he is not bound by it. He knows it is protected for him but he still knows that there is no penalty if he does not proceed with the shipment and the same terms apply to the shipping company. If they wished to stipulate yes, they will agree.

30

The Union Company shipping general cargo out of the port of Auckland did not have any contracts of affreightment of your years of being with it? Yes many.

40

Shipping general cargo out of Auckland, you are referring transtasman service for consolidators? No there was a contract of affreightment with forwarders which related to volume of LCLs they were required to ship each month and a penalty existing if it was not proceeded with. I am referring to the fact I was personally responsible for establishing and when I left I covered 50% of

10 the cargo shipped trans-Tasman. Under those development rates we would sit down with every customer in New Zealand who wished to have a specific freight rate and terms and conditions and we would agree to penalties if you were not able to meet those terms and conditions, and we would monitor it together as shipper and shipping company with a view to increasing the shipping company's revenue and the exporter's profitability throughout the year. It was a very successful operation.

In the High Court of New Zealand

No. 5.18.

Defendant's evidence
Emmet John Hobbs

That was the practice was it not where the shipper dropped out, and shipped by and large through a consolidator in much the same way as the Railways do not deal with customers on their bulk stuff?

Cross-Examination
- continued

20 No it was the opposite in fact. Because we were in a difficulty with the margins that freight forwarders were charging shippers we decided as an explicit policy to deal direct with customers and then reduce forward margins to a specific level, much like a commission. The best example I can give of that was the Fisher & Paykel which eventually broke away from that commitment and shipped part of its cargo with opposition carrier Maritime Carriers New Zealand Limited and made a contract of affreightment with that Company.

30 If a contract of affreightment is intended to imply an obligation on someone's ship, no reason at all why that cannot be done by an understanding between the parties is there? There is no reason at all so long as there is sufficient trust and experience between the parties so that they know precisely what they are committing themselves to.

40 Re-examined Carruthers:

Re-examination

You were asked about cover bookings, what facts or matters are you considering in a cover booking? Normally the upper level of volume to be protected, ports of loading, and the ports of discharge. The freight rate is not normally referred to because that is covered normally by contract of affreightment.

Does a cover booking deal with one shipment or

In the High
Court of New
Zealand

more than one shipment? I have experience in that
area, I would say it normally covers one booking
for one ship.

EVIDENCE FOR THE DEFENDANT CONCLUDED AT 4.30 P.M.

No. 5.18

Defendant's
Evidence
Emmet John
Hobbs

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Re-
Examination
- continued

Evidence
concluded

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NO. 6

In the High
Court of New
Zealand

AFFIDAVIT OF GUNNAR MILE

I, GUNNAR MILE of Klokkerjordet 1, 1364
Hvalstad, make oath and say as follows:

No. 6.

Affidavit of
Gunnar Mile

1 June 1983

10 13. I have been involved in the waste paper trade
since 1950, and have specialised in waste paper
for the last 13 years. For some years I have been
a consultant to the Norwegian government regarding
recycling of waste paper and used textiles.

20 14. I am the Secretary of the Norwegian Wastepaper
Processors Association. This Association
represents 25 out of the 32 waste paper processors
in Norway. The average annual output of members
of the Association is 55-60,000 tons. As
Secretary of the Association I am familiar with
market conditions and prices of waste paper not
only in Scandinavia, but also in England and
Northern Europe. All important information
concerning the waste paper industry appears in
trade magazines to which the Association
subscribes and with which I am familiar. The
monthly magazine "Pulp and Paper International" is
one of the authoritative trade publications.

30 15. I am fluent in English.

16. ONE of the Association's functions is to
negotiate with the Norwegian Pulp and Paper
Association concerning the prices paid by members
of that Association for waste paper.

40 17. ATTACHED marked "A1" is a page from the price
list of the Norwegian Pulp and Paper Association
dated 13 June 1980, setting out the maximum prices
payable by members of that Association for various
grades of waste paper at that time. Exhibit
marked "A2" is a certified English translation of
the page. I can confirm the accuracy of the
translation.

18. IN June and July 1982 there were negotiations
between myself on behalf of the Norwegian

In the High
Court of New
Zealand

Wastepaper Processors Association and Mr Lie-Nielsen of the Norwegian Pulp and Paper Association concerning a revision of the maximum prices set out in the price list of 13 June 1980. As a result of such negotiations, the maximum prices of certain of the grades of paper listed were adjusted.

No. 6.

Affidavit
of Gunnar
Mile.

19. THE adjustments agreed between the two Associations are recorded in a letter from the Pulp and Paper Association dated 7 July 1982 and signed by Mr Lie-Nielsen. Exhibit marked "B1" is such letter, and Exhibit marked "B2" is a certified translation thereof. I can confirm the accuracy of the translation.

10

1 June 1983

20. THE price list, Exhibit "A1" referred to in paragraph 5 hereof, has been marked up in manuscript to reflect the changes made in the maximum prices after the negotiations referred to in paragraphs 5 and 6 hereof.

20

21. FOR all practical purposes the waste paper markets in Norway and Sweden are identical.

22. I have been told about a shipment of 271 tonnes of mixed waste discharged from the vessel TARAGO and sold by ScanCarriers A/S to a Swedish paper mill in July 1982 for 100 Swedish Crowns per tonne. (The value of the Swedish Crown is effectively identical to the value of the Norwegian Crown). Although this price is only about one-third of the maximum price referred to in the price list, I consider that it was a fair price for the shipment because:

30

(a) At that time, because of the world-wide economic recession, mixed waste paper of all kinds was in tremendous over-supply all over Europe, and in the United States. In Scandinavia alone, paper mills were holding mixed waste stocks in excess of 100,000 tonnes.

40

(b) As a result of this over-supply, the ruling prices fell in August 1982 to 250 Crowns per tonne, which is the current level.

(c) Irregular tonnages such as the one in question, which did not come from regular trade

sources, or are spot sales, are frequently bought at less than half the official price.

In the High Court of New Zealand

(d) I am aware that the Timsfors mill, which bought the mixed waste from the TARAGO, bought 500 tonnes of mixed waste from a waste paper plant in Oslo for 100 Norwegian Crowns per tonne in January 1983.

No. 6.

Affidavit of Gunnar Mile

1 June 1983

10 23. THE official June, July and August maximum prices of A.2 mixed waste, pressed in bales and loaded at place of despatch, for various European countries outside Scandinavia were as follows:

	June	July	August
West Germany (D.M.)			70 70 75
France (F.Fr.)	200	200	200
Belgium (B.Fr.)	1075	1075	1125

20 However, spot sales in West Germany, France and Belgium would be subject to a heavy discount, for the same reasons as set out in paragraph 9 hereof. I would therefore expect that, if the waste paper from the TARAGO had been sold in any of those countries, a price comparable to the Swedish price would have been achieved.

30 24. THE waste paper trade is very sensitive to market conditions, and has violent ups and downs. Tonnages which are not committed to long term contracts very often have to be sold at give-away prices during depressed periods such as the present. The higher grades of waste paper, such as "hard white shavings", "computer printout", and "ledger" are direct substitutes for virgin pulp, and constantly follow the virgin pulp prices, which are currently low on account of the present recession.

40 SWORN at "British Consulate,)
Oslo" this "1st" day of) "Gunnar Mile"
"June" 1983, before me:)

"H.B.M. CONSUL"

"A1"



VII A.1 : s.1.

Returpapir

For RETURPAPIR er det fastsatt følgende maksimale innkjøpspriser:

A. Sortert og presset i baller

Nr.	Kvalitetsbenevnelse	Innhold	Pris pr. 1000 kg
1	Trykkeriavfall	(trykkeriavfall uten aviser, ukeblader og tidsskrifter)	kr. 340,- = 4,- - kv 3
2	Sams <i>- Mixed waste</i>	(med maks. 70% aviser og maks. 30% ukeblader og tidsskrifter) ...	" 330,- = 4,- - kv 2
3	Tidsskrifter	(leste og uleste ukeblader og tidsskrifter)	" 190,- <i>ingen surbring</i>
4	Bølgepapp	(bølgepapp og kraftpapir uten asfalt, plast og våtsterkt papir, maks. 5% massivpapp)	" 460,- + 30,- - kv
5	Aviser	(leste og uleste)	" 425,-
6	Avsvertningskvalitet	(ca 70% aviser, ca 30% ukeblader/tidsskrifter, eller trefritt/treholdig trykkeriavfall, ikke gjennomfarset)	÷ 25,- - kv " 400,- <i>ingen surbring</i>

Prisene gjelder for returpapir presset i gode baller på min. 250 kg.

Fritt opplastet avsenderstedet, bane eller bil etter kjøpers valg.

Kjøpsbetingelser: I henhold til gjeldende bestemmelser for omsetning av returpapir.

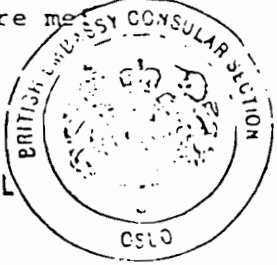
THIS is the page from the price list marked "A1" referred to in the ~~annexed~~ affidavit of GUNNAR MILE sworn at ~~Oslo~~ Oslo this 1st day of June 1983 before me

ms 4/1

13. juni 1980

H.B.M.

H.B.M. CONSUL



"A2"

Translation from Norwegian

PSF (Norwegian Pulp and Paper Association)

VII A.1 : p.1.

Waste Paper

The following maximum purchasing prices have been set for WASTE PAPER:

A. Sorted and pressed into bales

No.	Quality designation	Content	Price per 1000 kg
1.	Printing waste	(printing waste, excl. newspapers, magazines and journals)	NOK 340.- less 40.- = NOK 300.-
2.	Mixed waste	(with max. 70% newspapers and max. 30% magazines and journals)	NOK 330.- less 40.- = NOK 290.-
3.	Journals	(read and unread magazines and journals)	NOK 190.- no change
4.	Corrugated paper	(corrugated paper and kraft paper excl. asphalt, plastic and water-resistant paper, max. 5% solid cardboard)	NOK 460.- plus 30.- = NOK 490.-
5.	Newspapers	(read and unread)	NOK 425.- less 25.- = NOK 400.-
6.	De-inking quality	(approx. 70% newspapers, approx. 30% magazines/journals, or woodfree/wood-containing printing waste, not printed through)	NOK 400.- no change

The prices apply for waste paper pressed into good bales of at least 250 kg.

Loaded at place of despatch free of charge, on train or lorry as requested by purchaser.

Conditions of purchase: According to regulations in force for sale of waste paper.

13 June 1980

True translation certified:

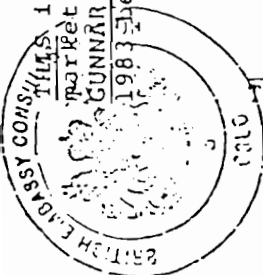
Elizabeth A. Sævi



is the translation of the page from the price list referred to in the annexed affidavit of GUNNAR MILE sworn at this 14 day of June 1980 before me:

P. D. N. CONSUL

M. Sævi



"B1"



Norsk Returpapirforbund
Postboks 95
1364 Hvalstad

Papirindustriens
Sentralforbund
Norwegian Pulp and Paper
Association

Drammensveien 30
Postboks 2446 Solli, Oslo
Telefon 1021 56 77 80
Telex 16710 cyper n
Telegramadresse -cyper n

Oslo, 7. juli 1982
OLN/sth

Priser

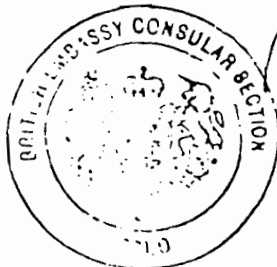
Vi henviser til Deres brev av 22. f.m. og bekrefter dagens telefonsamtale om at det nu er enighet om prisene for returpapir, nemlig at prisene for trykkeriavfall og sams reduseres med kr 40,-, prisen for aviser reduseres med kr 25,- og for bølgepapp økes prisen med kr 30,-, alt i forhold til prisliste av 13. juni 1980.

De nye priser gjelder fra 7. juli d.å.

Med hilsen
PAPIRINDUSTRIENS SENTRALFORBUND


Ola Lie-Nielsen

THIS is the letter from the Norwegian Pulp & Paper Association marked "B1" referred to in the annexed affidavit of GUNNAR MILE sworn at *Bokkumle Oslo* this *6th* day of *June* 1983 before me:



"B2"

Translation from Norwegian

P S F

Papirindustriens Drammensvn. 30
Sentralforbund Oslo 2

Norwegian Pulp and Paper
Association

Norsk Returpapirforbund
(Norwegian Wastepaper Association)
P.O.Box 95
1364 Hvalstad

Oslo, 7 July 1982
OLN/sth

Prices

We refer to your letter of 22 June 1982 and confirm today's telephone conversation about the agreement which has now been reached on the prices for wastepaper, i.e. that the prices for printing waste and mixed waste will be reduced by NOK 40.-, the price for newspapers will be reduced by NOK 25.- and for corrugated cardboard the price will be increased by NOK 30.-, all in relation to the price-list of 13 June 1980.

The new prices apply from 7 July this year.

Yours faithfully
PAPIRINDUSTRIENS SENTRALFORBUND

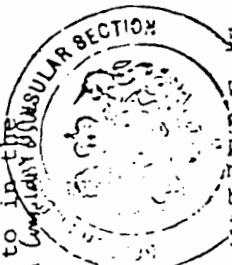
Ola Lie-Nielsen (sign.)
Ola Lie-Nielsen

True translation certified:

Elizabeth A. Sævi



THIS is the translation of the letter from the Norwegian Pulp & Paper Association marked "B2" referred to in the annexed affidavit of GUNNAR MILE sworn at *Oslo* this 1st day of June 1983 before me:



H. O. M. CONSUL

N. O. M.

110 5/1

NO. 7

In the High
Court of New
Zealand

REASONS FOR JUDGMENT OF WALLACE, J.

In this action the Plaintiff claims from the Defendant damages totalling \$948,034.37 arising out of an alleged breach of contract to ship waste paper to India. The Defendant counterclaims for payments of freight totalling \$71,685.40.

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of Wallace, J.

17 August 1983

The Plaintiff company inter alia purchases and exports waste paper. The Plaintiff was formed in 1975 and by 1981 had a share capital of \$60,000. The principal shareholder in the Plaintiff is a Mr P.A.D. Cash. He became aware that there appeared to be a market for New Zealand waste paper in India and during 1981 he was anxious to exploit the possibilities in that regard. A major problem in developing the Indian market was the difficulty in obtaining regular shipping space, coupled with the freight rates which made prices for New Zealand waste paper uncompetitive. However, towards the end of 1981 Mr Cash learned that the Defendant was proposing to offer a new and regular service to the Arabian Gulf which would enable transshipment to Indian ports. This service was of great interest to Mr Cash provided he could negotiate a suitable freight rate, for by this time he had, following visits to India, effected some sales and also had on hand some order. Further, he believed he would readily obtain additional orders for delivery during the first half of 1982.

Mr Cash therefore entered into discussions with representatives of the Defendant. Those discussions were primarily with Mr Robinson, who was the Defendant's marketing manager in New Zealand, and Mr Teskey and Mr Freer who were respectively the marketing manager and the operations controller of the Defendant's Auckland agents, The East Asiatic Company New Zealand Ltd. The discussions covered, inter alia, the nature of the service to be offered by the Defendant (which was to be a monthly one using roll-on roll-off vessels commencing with the sailing of a vessel named the "Barranduna" in

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March 1982) and possible freight rates. In the sequence of events, importance attaches to two meetings which took place on 29th January, 1982, the first being between Mr Robinson, Mr Freer and Mr Cash, and the second being between Mr Cash, Mr Teskey and Mr Wilson. Mr Wilson was the principal shareholder in an English company named Fairhill Enterprises Ltd. Through that company he dealt in waste paper and was familiar with the Indian market. After forming a friendly association with Mr Cash, Mr Wilson ultimately began to place business for the Plaintiff in India on a commission basis.

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Set against the background of earlier meetings where shipping to India was discussed, the Plaintiff alleges in its Statement of Claim that as a result of the meetings in January, 1982, and a subsequent telex dated 3rd February, 1982, the Plaintiff and the Defendant entered into a partly oral and partly written contract in which the Defendant represented and/or warranted the availability of space on a monthly basis to fulfil the probable requirements of the Plaintiff to ship not less than 1,000 tonnes of waste paper on every sailing of the Defendant's northbound vessels during the period up to and including July 1982. In that period there were in fact four sailings of the Defendant's vessels from Auckland, namely:

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Barranduna on 26th March, 1982,
Tarago on 11th May, 1982,
Tombarra on 5th June, 1982,
Barranduna on 5th July, 1982,

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The Plaintiff claims that in reliance on the alleged contract it sought and procured purchases of waste paper in New Zealand and the sale of the same in India. Thereafter, the Plaintiff advised the Defendant of its wish to make a first shipment of approximately 1,000 tonnes on the sailing of the "Barranduna" in March 1982. In the outcome, approximately 640 tonnes of waste paper were shipped aboard the "Barranduna" but some 280.610 tonnes delivered for shipment were left behind. The Plaintiff claims that the Defendant was in breach of contract in leaving the paper behind and seeks damages in respect of the short shipment on the "Barranduna" in the sum of \$39,896.29. The

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Defendant denies liability for that claim on various grounds which I shortly mention.

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10 The Plaintiff further alleges that it duly procured other contracts for the purchase of paper in New Zealand and the sale thereof in India and subsequently advised the Defendant that it wished to make a shipment of approximately 1,000 tonnes on the sailing of the "Tarago" in May 1982. The Plaintiff claims that in breach of the alleged contract the Defendant refused to carry any further cargo for the Plaintiff on the "Tarago", other than the paper which had earlier been left behind by the "Barranduna".

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20 The Plaintiff further alleges that, following the departure of the "Tarago", it advised the Defendant that it wished to make a shipment of approximately 1,000 tonnes on the sailing of the "Tombarra" in June 1982, and that the Defendant in breach of its contract refused to carry any cargo for the Plaintiff on the "Tombarra". In relation to the failure to carry paper on the voyages subsequent to the first sailing of "Tarago") the Plaintiff claims damages in the sum of \$427,839.25, being the loss of profit which the Plaintiff claims to have suffered in relation to approximately 4,500 tonnes of various grades of waste paper.

30 Finally, the Plaintiff claims that as a result of the Defendant's breaches of contract the Plaintiff has been unable to carry forward its waste paper exporting business to Western India, that its market and general reputation in India have in effect been destroyed, and that it has been unable to keep the obligations it entered into with its suppliers in New Zealand. In respect of these matters the Plaintiff claims
40 damages in the sum of \$480,298.83.

In its Amended Statement of Defence the Defendant admits that it sent a telex to the Plaintiff dated 3rd February, 1982, setting out a promotional freight rate applicable to the carriage of waste paper to India, and that it therefore agreed that the freight rate specified in the telex would apply as a promotional rate during the period specified. The Defendant,

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however, denies that it entered into any contract obliging it to accept bookings from the Plaintiff for shipment of paper.

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Further, in relation only to the Plaintiff's claim for damages arising out of the short shipment on the "Barranduna", the Defendant raises a series of defences based upon the terms of the Defendant's bill of lading. Basically, the defences relate to provisions in the bill of lading that the Defendant is not liable for damage caused by delay, is allowed certain liberties when goods cannot safely or properly be carried or carried further, and has the right to tranship and unload goods. As a further defence to the Plaintiff's claim for the short shipment on the "Barranduna", the Defendant pleads that the parties entered into an agreement concerning the subsequent carriage of the waste paper on the "Tarago", under which agreement the Plaintiff waived all claims which it then had or might thereafter have had against the Defendant in respect of the short shipment.

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The Defendant also counterclaims against the Plaintiff for the sum of \$42,252, being the balance of freight allegedly due but unpaid in respect of paper shipped on the "Barranduna" and the further sum of \$40,608.86 in respect of the paper shipped on the "Tarago". After allowing for certain credits in relation to re-weighing of the paper and the sale of the paper on the "Tarago" (which the Defendant claims it was entitled to sell in exercise of the lien given in the bill of lading), the net amount counterclaimed by the Defendant in respect of freight is \$71,685.40. I should also record that the Defendant abandoned a further counterclaim that the Plaintiff be ordered specifically to perform an agreement to give a debenture over its assets.

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In its Reply to the Counterclaim, the Plaintiff denies all liability under the counterclaim pleading that there was no agreement concerning the subsequent carriage of the short shipped paper on the "Tarago", that those arrangements only ever reached the stage of indicating a willingness to enter into an agreement at a future time, and that in the events

which transpired the agreement remained incomplete. The Plaintiff further denies all liability for the freight and denies that any of the provisions in the bill of lading are applicable.

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I first consider whether there was a contract to carry on the terms alleged by the Plaintiff. The contract alleged by the Plaintiff is a partly oral and partly written one, made on or about the 29th January, 1982. The written portion of the contract is said to be contained in the Defendant's telex advice dated 3rd February, 1982. The telex read as follows:

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"Flwg our discussion on Friday 29/1 we agree to a promotional rate of US\$120 plus any CAF and BAF and this rate will be held until 29/7/82

This rate is to cover your paper waste which is to be shipped on your pallets or skids and will be loaded onto our vessels as unitised cargo. Overall pallet height (from ground to top of cargo) not to exceed 8.5 feet"

The oral portion of the alleged contract relates to matters said to have been agreed between Mr Cash on behalf of the Plaintiff on the one hand, and Mr Teskey and Mr Robinson as agents or servants of the Defendant on the other.

The specific term as alleged by the Plaintiff in the Statement of Claim is that the Defendant's agents or servants

"represented and/or warranted the availability of space on a monthly basis to fulfil the probable requirements of the Plaintiff to ship not less than 1,000 tonnes on every sailing during the period up to and including July 1982."

The Defendant entirely denies any contract to carry. The Defendant's contention is that there were discussions between the parties leading to the telex setting out the promotional freight rate, but that there was no contract and that there was to be none until later contracts of carriage were entered into on a vessel by vessel

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basis on normal bill of lading terms.

In order to determine whether or not the parties entered into the contract alleged by the Plaintiff, it is necessary to consider the facts in detail. Mr Cash in his evidence confirmed having discussions with representatives of the Defendant concerning the proposed new service to the Arabian Gulf, which would allow transshipment to India. According to Mr Cash the discussions culminated at one of the two meetings on 29th January when he went with Mr Wilson to meet Mr Teskey at the office of the East Asiatic Company. Mr Cash said that they discussed shipments to India and, more specifically to Bombay. Thereafter Mr Cash's evidence was as follows:-

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"Did you know how many ships Scans were going to have in 1982? Not at that meeting. Did you find out later they had 3 roll on roll offs, the Barranduna, the Tarago and the Tombarra? I did yes.

20

You know what their approximate carrying capacity was? I believe about 15,000 tonnes. Did Mr Teskey at this conference or other time tell you anything as to how full or empty the vessels were expected to be and how much they would take? Yes this was very important due to the fact we had been having trouble with space allocated on other shipping companies and we wanted to make sure sufficient space was available. Mr Teskey told us the reason why they were putting shipping to Dubai were ships southbound were reasonably full and ships going northbound were only half full. Which were full? Southbound was full and northbound was half full.

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You said Mr Teskey and another man enquired of you as to what sort of volumes you would think of shipping with them? Yes, we indicated we would ship about 1,000 tonnes per vessel. Was money mentioned at any stage? I think we were trying to negotiate a better freight rate than the one they had given us at \$125. He had given us that freight rate verbally on the telephone.

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Did the period of the freight have any significance to you and did you ask Mr Teskey

for any particular period?
Did the period of freight have any
significance to you? Yes it would enable us
to have regular shipments to our clients.
Did you tell Mr Teskey this? I did yes, I
told him we had enquiries for 4,000 to 6,000
tonnes from India.

There is a document produced, a telex of 3rd
February 1982, remember that telex. Yes I do.
Is that the text of the telex you then
received? That is correct.

The document speaks for itself in its own
language, I think it proper to ask whether or
not the period then was what you had asked for
and was acceptable to you in regard to
discussions? Yes it was. Mr Wilson and
myself were delighted."

I have already set out the terms of the telex
of 3rd February, 1982. That telex was sent by Mr
Robinson from the Defendant's offices in
Wellington. Mr Cash did not in his evidence
mention any meeting with Mr Robinson on 29th
January, and I should record that the telex sent
by Mr Robinson was preceded by a telex dated 2nd
February from the East Asiatic Company to the
Defendant, which read as follows:

"Aotearoa - Waste paper to India.

Further meeting to-day with Aotearoa who
request reconsideration of rate quoted for
waste paper to India stop they request best
rate to be confirmed by telex (to NZ 21931)
indicating duration of validity which should
be for six months if possible but must be
until end June, 1982 as minimum stop plse
confirm."

Following the meeting on 29th January and the
exchange of telexes, it appears that Mr Wilson,
and subsequently Mr Cash, went to India with a
view to securing orders and, in Mr Cash's case,
arranging letters of credit for paper to be
shipped on the first sailing of the "Barranduna".

Although Mr Cash's evidence-in-chief
concerning the terms of the contract was
relatively brief, this evidence was elaborated in

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cross-examination. His evidence during cross-examination was as follows:-

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"I want to come to the arrangements which you say were in force; the first point is that on your claim you were not restricted to an upper limit in terms of tonnage? We indicated we would be shipping about 1,000 tonnes.

But there was no firm limit above 1,000 tonnes was there? There was no indication from me that we would be shipping any more than 1,000 tonnes. And similarly there was no restriction on your shipping less than 1,000 tonnes on your analysis? That is correct. And you could vary the tonnages basically to suit yourself? That is correct.

And in fact if it came to a point you could ship with someone else if you wanted to? That is correct."

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Mr Cash was also cross-examined to establish that the Plaintiff did not make a booking to ship any waste paper on the "Barranduna" until approximately two weeks before the vessel arrived in New Zealand. At this stage the Plaintiff indicated a wish to ship some 800 to 900 tonnes, being the amount for which letters of credit had been obtained in India.

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Mr Cash was further cross-examined concerning his knowledge of the extent to which Mr Teskey was authorised to commit the Defendant. His evidence in that regard was as follows:-

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"And in making the arrangement which you did, with Scancarriers, you relied on the telex of 3rd February, 1982? We relied on our meeting with Mr Teskey and the telex.

In dealing with Mr Teskey, it was clear to you wasn't it that he had to go to Scancarriers in Wellington for approval of what he agreed to? He didn't agree to anything as far as freight rate was concerned. I believe we were quoted a freight rate of 125. He did stipulate the ship would only be half full. That was a point that was our major concern. But it is clear he worked for East Asiatic Co? He did yes.

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Did you know from your dealings he had to

refer to someone else for approval of what he did? Yes.

Did you know he had to refer to Scancarriers in Wellington? Yes, that is why we were waiting for the telex.

Did you know that in turn Scancarriers had to refer overseas? I presume so.

That is the normal course of events in dealing with shipping arrangements in NZ? That is right.

So what you received at the end of the day was the telex of 3rd February 1982? Correct.

You referred to a discussion with Mr Teskey, when do you say that took place? On or about the 29th.

That is January 1982? That is right.

And do you say you had - at that meeting you had discussion about space in the ship? Yes.

Put again what Mr Teskey said. The vessel was going northbound approximately half full.

Was that in response to a general enquiry from you as to how much space might be committed for NZ cargo? We needed confirmation that there was sufficient space to carry out cargo to India, and -

Was that in response to a general enquiry from you as to how much space was available for NZ? No specific enquiry.

But it was directed to the total amount of space that might be available from NZ? That was available from NZ.

You said that discussion related to vessels, which vessels were you talking about? There were no vessels scheduled at that time, it was only a discussion. It was not arranged for sure which vessel. Or to my knowledge at least.

That was the first enquiry from you about space? Well we had started towards the end of 1981. Scans had approximately 800 to 1,000 tonnes a month.

Was this the first occasion though on which you asked them on how much space was likely to be available on the ships in service? I never had indication or otherwise that 1,000 tonnes space would be available. That is why it was a specific request at the meeting to Teskey. What is the use of getting a freight rate if you have no space.

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Was the meeting with Teskey at the end of January the first occasion on which you enquired how much space was likely to be available on the ships in the service? As far as I know, yes."

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Finally, I should mention that Mr Cash was cross-examined concerning his experience as an exporter. It emerged from the cross-examination that he had considerable previous experience in relation to the export of paper and the shipping arrangements which are normally made. He accepted in cross-examination that he was aware, as a matter of ordinary shipping practice, that the making of a firm booking is not a guarantee of space on the vessel and that, in the absence of a special arrangement, a contract ordinarily arises only on acceptance of the cargo for loading (or acceptance of the cargo at the wharf).

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Mr Wilson was called by the Plaintiff and also gave evidence about the meeting with Mr Teskey on the 29th January, 1982. Concerning that meeting Mr Wilson's evidence was:-

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"Did you go with Mr Cash shortly after your arrival to a shipping agency East Asiatic Co. and have discussions there as to shipping? Yes we did.

Would you tell us who were present at such a discussion? I went with Mr Cash into the office and saw a Mr Teskey. As far as I can recollect he was the only gentleman from that Company present.

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Did you have in your mind what you were looking for in the nature of time and volume of waste paper to be carried forward to India? Yes.

Did you or Mr Cash in that discussion tell Mr Teskey what it was you were looking for in both time and volume? Yes we did. Mr Cash and I knew in advance or more correctly I brought with me indications of the tonnage that could be accepted by India from NZ. This was a figure of about 5 to 6,000 tonnes for shipment in the period February or March through to July 1982.

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Did you ascertain or try to ascertain from Mr Teskey the space available for such

shipments? Yes we did.
Did he tell you anything about the capacity of Scancarriers vessels going to Arabian Gulf for transshipment from Dubai to India and Pakistan? Yes, he did and he showed us a diagram of the ship and explained, and because of my interest in ships, how the cargo was loaded on different decks, but I cannot at this moment recall the exact capacity but I think it is somewhere in the region of 6,000 tonnes.

Can you remember what time of the day that you went to see Mr Teskey? I can't recall the exact time of day although I believe it was late morning. Mr Cash and I went there after a telephone appointment to try and find out whether Scancarriers would be able to offer us space on their ships for the tonnage we had in mind and at which freight rate. I think we discussed the freight rate first and we told him that we needed a very good competitive rate and at that time I believe a figure of \$140 US was mentioned. As for space, he told us that there was no problem at all, that the service was only just beginning, and that there would be no difficulty in carrying our projected monthly tonnage of around 1,000 metric tons. In fact I do recall him suggesting that the vessels were only likely to be half full. After a little while we got back to Teskey if it was possible to reduce the rate of \$120 US per metric tonne. He told us that he thought this would be possible on a promotional basis as it would help not only ourselves but it would help to fill the ships on that run. I recall that he agreed to this rate and would confirm to us by telex. I think in a nutshell that is what happened."

And subsequently:-

"Do you say the arrangement was that Aotearoa was not required to ship any particular quantity but that Scan was required to take something like 1,000 metric tonnes on every shipment up to the end of July? No I don't say that. We at that time had firm orders for that space, about 900 to 1,000 tonnes on the first ship. And after this news about the

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space availability for the following five months, I made the decision to return to India quickly to firm up the promised contracts so that I could tell Mr Cash that we had definite orders for those months to be shipped, at about the agreed tonnage per sailing."

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Mr Wilson further stated that he did not recall any discussion on freight rates to Europe at the meeting.

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The remaining evidence concerning events relevant to the existence of the alleged contract to carry came from the Defendant's witness. The first of these witnesses was Mr Teskey, who stated that as marketing manager of the East Asiatic Company he was asked to evaluate cargo possibilities in the Auckland area for the new service. He had previously had dealings with Mr Cash concerning another service which the Defendant had been operating. It appears that Mr Cash would have been on the Defendant's mailing list for details of the new service and that discussions subsequently took place during December 1981. As a result of these discussions Mr Teskey stated:

"The quantity involved at any particular time varied somewhat, but we were left with the firm impression that we could expect approximately 1,000 tonnes of waste paper on each of Scancarriers sailings to that area."

At that time Mr Cash was mentioning various destinations in Pakistan and India. Possible freight rates were also discussed and it was clear that Mr Cash was interested in the service. He, however, was by no means the only person interested in the service, and Mr Teskey said that there was undoubtedly a lot of interest from other quarters. Mr Teskey also stated that as a result of previous dealings with Mr Cash he believed he was an experienced and knowledgeable exporter, and that he had little reason to doubt Mr Cash was able to obtain and sell tonnages of round about 1,000 tonnes per monthly sailing. Mr Teskey also referred to the various telexes which preceded the meeting on 29th January and the discussions and consultations in respect of a freight rate.

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As far as the meeting on 29th January, 1982, was concerned, Mr Teskey confirmed that Mr Wilson was present and stated that they once again generally discussed the configurations and capabilities of the Defendant's vessels. He said there was also considerable discussion of possible sales of waste paper to Europe, in relation to which Mr Teskey pointed out that the Defendant was bound by Conference requirements, and that an application for a freight rate would have to be prepared and submitted. This was in fact in due course done, although the Plaintiff never made any attempt to take advantage of the freight rate quoted.

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Mr Teskey in his evidence also described efforts made in February 1982 to obtain more detailed information from Mr Cash as to specific tonnages for specific destinations. He said it was quite apparent to him that Mr Cash was trying to do the best he could in giving him some idea, bearing in mind the relative vagaries of the Indian market, and also the difficulties in obtaining firm commitments for available paper. Approximately four weeks before the "Barranduna" arrived Mr Teskey met Mr Cash and told him he would have to make some form of commitment as to his bookings on the first vessel, and that that commitment would be the subject of confirmation/acceptance by the Defendant. He stated that the East Asiatic Company

"certainly had no authority to confirm any booking space for the type of tonnages we were talking about, that is around 1,000 tonnes"

and that he was trying to press Mr Cash for a firm commitment to be made not later than two weeks before the expected arrival of the "Barranduna".

Mr Teskey gave quite detailed evidence concerning his authority (and that of the East Asiatic Company) as agents for the Defendant. He said that in theory every booking was subject to confirmation by the Defendant, but that in practice relatively small bookings of one or two container loads were the subject of some discretion. Once that ceiling was reached, the

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East Asiatic Company was in each case required to refer bookings to the Defendant for approval and "unquestionably that authority did not allow us to accept parcels anywhere near 1,000 tonnes". It was in fact Mr Teskey's practice to refer any booking in excess of one container load, i.e. approximately 20 tonnes. Mr Teskey stated he was not aware of the total New Zealand allocation for cargo on the Defendant's vessels.

On the subject of confirmation of bookings by the Defendant, Mr Teskey gave evidence concerning a later occasion relating to the vessel "Tarago". In respect of that Mr Teskey said:-

"In a subsequent discussion which I had with Mr Cash in East Asiatic's office, I can't recall Mr Cash's exact words, but he did lead me to believe that he understood that he had a confirmed booking on the Tarago for a further 1,000 tonnes. I was quick to point out to Mr Cash that his booking had been referred to Wellington for confirmation but that until that confirmation had been received we were not authorised to confirm that space. There was some additional discussion from Mr Cash who maintained that he had been told by somebody in the office, that is in East Asiatic's office, that his booking had been confirmed. I indicated to him that his booking had not been confirmed and subsequent enquiries which I personally made to those members of East Asiatic staff who would have likely to have had some discussion with Mr Cash relative to the booking made it clear to me that there had been some misunderstanding and that in fact nobody in East Asiatic had given the clear undertaking to Mr Cash that his booking had been confirmed. Mr Cash appeared to accept this because in later conversations with him he did make reference to a booking and asked if any subsequent confirmation from Wellington had been forthcoming. That booking confirmation was never received."

In cross-examination Mr Teskey repeated that East Asiatic never became involved in the reasons for accepting or not accepting cargo, and that

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instructions were taken from the Defendant. He agreed that at the meeting on 29th January there was discussion concerning the Defendant's ability to offer space to the Plaintiff for the sort of quantities he was talking about. The cross-examination then proceeded:

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10 "Did you assure Mr Cash and the Englishman that there was space available or would be? I can't actually remember having done so but again in the context of our discussions and in view of the fact that Scancarriers was obviously looking for cargo, I am quite sure that some sort of assurance of that nature would have been sought and confirmed. But that would be normal practice."

Later in his cross-examination the following passages appear:-

20 "As I understand your evidence you said you told Mr Cash that in regard to his firm requirement for about 1,000 tonnes, you considered there would be ample space availability? Yes that is the indication which we had been given by Scancarriers."

30 "And would you agree with me that the message that he received from the protracted discussions was that he had been offered a special export promotional rate for a certain period, and that you expected him to get cargo to use that special promotional rate? Yes. In January or February you would not have expected Mr Cash to be denied space if space was available? No, except following the inspection of the mixed waste."

40 "I wish to take you back to the late morning of 29th January last year, in answer to my friend you told us that there was a certain amount of discussion re the north Europe Conference arrangements? Yes. But that wasn't the main part of your discussion was it? No, the main part was relating to Scancarriers vessels, their layouts and abilities to handle various types of cargo. You would have been given some idea by your principals as to the space the ships were

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likely to have for freight? Not in so many words. The principal e.g. never told us we could book up to 3,000 tonnes cargo on any particular sailing as space varied from voyage to voyage and as already stated we were clearly given to understand that commitments of a substantial nature would have to be confirmed by the principal. There was never a specific figure given to the carriers to any particular tonnage on any one or a number of sailings.

But the fact of the matter was that the two Ro/Ro vessels on service had been going northbound less than full, is that not so? From NZ yes."

"Would it be true that when space was denied that you personally had some degree of sympathy for the position Mr Cash was thereby placed in? Yes I did."

Finally, it should be mentioned that in re-examination Mr Teskey stated he had frequently encountered occasions when shipowners quoted a promotional rate and were not thereafter presented with cargo for shipment (he had previously agreed that when shipowners quoted a promotional rate they did not later seek an increase in that rate during the period for which the promotional rate was to run).

The next witness who gave evidence on behalf of the Defendant concerning the events relating to the alleged contract was Mr Robinson, the Defendant's marketing operations manager for New Zealand. He stated that he had a preliminary meeting with Mr Cash in December, at which stage Mr Cash mentioned that he was looking at a shipment of approximately 1,000 tonnes. This was followed by a second meeting on the 29th January, when at Mr Cash's request he went to the Plaintiff's premises in Parnell, accompanied by Mr Freer, who was the operations controller for East Asiatic. Although Mr Cash did not mention this meeting in his evidence, it seems clear that it took place and that there were in fact two meetings on the 29th January. Mr Robinson said he was informed that Mr Cash wished to discuss the unitising of the cargo, but that when he and Mr

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10 Freer arrived at the Plaintiff's offices he found Mr Cash wished to discuss the freight rate. Mr Robinson said that he was not able to give any firm indication on freight rate but he assured Mr Cash he would investigate the matter. Mr Robinson stated that during the meeting on the 29th January Mr Cash indicated quantities of up to 1,000 tonnes, and that the discussion centred around the first sailing, i.e. the "Barranduna". Mr Robinson also confirmed that he subsequently received the telex of 2nd February from the East Asiatic Company concerning the freight rate, and said that following his discussion with Mr Cash he spoke with the Defendant's general manager for New Zealand, Mr Andersen. As a result, he was authorised to quote the rate of US\$120, which he did in the telex of 3rd February. The telex specifically referred to his meeting with Mr Cash and was apparently in response to the request made at that meeting.

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20 When asked what he would have expected to have happened after quoting the freight rate, he said:

"We would then expect the shipper to use that freight rate, acknowledge he is going to use the freight rate, and try to conclude sales based on that.

30 When would you expect to hear next from the shipper? Depending on the area, it is usually the case up to 3 months before a shipper will come back on this sort of thing.

If he had concluded sales what would he come back with? Once he concluded the sales he would request our local agents for space on a particular ship."

40 Mr Robinson also gave evidence concerning a system of cover bookings operated by the Defendant and other carriers. It appears that in some circumstances shipowners are prepared to take what is known as a cover booking. This is done by the shipper indicating a space requirement by way of a cover booking, but if the booking is not firmed up within two or three weeks of the date the ship is due to arrive, the booking is normally cancelled. Mr Robinson said that before cancelling a cover booking a discussion would take place with the shipper. He further said that when

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the Defendant takes a cover booking, the Defendant would do everything within its power to ensure that it took the cargo and that it had an obligation to do so. He stated, however, that the Defendant would not take a cover booking for a quantity of freight in the region of 1,000 tonnes, the reason for this being that a booking for more than a small amount of cargo cannot be taken more than two months in advance without having prior arrangements made with the Defendant's head office to ensure that the required allocation is obtained.

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Mr Freer was also called by the Defendant. He gave evidence concerning the normal booking procedures, again making it clear that the East Asiatic Company was not authorised to accept without reference to the Defendant in Wellington a booking of anything like 1,000 tonnes. As far as the meeting on 29th January was concerned, Mr Freer's evidence added little. He said that the Defendant's representative expressed interest in accepting the cargo and it was just a matter of negotiating the freight rate and the type of packing for the carriage. He said nothing was formally agreed at the meeting and that Mr Robinson was going to get the information he required and forward it on to the Defendant.

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In recording the above evidence I have referred not only to the evidence of events leading up to and concerning the meetings of 29th January, but also to the evidence concerning booking procedures. This is because the crucial events must obviously be viewed against the background known to both parties. In that regard there was also other relevant evidence, the most important of which came, on the Plaintiff's side, from Mr Hutchings, and on the Defendant's side from Mr Hobbs.

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Mr Hutchings is a shipping clerk employed by one of the largest shipping agents in New Zealand. He spoke about his previous dealings with Mr Cash. In cross-examination his evidence was:

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"Dealing with the usual practice that applies to everyone, when you are discussing

preliminaries there is no commitment on either side? Usually we agree there is space available.

But later on when you want to firm up plan for the ship don't you ask for a formal booking? Yes that is correct.

So until that time there is probably no commitment on either side? No, apart from as I said before the cover bookings.

The next step that occurs is the delivery of the goods to the wharf? Yes.

And at the point of acceptance of cargo for shipment do you agree there is an obligation to carry cargo? Yes, once cargo is delivered to the wharf and there is a delivery docket signed by us on behalf of the Co. we are obliged to ship it."

Mr Hutchings also dealt with the question of cover bookings. He indicated that his Company's practice was to accept cover bookings from some of the larger shippers while they were establishing their letters of credit overseas. In his Company's case cover bookings are pencilled in and a check is made with the shipper prior to the ship's arrival in New Zealand as to what space is actually required. Mr Hutchings said that when a cover booking was accepted no charge was made for it, that it was only an indication from the shipper that he might require the space or some part of it, and that if the space was not required no charge was made.

Mr Hobbs was called by the Defendant as an experienced shipper to give evidence concerning common shipping practices in New Zealand, with a view to demonstrating the background against which both parties operated. Mr Hobbs stated that the most common arrangement for the export of goods from New Zealand was on liner terms on bill of lading conditions. He said, however, that the alternative to that was a contract of affreightment, which in his view was the only alternative.

He then dealt with the procedure normally followed when a shipment was made on liner terms involving, first, agreement as to a freight rate which would frequently be part of an issued

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schedule but which might be the subject of specific agreement in relation to particular types of cargo. He said that once the freight rate was struck it was regarded as binding on the shipper for the period involved, but that the only significance of the freight rate was that if goods were subsequently accepted by the shipowner for shipment the agreed freight rate was the one which would be charged. He said it was common for freight rates to be agreed but for the shipper to bring no goods forward for shipment, and that this pertains in possibly 30% of all enquiries.

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According to Mr Hobbs once the freight rate has been agreed the shipper normally indicates the volume he intends to ship. He said that there may be considerable liaison between the shipowner and shipper in that regard right up to the time when cargo is called to the wharf, and that in those discussions or negotiations there is no commitment on the part of either the shipper or the shipowner to ship the volume that has been discussed. Subsequently the shipowner, having verified its ability to take the cargo, calls the cargo down to the wharf by direct contact with the shipper. The cargo may, however, prove not to be available at that stage and it is not uncommon, even at such a late juncture, for the shipper not to ship the quantities discussed. When the cargo reaches the wharf it is received by tally clerks and directed to safe storage, where it is later examined by the stevedores and the officer in charge of loading the vessel. Generally cargo that has been called to the wharf is expected to be shipped. Mr Hobbs said, however, that in common New Zealand practice there appears to be no obligation on the shipowner to ship such cargo and that the time when it appears a contract is made is when the ship owner instructs the stevedore to pick up the cargo for loading on to the ship.

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Mr Hobbs also gave evidence that he was familiar with the system of booking cargo, having worked for a number of years with a major shipowner. He stated that even after a booking has been accepted by the shipowner there is still no commitment, though it is evidence of goodwill and best endeavours by the shipowner and the shipper to meet the level of cargo that has been

discussed. In that connection Mr Hobbs also dealt with cover bookings, which he said normally apply when a shipper does not have sufficient knowledge, at the time bookings are made, of precisely what he wants to ship. He therefore gives an estimate for which he seeks to be covered up to the time of shipment.

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10 Finally Mr Hobbs gave evidence concerning contracts of affreightment, which are usually formal agreements, and normally provide for exclusivity and a dead freight penalty, i.e. the shipowner is obliged to accept a certain quantity of goods and the shipper is obliged to pay dead freight if the goods are not available. Mr Hobbs produced several examples of typical contracts of affreightment.

20 The Plaintiff contends that the evidence establishes a contract to carry on the terms alleged in the Statement of Claim. On the other hand, the Defendant contends that it only quoted a promotional freight rate and that there was no contract to carry. In the Defendant's contention there was no contract until goods were shipped on board a particular vessel on the usual bill of lading terms. The Plaintiff accepts the carriage on each vessel was to be on normal bill of lading terms, but say that the Defendant was obliged to accept up to 1,000 tonnes on each vessel. In
30 relation to the alleged obligation to accept 1,000 tonnes on each vessel, I have deliberately recorded quite extensive sections of the evidence verbatim, rather than following the more usual course of setting out the evidence in narrative form. This is because I am of the view that, in considering whether there was a term as alleged by the Plaintiff, it is important to have in mind the
40 precise evidence of the respective witnesses.

As far as the law is concerned, I was referred to very few authorities. Counsel treated the matter as turning upon the legal principles concerning formation of contracts (as applied to the primary facts which themselves are to be considered in the light of any relevant background evidence). Mr Carruthers indicated that a wide ranging search for authority had produced little by way of direct assistance. Thus the standard

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texts made it clear that practices vary in different countries and ports, see e.g. Scrutton on Charterparties and Bills of Lading, 18th Ed., 1974, at Article 63. Carver's Carriage by Sea, 13th Ed., 1982, Vol. 1, at para. 49, and Singh & Colinvaux British Shipping Laws, Vol. 13, 1967, at paras. 668 to 670. Mr Carruthers also referred me to several decided cases, only one of which had any real relevance, that being Heskell v. Continental Express Ltd. (1950) 1 All E.R. 1033, in which Devlin, J. discussed the methods of booking then pertaining in England and the time at which a contract of carriage arises.

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Mr Carruthers submitted that there were really only two possibilities, i.e. a contract to carry made on or about the end of January and early February, 1982, to be followed by later contracts of carriage in respect of each individual shipment or, alternatively, that there were simply contracts of carriage which arose only when cargo was accepted on each vessel for shipment. Mr Carruthers was inclined to equate the first category with contracts of affreightment. This may indeed be the common situation where shipowners agree to accept specific and substantial quantities of cargo over a period of time. I think it is clear, however, that as a matter of law there is no strict division between formal contracts of affreightment and other contracts of carriage on e.g. liner terms. It is always a matter of what the parties have agreed and it is possible for them to agree on any terms they respectively offer and accept. Indeed Mr Carruthers did not dispute this. Nor, for example, did Mr Hobbs dispute that it was possible to make any form of agreement the parties chose. Formal contracts of affreightment no doubt suit, for example, some of the larger exporters who wish to negotiate terms with shipowners covering a period of time. It is, however, open for shipowners and shippers to negotiate an oral or partly oral and partly written contract covering an extended period, which is what the Plaintiff contends happened in the present case. For practical reasons such contracts may be rare, which would explain the dearth of authority, but there would seem to be no doubt that it is open to shippers and shipowners to negotiate whatever oral

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or written contractual terms they choose.

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In the present case, therefore, the issue is whether the Plaintiff has established on evidence the partly written and partly oral contract alleged in the Statement of Claim. In that regard it should be remembered that this is a commercial matter and that the Court should take note of commercial realities and should endeavour to give effect to any arrangement made between the parties.

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As a final matter before setting out my conclusions concerning the existence of the alleged contract, I should record the views which I have reached in relation to credibility. As I think emerges from the evidence to which I have referred, there is not a great conflict between the witnesses. The real issue is what the evidence establishes. There are, as one would expect, discrepancies, but they are not of a major nature and I formed the impression that all the witnesses were endeavouring to tell the truth. The only comment which I would make is that, perhaps with the benefit of hindsight, and in the light of the magnitude of the loss which he considers the Plaintiff has suffered, Mr Cash had some tendency to see matters differently in retrospect, and to place greater importance on matters than he did at the time they took place. Nevertheless he impressed me as a genuine person and I accept that he was at all times endeavouring to give a truthful account.

I turn now to consider the application of the law to the facts. Both in the Statement of Claim and in submissions the Plaintiff contended that there was an express contractual term concerning the availability of space to fulfil the probable requirements of the Plaintiff to ship not less than 1,000 tonnes on each sailing of the Defendant's vessels. The person who is primarily alleged by the Plaintiff to have committed the Defendant to that term is Mr Teskey. I consider it is clear beyond doubt that Mr Teskey, as the Defendant's agent, never intended to commit the Defendant to a contract to accept 1,000 tonnes of waste paper on each of the sailings between January and July and, moreover, never thought he

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was doing so. Mr Teskey was well aware a booking of that size had to be approved by the Defendant, and he would not have contemplated giving informal approval. That, however, does not determine the matter because the Court applies an objective test when deciding whether parties have reached agreement. Thus Chitty on Contracts (25th Edition) at paragraph 41 states:-

"the normal test for determining whether the parties have reached agreement is to ask whether an offer has been made by one party and accepted by the other. In answering this question, the courts apply an objective test: if the parties have to all outward appearances agreed in the same terms upon the same subject matter neither can generally deny that he intended to agree."

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The requirement for an objective test is also referred to in Oscar Chess Ltd. v. Williams (1957) 1 W.L.R. 371 AT 375, where Denning, L.J. stated "If an intelligent bystander would reasonably infer that a warranty was intended that will suffice".

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The question, therefore, which must be asked is whether a reasonable person, experienced in shipping for export (as both parties were) would consider that Mr Teskey, or any other representative of the Defendant, either orally or in writing or by a combination of both, contractually committed the Defendant to (or, to use the words of the Plaintiff's Statement of Claim, represented or warranted the Defendant would) have space available on a monthly basis to fulfil the probable requirements of the Plaintiff to ship not less than 1,000 tonnes of paper on every sailing until the end of July 1982, with the Defendant being obliged to accept that tonnage and keep the space available (at least until a very late stage), but the Plaintiff not being obliged to ship anything.

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I have reached the conclusion that the answer to that question must be in the negative. Moreover, I do not consider that Mr Cash at the time believed the Defendant was contractually committed, though I accept that Mr Cash believed

the Defendant was very likely to have that sort of space available.

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10 Set against the background of the way in which
bookings are made in New Zealand by shipowners and
shippers, I cannot accept that a shipowner can
reasonably be regarded as offering to contract in
such an informal manner on the terms suggested. I
have no doubt that Mr Teskey believed there was
likely to be space available, and that he so
indicated to Mr Cash and Mr Wilson (likewise Mr
Cash and Mr Wilson gave an indication of the
Plaintiff's prospective tonnages). To use Mr
Teskey's own words, he "gave some sort of
assurance". It is important to remember, however,
that Mr Teskey added the qualification "But that
would be normal practice", and in any event what
was said has to be viewed against the whole
factual background. As I view the matter, what Mr
20 Teskey did was to indicate that, as at the 29th
January, it appeared likely there would be space
available if the Plaintiff in due course was able
to obtain firm orders in India and thereafter
sought to enter into contracts with the Defendant
to ship the paper on a vessel by vessel basis on
ordinary liner terms. No matter how keen the
Defendant was to obtain freight (and I bear in
mind the evidence that the Defendant's vessels had
before the introduction of the new service been
30 travelling northbound half full), I do not
consider a reasonable person experienced in
shipping would have thought Mr Teskey (or Mr
Teskey and Mr Robinson by the telex) had committed
the Defendant to hold available such a large
tonnage for one shipper who had no obligation to
ship or to pay dead freight if cargo did not
eventuate. The tonnage involved was a very
significant portion of the total tonnage allocated
to New Zealand (for example "Barranduna" was
40 allocated approximately 6,000 tonnes from all New
Zealand ports) and the evidence establishes that
there was real interest in the new service from a
variety of other shippers. No evidence was given
that the Defendant's agents expressly agreed to
the term alleged by the Plaintiff, but had Mr Cash
put the specific question to Mr Teskey "Do you on
behalf of the Defendant undertake that the
Defendant will accept a thousand tonnes on each
shipment?", there is no doubt what the answer

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would have been. Mr Teskey would have responded that he could give no such commitment. In that regard it needs also to be kept in mind that Mr Teskey was aware Mr Cash could not at that time give a commitment that the Plaintiff would ship any paper. Although Mr Teskey thought it likely the Plaintiff would obtain the necessary supplies of paper in New Zealand and orders in India, that had yet to be achieved.

In addition, as I have previously indicated, I do not consider Mr Cash at the time believed Mr Teskey was contractually committing the Defendant to 1,000 tonnes per vessel (and Mr Wilson, when asked, did not say that). Mr Cash was aware that Mr Teskey had to obtain authority and I do not consider the subsequent telex from Mr Robinson can be regarded as having committed the Defendant to 1,000 tonnes per sailing when that is not mentioned in the telex. Further, Mr Robinson was not at the meeting with Mr Teskey and any discussion between Mr Cash and Mr Robinson on 29th January centred around the tonnage which was to go on the "Barranduna". In relation to Mr Cash's belief, it is of some significance that his subsequent conduct does not seem to be really consistent with him having the view that the Plaintiff had a firm contract to carry 1,000 tonnes per shipment. Granted that on his version of the contract the Plaintiff had, in respect of each sailing, to advise the Defendant what tonnage, if any, the Plaintiff wished to ship, one would nevertheless have expected an assertion that there was a prior contractual obligation to take 1,000 tonnes when Mr Cash had the discussion with Mr Teskey concerning the alleged firm booking on the "Tarago". Nor it seems did the Plaintiff assert the existence of a firm contract to take 1,000 tonnes on each sailing during the negotiations leading up to the alleged agreement concerning the paper to be carried on the "Tarago".

In relation to the above matters I have not referred to the question of cover bookings. This is for the reason that it is clear in the present instance the Plaintiff did not attempt to make a cover booking, which would in any event not have been accepted as such in view of the quantity -

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see Mr Robinson's evidence. Mr Clark was minded to equate the situation with that of a cover booking, and suggested that cover bookings amounted to firm contracts even if, for commercial reasons, they were not regularly enforced by shipowners making a charge for dead freight if the cargo did not eventuate. That submission seems, however, to be somewhat contrary to the evidence because it appears that shipowners readily release shippers from cover bookings. In any event the evidence concerning cover bookings is not totally clear and I do not consider I should make any findings as to the legal status of such bookings when they are not truly in issue in the present litigation.

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For the reasons which I have indicated I am of the opinion that there was no contract to carry on the terms alleged by the Plaintiff.

In the light of the above conclusion it is not strictly necessary for me to consider the Defendant's further contention that there was no consideration for the alleged contract. I should, however, record that Mr Carruthers submitted there was no consideration for the reason that the Plaintiff was not obliged to ship any cargo at all with the Defendant. In that respect Mr Carruthers referred to the discussion of the law in Chitty (ante) at paragraph 160. Mr Carruthers suggested that a commitment to ship with the Defendant any waste paper for which the Plaintiff might obtain orders would have been sufficient to provide consideration, as distinct from the alleged arrangement which left the Plaintiff free to ship nothing or use other shippers if it so desired. In response to that submission Mr Clark accepted that consideration was not provided on or about the 3rd February, 1981 (i.e. at the time the telex was received), but submitted that it was provided later by the Plaintiff's conduct in presenting cargo for shipment on the "Barranduna" and paying freight in relation thereto. On that analysis Mr Clark suggested there was an offer from the Defendant on the 3rd February which remained open and was ultimately accepted by the Plaintiff some time in March. While that is a possible argument (being similar to a contention that there was a unilateral contract) it is open to the counter

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argument that presenting cargo for shipment and paying freight thereon is, as Mr Carruthers suggested, equally attributable to a contract of carriage on the "Barranduna" on ordinary liner terms. I nevertheless incline to the view that the Plaintiff would, one way or another, have been able to establish consideration if there had been an offer and acceptance on the terms alleged. For example, consideration might be found in some form of detriment to the Plaintiff, whom both Mr Teskey and Mr Robinson expected to seek orders for supply of waste paper to India, thereby no doubt expending effort and money in obtaining the orders which the Plaintiff was likely to ship with the Defendant.

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As an alternative submission on behalf of the Plaintiff Mr Clark advanced the contention that Mr Teskey made a misrepresentation concerning availability of space to enable the Plaintiff to ship not less than 1,000 tonnes on each sailing, and that as a result the Plaintiff was entitled to rely upon Section 6 of the Contractual Remedies Act, 1979. Section 6 of the Act provides as follows:-

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- "6. (1) If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract -
- (a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken; and
 - (b) He shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation.

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Mr Clark submitted that, even if there was no contract with a term concerning availability of space for 1,000 tonnes of waste paper on each sailing, there was nevertheless a contract in terms of the telex of 3rd February, 1982, i.e. a

different contract establishing a freight rate of US\$120 per tonne. On that basis Mr Clark's argument was that Mr Teskey made a misrepresentation in the same terms as the alleged contractual term concerning the availability of space for 1,000 tonnes on each sailing, which induced the Plaintiff to enter into a contract concerning the freight rate. In that event Mr Clark contended that Section 6(1) of the Contractual Remedies Act applied, entitling the Plaintiff to damages in the same manner and to the same extent as if the representation were a term of the contract that has been broken.

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I consider, however, that the argument cannot succeed. In the first place, I do not think the telex constituted a contract made on 3rd February or an offer which was open for acceptance at a later date. Rather it was an indication that if in due course the Plaintiff and the Defendant entered into a contract to ship waste paper the freight rate would be US\$120 per tonne. The freight rate of US\$120 would then become a term of any subsequent contract. The telex would also in some circumstances no doubt create an estoppel. But I do not consider it is possible to regard the telex as a contract made on the 3rd February, to which a representation by Mr Teskey became attached as a term by reason of the provisions of the Contractual Remedies Act. Any contract between the parties was made much later than the 3rd February, when the waste paper was accepted on the "Barranduna" on ordinary liner terms, and there never was any contract in relation to later vessels (apart from the short-shipped mixed waste which went on the "Tarago").

In the second place, if I am wrong in the above view and the telex concerning the freight rate did create a contract, a question arises as to whether what Mr Teskey said amounted to a representation. I consider that at best, from the Plaintiff's point of view, what Mr Teskey said amounted to an indication concerning the likely future position (which Mr Teskey genuinely believed) and was not a representation. I am conscious that this is a difficult area of the law, and I have therefore given some consideration to the many authorities which are very fully

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discussed in Chapter 2 of Spencer Bower & Turner on Actionable Misrepresentations (3rd Edition). There is also an interesting discussion in the latest edition of Chitty (ante) at paragraph 396, where it is suggested that the distinction between fact and opinion has possibly become less important since Esso Petroleum Co. v Mardon (1976) Q.B. 801, with the result that dichotomies between facts, opinions and intentions may be regarded as too neat. Even assuming, however, that what Mr Teskey said would in some circumstances or to some extent constitute a representation, I consider that Mr Teskey did not represent that the Defendant would keep available for the Plaintiff space for 1,000 tonnes of paper on each sailing. Set against the background known to both parties, a representation was not made to that effect. What the Plaintiff would ship and the Defendant would accept was a matter to be decided later as and when the Plaintiff was able to make bookings. I do not consider that a general statement or assurance about the likelihood of space availability can be elevated into a representation that a thousand tonnes of space per sailing would be kept available for the Plaintiff.

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In the third place, even if the telex concerning the freight rate did create a contract, I doubt whether what was said by Mr Teskey induced the Plaintiff to enter into such a contract. No doubt, as Mr Cash said in his evidence, a favourable freight rate was of no use to the Plaintiff without availability of space. It may well be, however, that the prospect of space was not what induced a contract (if there was one) concerning the freight rate. The inducement for such a contract was the rate quoted. I appreciate that inducement need not be the sole inducement. Nevertheless it must be material, and I think that the true inducement for any contract concerning a freight rate must be the rate of the freight.

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For the above reasons I consider that the alternative argument advanced by the Plaintiff in relation to the Contractual Remedies Act must also fail. For completeness I should perhaps add that the Plaintiff did not plead or argue any tortious cause of action based on negligent misrepresentation, whether in the same terms as alleged in

relation to the contractual cause of action or in any other terms.

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10 Before leaving this aspect of the case I would say that a finding in the Defendant's favour on the cause of action concerning the partly oral and partly written contract alleged by the Plaintiff does not involve any approbation of the Defendant's actions. Indeed it is clear, for example, that Mr Teskey felt some sympathy for the Plaintiff when the Defendant declined to accept bookings on sailings subsequent to the "Barranduna". As far as the facts go, it appear the Defendant decided that, in the absence of any contractual commitment, it was not prepared to accept the Plaintiff's paper (apart from the short-shipped paper) on the three sailings after the "Barranduna". It further appears the primary reason for this was that the Defendant was able to obtain other better paying cargo (a 20 misunderstanding concerning the promotional freight rate and any difficulties concerning stowage were not known to the Defendant's head office when it was decided to decline to accept any further paper on the "Tarago"). In the result, the Plaintiff was unable to ship waste paper which it had successfully collected and for which it had obtained orders. I have no doubt that had the Plaintiff been able to ship the paper 30 it would have realised a reasonable profit thereon, though not as great a profit as is alleged in the Statement of Claim.

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40 In view of the conclusion that the Plaintiff has not established a partly written and partly oral contract as alleged, it is not necessary to consider the Plaintiff's claim for damages in that regard. It remains, however, to consider the Plaintiff's claim for damages in relation to the waste paper which was short-shipped on the sailing of the "Barranduna" and the Defendant's counterclaim for freight.

The Plaintiff's claim concerning the short-shipment alleges that the Plaintiff presented a total of 919.399 tonnes for shipment on the "Barranduna" and that of that figure 280.610 tonnes was left behind. The Plaintiff further alleges that the Defendant well knew the Plaintiff

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had entered into firm contracts with its suppliers in India and that the Plaintiff needed actually to ship the cargo before being able to obtain payment from its Indian customers by way of letters of credit. In the result, the Plaintiff alleges it suffered loss or damage amounting to \$39,896.29 as a consequence of the short-shipment on the "Barranduna".

In response to this aspect of the claim, the Defendant raises, as previously indicated, a series of defences. The Defendant also counterclaims for a balance of unpaid freight in respect of the mixed waste shipped on the "Barranduna", together with the amount of the freight for the mixed waste which was not shipped on the "Barranduna" but was subsequently shipped on the "Tarago". After allowing for credits for a re-weighing and for the proceeds of sale of the "Tarago" shipment, the total for which the Defendant counterclaims is \$71,685.40.

In outline, the events concerning the shipment of waste paper on the "Barranduna" and "Tarago" were as follows. The Defendant, through its Auckland agents, endeavoured during February 1982, to obtain detailed information from the Plaintiff concerning specific tonnages to be shipped on the "Barranduna". Mr Teskey in particular told Mr Cash that the Plaintiff had to make some definite commitment which would be subject to confirmation by the Defendant. Mr Teskey said he pressed for a firm commitment to be made no later than two weeks before the vessel's arrival date. On the 16th February the East India Company advised the Defendant that the Plaintiff wished to book firm in excess of 1,000 tonnes, but subject to letters of credit being established. In the event, the Plaintiff did not deliver to the wharf the tonnage advised, but it did deliver approximately 919 tonnes for which letters of credit had been obtained. The letters of credit required shipment before 31st March, and the Plaintiff, largely because of its liquidity situation, was not in a position to pay either its suppliers for the paper or the Defendant for the freight until the letters of credit had been negotiated. For that purpose an appropriately endorsed bill of lading was required.

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10 Before any of the waste paper was brought to the wharf Mr Teskey arranged to inspect some of the paper, which was at that stage being kept in stores belonging to the firms supplying the paper to the Plaintiff. Mr Teskey inspected the paper with Mr Freer on 9th March. Mr Teskey was not happy with some of the units (particularly the mixed waste) and thought they were unsuitable for transport. Mr Freer, however, whose concern this aspect mainly was, was not too concerned. There was discussion about tightening and increasing the strapping, and Mr Cash assured both Mr Teskey and Mr Freer that mixed waste presented in the form which they had been shown was acceptable to other shippers.

20 Matters then moved into Mr Robinson's domain. He gave evidence that he had previously explained to Mr Cash the configuration and deck heights of the Defendant's vessels and had informed him that cargo units should be in multiples of four, i.e. 4ft. high by 4ft. wide by 4ft. long. It should be noted, however, that Mr Robinson's telex of 29th January, 1982, indicated only that the overall pallet height should not exceed 8.5ft. It appears from the telex communications passing between the Defendant's Wellington and Adelaide offices that the Defendant's original
30 intention was to stack the units two high, which was the reason why a height of 8.5ft. was specified in the telex of 29th January, 1982 (since two units of 3.5ft. would fit within the available deck height). When, following the inspection of 9th March, Mr Teskey telexed Mr Robinson advising the exact sizes, it transpired that many of the mixed waste units were 5ft. 8 inches high. Mr Robinson then decided that those units could be stowed three high, stowage on that
40 basis being still within the available deck height, and sent a copy of the telex on to Australia so that the Defendant's cargo superintendent there, Mr Anvin, could make out his preplan. (Mr Anvin is one of four such superintendents who plan the loading of each vessel and then travel ahead of it on a port to port basis to supervise the loading).

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When Mr Anvin inspected the waste paper at the wharf in Auckland he was most unhappy with the state of the units of mixed waste. He asked for them to be restrapped and some attempt was made to do this. He also found that many of the mixed waste units had been placed by the Plaintiff or its suppliers on cardboard tubes or cones (from the centre of a reel of paper) instead of proper pallets, with the result that they were difficult to handle using forkhoists and difficult to stow because the tubes collapsed under pressure. When the waste paper came to be loaded on the vessel Mr Anvin made various efforts to have the units stowed on a three high basis. In this he succeeded so long as he had other types of sound unit to place on the bottom layer, but despite trying several expedients, it proved impossible safely to stow the mixed waste units three high. The best that could be achieved was two high, and as a result there was not space available in the vessel to take all the units of mixed waste. There were discussions between Mr Cash, Mr Anvin, Mr Robinson and Mr Freer concerning the problem. Mr Cash pointed out he had to get the waste paper shipped in order to negotiate the letters of credit and obtain payment. When he realised that it was inevitable some paper would be left behind, he requested the Defendant to do everything possible to complete certain lines, and this was done. It should also be mentioned that at one stage it was thought that, because of the difficulties, there would be insufficient time to load the paper, and the Defendant suggested that any paper left behind could be transported by road to a later port of call (Napier) and loaded there. Enquiries were made, but this course was not proceeded with when it became clear that there was not sufficient space available in any event.

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The waste paper which was left behind when the "Barranduna" sailed amounted to 271.12 tonnes. Of that some 9.490 tonnes was removed by the Plaintiff and the balance of 261.63 tonnes was shipped on the "Tarago", which was the next of the Defendant's vessels to sail north. The above tonnages do not correspond with the tonnages alleged in the Plaintiff's Statement of Claim, possibly because there was a re-weighing. For practical purposes the difference has no great

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effect on the amounts claimed either by the Plaintiff for its loss or the Defendant for the freight. I therefore propose to treat the monetary amounts set out in the Statement of Claim and the Counterclaim as correct (no submission to the contrary having been made to me).

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Upon the sailing of the "Barranduna" the Plaintiff was able to negotiate letters of credit concerning the paper shipped, except the mixed waste (part of which had been shipped and part left behind). In respect of the other paper, freight was paid to the Defendant from the proceeds of the letters of credit, the Defendant having issued appropriate bills of lading. This, however, was not achieved in respect of the broken shipment of mixed waste. A bill of lading was not issued since the Plaintiff could not negotiate the letter of credit (because of the broken shipment), with the result that the Plaintiff did not pay the freight in respect of the mixed waste which was actually shipped. There was initially a suggestion by the Defendant that it would off-load the mixed waste at the last New Zealand port of call (Timaru), but the Plaintiff did not desire this. Thereafter the parties entered into negotiations in which their respective solicitors became involved and which culminated in what the Defendant contends was an agreement binding on the parties. The Plaintiff denies any agreement was reached and further alleges (although it was not pleaded - the Defendant, however, took no objection to the lack of pleading), that if there was an agreement it was reached as a result of economic duress and was voidable at the Plaintiff's instance. It is not necessary at this juncture to set out details of the alleged agreement, but in simple terms it provided that the Defendant would transport the short-shipped mixed waste on the next sailing (the "Tarago") and would be given appropriate security for payment of the outstanding freight, upon which basis the Defendant would issue a bill of lading with payment of the freight being made by the Plaintiff no later than three business days after the departure of the "Tarago". The alleged agreement also contained a clause releasing each party from further liability.

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Following the making of the alleged agreement the Defendant duly accepted the short-shipped mixed waste on the "Tarago" and issued a bill of lading for the mixed waste which had gone on the "Barranduna". The Plaintiff did not, however, make payment of the freight for that mixed waste. Nor did the Plaintiff ever give the security envisaged by the agreement. The Plaintiff apparently negotiated a letter of credit in respect of the mixed waste but the payment was subsequently reversed by the Bank. Nor did the Plaintiff make payment for the mixed waste shipped on the "Tarago" and no bill of lading was ever issued in respect of it.

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When payment for the freight was not received the Defendant contemplated claiming a lien on the mixed waste which had been shipped on the "Barranduna". Ultimately, however, the Defendant discharged the mixed waste at Bombay without claiming a lien. The Defendant, however, refused to give the Plaintiff delivery information until the freight was paid. From the evidence it is not clear what was the ultimate fate of that paper.

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When the Plaintiff failed to pay for the freight in respect of the mixed waste on the "Tarago", the Defendant advised the Plaintiff that if the freight was not received by June 10th the Defendant would have no option but to sell the paper to defray costs. No payment being forthcoming, the Defendant did not off-load the paper at Dubai for transshipment to Bombay but carried the paper to Europe. After making various enquiries as to prices which could be obtained in Europe, the Defendant eventually sold the paper when the "Tarago" reached Gothenburg.

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It is the above sequence of events which has led to the Plaintiff's claim for the value of the short-shipped paper and the Defendant's counterclaim for the freight. The Plaintiff has made no claim for the mixed waste actually shipped to Bombay on the "Barranduna" (the fate of which, as earlier mentioned, remains unclear on the evidence).

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I deal first with the Plaintiff's claim for the value of the mixed waste. This claim is based

upon the Defendant's failure to ship the paper on the "Barranduna" and, as I previously indicated, the Defendant raises a series of defences. I propose first to consider the Defendant's contention that the claim cannot succeed because of the alleged agreement made between the parties and the subsequent failure by the Plaintiff to pay the freight, which the Defendant claims entitled it to a lien over the goods leading to their eventual sale to defray in part the freight charges.

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The Defendant's pleadings concerning this aspect of the claim are contained in clauses 20, 21 and 22 of the Amended Statement of Defence, which read as follows:-

"20. BY letter dated 8 April 1982 addressed to the defendant under its former name of Scandinavian Australia & New Zealand Carriers Limited and its agent the East Asiatic Company Limited the plaintiff agreed (inter alia) to enter into an agreement with the defendant in the form attached to such letter.

21. BY such agreement the defendant agreed to issue a bill of lading covering the shipment of the waste paper therein referred to on the vessel BARRANDUNA despite the non-payment by the plaintiff of the freight therefor, and to carry on the vessel TARAGO the waste paper which was not shipped on the vessel BARRANDUNA; and in consideration therefor the plaintiff (referred to in the agreement as "the Company") agreed as follows:-

'5. The company in consideration of the entry into this agreement by the lender (the defendant) hereby waives any and all claims that it may now or hereafter have otherwise had against the lender or any of the agents or shareholders or employees of the lender whether for damages at law or otherwise howsoever in respect of arising out of or in connection with the agreement and undertaking by the lender to procure the carriage of the paper to India but without prejudice to any rights of the company

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arising under this agreement and the lender likewise releases and discharges the company from any and all claims that the lender may now or hereafter have against the company in respect of non-payment of the portion of the freight which but for this agreement might be due or payable by the lender.'

22. IF the failure of the defendant to carry on the vessel BARRANDUNA a part of the waste paper tendered by the plaintiff for shipment on such vessel was in breach of contract or was wrongful (which is denied), and if the plaintiff suffered loss damage or expense as a result thereof (which is also denied), then by reason of Clause 5 of the agreement attached to the plaintiff's letter of 8 April the plaintiff has waived any claim against the defendant in respect thereof."

A good part of the evidence concerning this aspect of the matter came from the Plaintiff's solicitor, Mr Burton, who was apparently called by the Plaintiff pursuant to an undertaking given by Mr Clark. After the sailing of the "Barranduna" the parties, as previously mentioned, entered into negotiations through their solicitors. Those negotiations were aimed at finding a solution to the difficulties which had arisen following the partial shipment of the mixed waste on the "Barranduna", as a result of which the Plaintiff was unable to negotiate the letter or letters of credit relating to the mixed waste, with the Defendant being unwilling to issue a bill of lading for cargo in respect of which it had not been paid freight.

Negotiations were conducted in the main between Mr Burton and the Defendant's solicitor, Mr Franks. The broad aim of the negotiations was to devise a means whereby, with the agreement of the Plaintiff's Bank, the Defendant would be given security and would, when the short-shipped waste paper was shipped on the "Tarago", issue a bill of lading enabling the Plaintiff to negotiate the letter of credit, with the Defendant being paid freight out of the proceeds. It emerges from Mr Burton's evidence that the Plaintiff and the Defendant were able to agree upon the

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arrangements, but the problem was to obtain the Bank's agreement, particularly concerning the security. In his evidence-in-chief Mr Burton stated that he personally never received advice from the Bank that it had consented. In cross-examination, however, it emerged that matters reached a climax on the 8th April, 1982, which was apparently the Thursday prior to the Easter vacation. By that stage Mr Franks had submitted the relevant documents to Mr Burton, who had perused them and made amendments (discussed with Mr Cash) and had conferred with Mr Franks by telephone. However, the agreement was, in Mr Burton's words "subject naturally to the Bank agreeing to the debenture". On the 8th April Mr Burton gave the documents to Mr Cash, who took them to the Bank. Thereafter Mr Burton had nothing more to do with the matter (another partner in his firm took over from him).

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Two of the documents were on the Plaintiff's letterhead and read as follows:-

" 08 April 1982.

TO: Scandinavian Australian and New Zealand
Carriers Limited

The East Asiatic Company Limited

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In consideration of the issue of a Bill of Lading relating to a shipment on Barranduna my Company acknowledges as follows:

(a) That the remaining paper, i.e. paper now under your custody and control is now charged in your favour as a first charge.

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(b) My Company will enter into an Agreement in the form attached subject to the security documents being in the form of the draft submitted to the Company's solicitors Messrs Wilson, Henry, Martin & Co. by your solicitors Messrs Chapman Tripp provided that the final form is not inconsistent with the contract.

AOTEAROA INTERNATIONAL LIMITED

Per: (Signed) P.A.D. CASH

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"08 April 1982

TO: Scandinavian Australian and)
New Zealand Carriers Limited)
The East Asiatic Company) Lenders
Limited)

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The Commercial Bank of Australia Limited
AUCKLAND

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re: Used Paper Freight to India

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We refer to Letters of Credit held by the Bank due to expire today and enclose a draft form of Agreement intended to be entered into between the Company and Scandinavian Australia and New Zealand Carriers Limited and The East Asiatic Company Limited ("the contract"). The Company irrevocably instructs the Bank to pay to the Lenders upon presentation by it of the Bills of Lading referred to in Clause 1.2 of the contract the amount of freight due to the Lenders not exceeding \$45,000.00 to secure release of a first charge over the said Bills of Lading and the remaining paper. Such payment shall be made notwithstanding any matter or thing arising out of the relationship of the Banker and Customer between the Bank and the Company including the state of any accounts held by the Company with the Bank.

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Signed for and on behalf of
AOTEAROA INTERNATIONAL LIMITED

Per:
(Signed) P.A.D. CASH
(Director)

The Bank hereby confirms its acceptance of the instructions contained in this letter and undertakes to comply with them and acknowledges that the Lenders have agreed to enter into the contract in reliance of this confirmation and acknowledgement.

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Signed for and on behalf of
COMMERCIAL BANK OF AUSTRALIA NEW ZEALAND
LIMITED

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(Signature illegible)

The third document was the draft agreement
between the Plaintiff and the Defendant
containing, inter alia, clause 5 as set out in the
Defendant's Amended Statement of Defence.

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In the outcome, both letters were signed by Mr
Cash on behalf of the Plaintiff, and the
confirmation at the foot of the second letter was
signed on behalf of the Bank. The Bank diary note
for that day was also produced in evidence on the
basis that the parties accepted it as proved under
Sections 5 and 6 of the Banking Act, 1982. That
diary records:-

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"3.40p.m. negotiation under Letter of Credit
has not taken place. The shipping Company
require an acknowledgement from the Bank that
we will agree to freight \$33000 being paid to
ScanCarriers the Shipping Company from the
next negotiation in May and agree to them
holding a 1st charge over the \$77000 goods in
store awaiting shipment.

"4.00p.m. Mr Cash called with draft
agreement for me to sign. I rang C/L (Credit
and Lending). Mr Cash is to instruct
Solicitor to prepare 3rd m/O. He instructed
him by phone, in my presence to prepare the
m/- for the Bank. Agreement is for Bank to
pay the freight to the Shippers and
acknowledge that they have a 1st charge over
the paper. Mr Chany agreed to me signing this
document.

Mr Carruthers submitted that the evidence
established agreement on all the terms of a
binding contract. Mr Clark submitted that the
Defendant's allegation of an agreement was
equivalent to a plea of accord and satisfaction
and that all the necessary elements had not been
established. In relation to the law, he referred
to the definition of accord and satisfaction given
by Scrutton, L.J. in British Russian Gazette Ltd.

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v. Associated Newspapers Ltd. (1933) 2 K.B. 616,
at 643 (cited by Mahon, J. in Homeguard Products
(N.Z.) Ltd. v Kiwi Packaging Ltd. (1981) 2
N.Z.L.R. 322 AT 325.

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In his submissions, Mr Clark pointed out that there had to be consideration for the agreement. However, he did not really dispute the existence of consideration and I find that there was consideration, on the basis that the Defendant agreed to give a bill of lading without receipt of the freight (taking security therefor). Mr Clark was also critical that the Defendant had not called Mr Franks. It seems to me, however, that in the light of Mr Burton's evidence there was no point in calling Mr Franks who could not have added anything to what Mr Burton said. The key question is whether the Bank agreed to the arrangement, and in argument it emerged that this was the real objection taken by Mr Clark. He contended that the Bank diary does not show the Bank consented to the debenture. It is correct that the diary entry does not refer to the debenture on its face (there is a reference to a third mortgage over a house owned by the Company - this had been offered by Mr Cash as an additional security for the Bank). I consider, however, the evidence does establish that the Bank agreed to the debenture. The letter signed by the Bank states that "the lenders (i.e. the Defendant and the East Asiatic Company) have agreed to enter into the contract in reliance on the Bank's confirmation and acknowledgment". The contract referred to is clearly the draft agreement, as is shown by the letter upon which the Bank's confirmation is endorsed (which letter refers to "clause 1.2"). Clause 2.4 of the draft agreement, though somewhat inelegantly drafted, refers to the debenture (which in fact the Defendant's solicitors subsequently submitted to the Plaintiff's solicitors). Further, the diary entry refers to the draft agreement. In those circumstances I consider it is established that the Bank did agree to the giving of the debenture.

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Mr Clark further contended that there was no communication of the Bank's acceptance. This, however, cannot apply with regard to Mr Cash, who was present when the document was signed on behalf

of the Bank. Insofar as the Defendant is concerned, it seems clear that there must have been a communication of acceptance on the part of the Bank, for the Defendant in due course took the short-shipped paper on the "Tarago" and carried out its part of the arrangement. The Defendant clearly regarded all the arrangements as having been agreed.

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10 I therefore consider that there was a concluded agreement binding upon both the Plaintiff and the Defendant. The fact that the Plaintiff later failed to sign the debenture when it was submitted, cannot affect the agreement. The Plaintiff simply failed to do what it was obliged to do in terms of the agreement.

20 Mr Clark, however, further submitted that the agreement was voidable for economic duress and had been so avoided by the Plaintiff. It is clear that economic duress can vitiate the necessary element of consent to a contract. Thus in Moyes & Groves Ltd. v Radiation New Zealand Ltd. (1982) 1 N.Z.L.R. 368, at 372, Cooke, J. said:-

30 "In Pao On & Ors. v Lau Yiu & Anor. (1980) A.C. 614, 635-636; (1979) 3 All E.R. 65, 78-79, an appeal from Hong Kong, the Privy Council per Lord Scarman said that there was nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent.

40 Decisions in England at first instance by Kerr, J. and Mocatta, J. were cited with approval, the Privy Council noting that they stressed that for the principle to apply the pressure must be such that the victim's consent to the contract was not a voluntary act.

In the light of those and other authorities I would be prepared to accept that in New Zealand law economic duress can be a ground for avoiding liability under a contract. But it is certainly something which should not be found lightly."

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The elements of the defence have also recently been considered in Alec Lobb Ltd. v Total Oil G.B. Ltd. (1983) 1 All E.R. 944, at 960, where Millett, Q.C., sitting as Deputy Judge of the High Court, said:-

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"A plaintiff who seeks to set aside a transaction on the grounds of economic duress must therefore establish that he entered into it unwillingly (not necessarily under protest, though the absence of protest will be highly relevant), that he had no realistic alternative but to submit to the defendant's demands, that his apparent consent was exacted from him by improper pressure exerted by or on behalf of the defendant, and that he repudiated the transaction as soon as the pressure was relaxed."

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Mr Clark submitted that at the time of the agreement the Plaintiff was in a desperate position and that the short shipment, plus the withholding of any shipping documentation in regard to the partially shipped mixed waste, all judged in the context of a threat by the Defendant to discharge the latter cargo at Timaru, amounted to economic duress. In relation to that submission I first observe that the reference to the Timaru threat must be disregarded. The evidence on behalf of the Defendant was that the suggestion of a discharge at Timaru was made with a view to assisting the Plaintiff. Even assuming, however, that that was not so, the "Barranduna" left Timaru on the 31st March, 1982, so that any question of a threat to discharge at Timaru had expired well before the parties entered into the agreement.

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Mr Cash did not say anything of significance concerning the duress aspect in his evidence-in-chief, but in cross-examination his evidence was:-

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"Did you reach the position where you agreed to pay the freight on the mixed waste after you received the proceeds on the following ship? We were put in a position by ScanCarriers -
Do you agree or not? No.

10 You didn't agree to pay the freight? No. We
were put in a position by ScanCarriers where
we had no practical alternative and had to
sign a couple of documents agreeing to agree
to a form similar to one sent up by Scans
lawyers to my lawyers. It had been corrected
a number of times both with the bank's wishes
and ScanCarriers. We did sign these
agreements to agree because we had no
alternative. I considered it blackmail.
Scans well knew at that time the financial
position my Company was in. In fact I had
told Mr Anvin at time of loading and also
Captain Andersen on the Friday."

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20 Mr Burton also said at one stage of his
evidence that the Plaintiff was in a desperate
state, but it appears that passage in his evidence
was more directed to the Plaintiff's position in
negotiations with the Bank rather than to its
position in negotiations with the Defendant.

30 Despite Mr Cash's views as expressed in his
cross-examination, I do not consider that the
Defendant's attitude amounted to blackmail or
improper pressure which vitiated consent. It is
true that the Plaintiff was in financial
difficulties (indeed the Plaintiff at no stage was
in a good financial position) as was known to the
Defendant, inter alia, because the Plaintiff could
not pay the freight. Mr Cash had also made clear
the Plaintiff's problem in negotiating the letter
of credit once the mixed waste was only partially
shipped. All the Defendant sought, however, was a
satisfactory arrangement to pay the freight for
the mixed waste already shipped on the
"Barranduna" and release of the Defendant from any
claims concerning short-shipment. In terms of the
40 agreement the Defendant was postponing payment of
freight due when the "Barranduna" had sailed until
three days after the "Tarago" had sailed to enable
the Plaintiff to negotiate the letter of credit.
The Plaintiff made no protest at the time and had
advice from its solicitors. It could have elected
to take proceedings against the Defendant at that
juncture (rather than negotiate) if it had thought
fit. The whole of the evidence leaves me with the
view that the Plaintiff was willing to negotiate
with the Defendant and that the arrangements were

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reasonably acceptable to the Plaintiff, who did not at that time foresee difficulties in getting payment for the mixed waste if it was shipped on the "Tarago". Indeed the agreement reached does not radically differ from that suggested by Mr Cash in his telex sent to Mr Anderson on 29th March, 1982 (the principal difference being that in terms of the agreement the Defendant was also to have security). The real problems in negotiating appear to have lain in obtaining the Bank's agreement.

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As a final matter I mention that it may be debatable whether the Plaintiff actually took steps to repudiate the contract. The Plaintiff appears never explicitly to have said the contract was repudiated. The Plaintiff simply failed to pay the freight (because presumably it did not have the funds) and then did nothing about the debenture. However, whether or not there was a repudiation I am, for the reasons I have set out, not prepared to hold that there was economic duress negating the element of consent to the contract on the Plaintiff's part.

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I therefore consider that the Plaintiff is bound by the provisions of Clause 5 of the draft agreement. That clause provided that the Plaintiff -

"hereby waives any and all claims that it may now or hereafter have otherwise had against the lender (Defendant) ... whether for damages at law or otherwise howsoever in respect of or arising out of or in connection with the agreement and undertaking by the lender to procure the carriage of the paper to India but without prejudice to any rights of the company (Plaintiff) arising under this agreement"

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The parties accept that, if the agreement is binding, the above provision applies to the paper short-shipped on the "Barranduna" (but not to any of the wider issues concerning the alleged failure by the Defendant to take waste paper on other vessels). The Defendant's pleading treats Clause 5 as a complete defence to the Plaintiff's claim for the short-shipped paper. However, Clause 5 is specifically stated to be "without prejudice to

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any rights of the company (Plaintiff) arising under this agreement", i.e. making it clear, inter alia, that the Defendant was obliged in terms of the agreement to carry the short-shipped paper to India. The Defendant did not do that, but, when the freight was not paid, carried the paper through to Europe and sold it there in terms of a lien which the Defendant claimed under the bill of lading. It must therefore be determined whether the Defendant acted within its rights in so doing.

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The agreement did not deal with the question of payment of freight for the short-shipped waste paper carried on the "Tarago". The agreement only made specific provision for payment of freight in respect of the portion of the mixed waste which had been carried on the "Barranduna". I am satisfied, however, that the only possible inference from all the circumstances is that the parties envisaged the issue of a bill of lading in respect of the "Tarago" with the paper being carried and the freight payable on the terms of the Defendant's usual bill of lading. In his evidence Mr Cash accepted that in the ordinary course it was the shipper's obligation to prepare and present a bill of lading. It appears, however, the Plaintiff did not present a bill of lading in respect of the waste paper carried on the "Tarago". At all events none was ever issued. In the above circumstances I consider that the decision in Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd. (1954) 2 O.B. 402, is directly applicable. Devlin, J. there held that whenever a contract of carriage is concluded and it is contemplated that a bill of lading will be issued in due course, the contract is from its "creation" covered by a bill of lading.

I therefore am of the view that the carriage of the waste paper on the "Tarago" was governed by the terms of the Defendant's normal bill of lading, clause 11(1) of which provides:-

"Freight shall be deemed fully earned on receipt of the Goods by the Carrier and shall be paid and non-returnable in any event."

Further, clause 12 of the bill of lading provides:-

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"The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable by the Carrier under this contract ... and for that purpose shall have the right to sell the Goods by public auction or private treaty without notice to the Merchant."

Once the Plaintiff failed to pay freight the Defendant was entitled to exercise its rights of lien and to sell the paper in terms of clause 12. In that respect it gave notice of its intention to do so, although that was not required in terms of clause 12.

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In the above circumstances I consider that, after the Plaintiff failed to pay the freight, the Defendant acted within its legal rights in claiming the lien and selling the goods. The Defendant, therefore, cannot be said to have failed to carry out its obligations in terms of the agreement reached between the parties on the Thursday prior to the Easter vacation.

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Mr Clark, in the course of his submissions, contended that there had been in effect a fundamental breach by the Defendant in the sense that there was a total failure to carry to the agreed destination. I consider, however, that the answer to this is that the Defendant would have carried to destination in India had the Plaintiff failed to pay the freight, was entitled to exercise its rights in terms of the bill of lading. Whether the Defendant achieved a reasonable price on the sale of the goods is a matter which must be considered in relation to the Defendant's counterclaim (wherein a credit is allowed for the price for which the paper was sold).

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For the reasons which I have given I therefore consider that the Plaintiff cannot succeed in its claim for the value of the short-shipped waste paper. As a result that claim must also fail and it is not necessary for me to consider the various other defences raised by the Defendant in relation to the terms of the bill of lading.

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It remains for me to deal with the Defendant's counterclaim. In that respect the Defendant counterclaimed first for the balance of the freight due in respect of the mixed waste shipped on the "Barranduna" (249.66 tonnes - shipped under bill of lading A.57 - the freight on a small tonnage of mixed waste shipped under bill of lading A.58 was paid).

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10 Pursuant to the agreement between the parties the Defendant issued a bill of lading in respect of this paper. A copy produced in evidence has stamped on it both "freight unpaid" and "freight prepaid" and the evidence does not establish the precise position in that regard. In terms of the agreement reached on the Thursday prior to the Easter vacation, the date for payment of freight was 14th May, 1982 (three days after the vessel left the New Zealand coast). When the Plaintiff
20 did not pay the freight the Defendant first considered claiming a lien, but eventually discharged the paper in India without doing so.

30 In his submissions in relation to the counterclaim Mr Clark contended that the Plaintiff was relieved from liability to pay the freight in respect of the mixed waste shipped on the "Barranduna" because the Defendant declined to provide delivery information until the Plaintiff paid the freight, as a result of which the Plaintiff was not able to satisfy its Indian customer that the cargo had been landed and would be delivered. However, the Defendant did not decline to provide the information until the 28th June. The freight had been due since the 14th May, and had it been paid in terms of the agreement the Plaintiff would have received the information concerning the discharge of the cargo. In those circumstances I do not consider
40 that it is open for the Plaintiff to rely on the Defendant's refusal to provide information, and I consider that the Defendant is entitled to succeed on the counterclaim for the freight in respect of the mixed waste shipped on the "Barranduna". The calculation made on the face of the relevant bill of lading establishes that the freight due amounted to \$37,369.37.

In relation to the mixed waste shipped on the

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"Tarago", I have already held that the Defendant was entitled to be paid freight and acted within its rights in exercising the lien and selling the mixed waste in Europe. It remains, however, to consider whether the Defendant achieved a fair price for the waste paper. In that respect I am, for the purpose of this decision, prepared to accept that the Defendant is in the same position as a mortgagee. The law appears to be that the mortgagee must act bona fide and take reasonable precautions to obtain a proper price: Alexandre v. New Zealand Breweries (1974) 1 N.Z.L.R. 497 (there are conflicting decisions in other jurisdictions).

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I am satisfied that it was reasonable for the Defendant to choose to carry the paper to Europe rather than incur the transshipment cost from Dubai to India or incur storage charges in Dubai. When the vessel reached Europe enquiries were made in Germany, Holland and Sweden. Ultimately, the paper was sold in Gothenberg for the very poor price of SK\$100 per tonne. While I accept, from Mr Mile's affidavit, that that was probably the best price obtainable in Norway and Sweden, it seems clear from the telex from Cornelder dated 28th June, 1982, that a better price was available in Holland. That price was DF.185, or approximately US\$32 per tonne, and, according to the conversion rates given to me by counsel, was nearly twice the price obtained in Gothenberg. It was submitted to me that the price in Holland was subject to survey, but it seems clear from the telex that the price was quoted following survey. In my view the Defendant should have decided to sell in Holland and a decision to do so would have been reasonable. This would have realised almost twice the price in Sweden and I do not consider that the Defendant was justified in deciding against a sale in Holland. I therefore am of the opinion that, although the Defendant acted bona fide, reasonable precautions would have ensured a price in the region of \$12,000 and I consider that the Defendant should have credit for that amount rather than the figure of \$6,298.83 referred to in the counterclaim.

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I therefore find that the Plaintiff is liable to the Defendant for the freight in respect of the

"Tarago" shipment totalling NZ\$40,608.86, plus the freight on the "Barranduna" shipment amounting to \$37,369.37 (this figure is less than the amount the Plaintiff undertook to pay on the agreement between the parties and is based on the actual tonnage shipped), less the credit of \$12,000.00 to be given by the Defendant in respect of the disposal of the paper, making the total due from the Plaintiff to the Defendant of \$65,978.23.

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10 There will accordingly be judgment for the Defendant on the counterclaim for that sum.

20 The parties were agreed that costs should follow the outcome and suggested that I should deal with all matters of costs at this juncture. That, inter alia, involves considering whether it is appropriate to grant a certificate for the whole costs of the action under clause 37 of Table C of the Code of Civil Procedure. Although I am satisfied that there should be a certificate for costs in excess of \$2,500, I am not prepared to give a certificate for the whole costs of the action without the benefit of a detailed calculation of the Plaintiff's costs and submissions as to whether or not a certificate for the whole costs should be granted. If the parties would prefer to avoid a further hearing concerning costs, I suggest that the Defendant's counsel should submit a memorandum (to which Plaintiff's counsel should respond) setting out the costs claimed, coupled with brief submissions as to why a certificate for the whole costs should be granted. The computation of costs should refer to any costs claimed in relation to interlocutory matters. As at present advised I would be prepared to certify for the extra days involved and for extra counsel. As far as witnesses who came from overseas are concerned, it appears to me reasonable to certify for their full air fares, but I doubt whether it is appropriate to allow any significant sum for their accommodation costs in New Zealand.

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Solicitors:

Earl Kent & Co., Auckland, for Plaintiff.
Chapman Tripp, Auckland, for Defendant.

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Court of New
Zealand

NO. 8

FORMAL JUDGMENT OF THE HIGH COURT

No. 8.
Judgment of
the High
Court
17 August
1983

THIS action coming on for trial on the 7th, 8th, 9th, 10th, 13th, 14th, 15th, 16th, 17th and 30th days of June 1983 and the 1st day of July 1983 before His Honour Mr Justice Wallace, after hearing the Plaintiff and the Defendant and the evidence then adduced it is adjudged that judgment be entered in favour of the Defendant in respect of the Plaintiff's claim against the Defendant and further that judgment be entered in favour of the Defendant in the sum of SIXTY-FIVE THOUSAND NINE HUNDRED AND SEVENTY-EIGHT DOLLARS AND TWENTY-THREE CENTS (\$65,978.23) in respect of the Defendant's counterclaim against the Plaintiff AND IT IS FURTHER ORDERED that the question of costs both in respect of the Plaintiff's claim and the Defendant's counterclaim be reserved pending submissions in that regard.

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DATED the 17th day of August 1983.

BY THE COURT

L.S. "P. H. MILWARD"
[Deputy] Registrar

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NO. 9

In the High
Court of New
Zealand

IN THE COURT OF APPEAL OF NEW ZEALAND

No. 9

C.A. No. 132/83

Notice of
Motion on
Appeal

10 BETWEEN AOTEAROA INTERNATIONAL
LIMITED a duly incorporated company
having its registered office at
Auckland and carrying on business as
an Exporter

7 October 1983

APPELLANT

20 A N D SCANCARRIERS A/S a company
duly incorporated in Norway and
carrying on business in New Zealand
and elsewhere as Maritime Carrier
under the name or style or
Scandinavian Australian and New
Zealand Carriers Limited

RESPONDENT

30 TAKE NOTICE that this Honourable Court will be
moved at the first sitting thereof to be held
after the expiration of fourteen (14) days from
the date of service of this Notice or so soon
thereafter as Counsel can be heard on behalf of
the abovenamed Appellant by way of Appeal from the
whole of the Judgment of the High Court of New
Zealand in Admiralty (in its Auckland Registry)
given and made by the Honourable Mr Justice
Wallace, Judge of the High Court of New Zealand,
on the 17th day of August 1983 in the matter of an
action number AD.333/82 in the Auckland Registry
40 of the High Court of New Zealand in Admiralty
wherein the Appellant was the Plaintiff and the
Respondent was the Defendant UPON THE GROUNDS

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New Zealand

that the said Judgment is erroneous in fact and in
law

DATED at Auckland this 7th day of October 1983

No. 9.

B. H. CLARK
Solicitor for the Appellant

Notice of
Motion on
Appeal

TO: The Respondent, SCANCARRIERS A/S, and
its Solicitor, Mr T. J. Broadmore

7 October
1983

AND TO: The Registrar of the Court of Appeal

AND TO: The Registrar of the High Court of New
Zealand at Auckland

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NO. 10

No. 10.

JUDGMENT OF THE COURT DELIVERED BY COOKE J.

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the Court
delivered by
Cooke, J.

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In the High Court action out of which the
appeal arises the plaintiff (Aotearoa) is an
Auckland exporting company owned by Mr Paul Cash
and the defendant (ScanCarriers) is a Norwegian
shipping company with long-standing antecedents in
the cargo trade between European and Australasian
ports. As their ships returning to Europe via the
Suez Canal had not been attracting enough cargo,
ScanCarriers inaugurated in 1982 a variation in
the service. Henceforth the ships would call en
route at Arabian Gulf ports, from which cargo
could be transhipped by an associated shipping
line to other eastern ports. Knowing of
Aotearoa's interest in shipping to India, the
Auckland agents of ScanCarriers, the East Asiatic
Company (New Zealand) Limited, approached Mr Cash
towards the end of 1981. There were negotiations
during which Mr Cash indicated that he
contemplated shipping about 1,000 tonnes of
wastepaper to Bombay, with transshipment at Dubai,
on each of a series of ScanCarriers voyages in
1982. That would represent over one sixth of the
tonnage (6,000) intended to be allocated per
voyage to New Zealand cargo on the roll-on/roll-
off vessels, whose total capacity was about 15,000
tonnes. The main issue in the present appeal is

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whether the negotiations culminated in a contract relating to this series of voyages.

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10 In the event ScanCarriers accepted from Aotearoa some 920 tonnes of wastepaper for carriage on the first voyage, that of the Barranduna, which sailed from Auckland on 26 March 1982. Some of that cargo was left behind by the Barranduna but later shipped on the Tarago on 11 May 1982. ScanCarriers declined, however, to accept any more wastepaper from Aotearoa for carriage on voyages after the first voyage of the Barranduna, namely the voyage of the Tarago already mentioned and those of the Tombarra on 5 June and the Barranduna on 5 July 1982. It is clear that this refusal represented a policy decision by ScanCarriers and that the reason for it was that the freight rate quoted to Mr Cash by the New Zealand office of ScanCarriers in Wellington turned out, in the opinion of their head office in Oslo, to be too low. The rate quoted was US\$120 per tonne. There is a suggestion in evidence of a misunderstanding between Wellington and Oslo, in that Oslo may have intended to authorise that rate for carriage as far as Dubai only, whereas the rate was undoubtedly quoted to Mr Cash for carriage to Bombay. Be that as it may, the main issue in the appeal reduces, in our view and for reasons to be explained later, to whether ScanCarriers were entitled to refuse space to Aotearoa for the reason that the quoted freight rate was too low.

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40 The other issues in the appeal concern some of the cargo received by ScanCarriers for the first voyage of the Barranduna. Among the total cargo received for shipment on that voyage were 550 tonnes of mixed waste. Partly because of problems about packaging, some 261 tonnes were left behind by the Barranduna. A dispute followed but was settled on terms (inter alia) that this remaining paper be shipped on the Tarago. It was so shipped, but in the event as the freight had not been paid ScanCarriers did not discharge it at Dubai but carried it through to Europe and sold it under claim lien rights. Further, as regards the mixed waste in fact carried on the Barranduna and then on to Bombay, Aotearoa had been unable to pay the freight because of initial difficulty in

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obtaining from ScanCarriers bills of lading which could be produced to enable letters of credit to be negotiated. These matters led to claims and counterclaims in the High Court action for damages commenced by Aotearoa in October 1982.

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The action was tried by Wallace J. In a reserved judgment delivered on 17 August 1983 he held substantially in favour of ScanCarriers on all issues. The effect of the judgment was that Aotearoa failed to establish any contract covering the series of voyages and also failed on its claims regarding the mixed waste; whereas ScanCarriers succeeded on their counterclaim for freight, except that the Judge found that they could reasonably and should have sold the Tarago mixed waste for a better price in Holland instead of Gothenburg and that a credit of \$12,000 should be allowed to Aotearoa on that head instead of the \$6,298.83 in fact realised by the sale. In the result the plaintiff's claims were dismissed and the defendant obtained judgment on its counterclaim for freight in the total sum of \$65,978.23.

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Aotearoa gave notice of appeal against the whole of the judgment but at the hearing the appeal was expressly limited to three issues, namely (i) the main issue, as to whether a contract for a period was concluded as a result of the negotiations already mentioned; (ii) whether as regards the mixed waste the settlement of the dispute was vitiated by economic duress; (iii) whether the part of the counterclaim relating to the Tarago freight should fail because the cargo was not carried to Bombay. Regarding issues (ii) and (iii), at times during the hearing the Court was in some doubt as to whether Mr Clark was seeking to argue on some wider basis, but in the end he made it clear that the issues are limited as just stated.

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The Freight Rate Agreement

The main issue can conveniently be dealt with under the above heading, as there is no doubt that a special freight rate was agreed between the parties and much turns on the meaning and import

of that agreement in the surrounding circumstances.

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10 At the outset it is as well to state the fairly elementary point that a contract relating in some way to the carriage of goods by sea (or 'affreightment') need not be made with any formality - and probably often is not in this era of telex communications. Further, the purposes and terms of such contracts may vary a great deal. They do not necessarily fall into neat categories. Although Mr Carruthers accepted in this Court that this is so, as did some of the witnesses at the trial, considerable tracts of the argument and evidence for the defendant were addressed to a classification into what were described as contracts for carriage or of

20 carry or of carriage, on the one hand, and contracts to classification does not correspond to ordinary legal usage, as illustrated for instance by 43 Halsbury's Laws of England, 4th ed., paragraphs 401 and 495. While the labels used do not matter, it is essential not to be diverted by them from ascertaining the true intent and effect of particular arrangements.

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30 Moreover, the evidence called in the High Court is studded with references to such matters as liner terms, cover bookings, firm bookings, the practices of conference lines, contracts with producer boards. Defence witnesses even proffered opinions on questions of law such as when legal obligations arise in the course of various types of shipping transactions. Some of this material is useful as sketching a background of usage against the present parties were negotiating. But it is the legal effect or lack of legal effect of their particular dealings that has to be

40 ascertained. The decision in this case cannot govern the interpretation of different arrangements in different circumstances.

The wording of Wallace J.'s judgment indicates that he was under no misconception about the nature of his task, accepting that it is open to shipowners and shippers to make a contract for a certain period on such terms as they choose. Still, the volume of evidence of dubious relevance

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to which he was subjected and the range of arguments in the whole case may well have made it difficult to keep the essential issue in this part of the case in focus.

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There is little dispute about the primary facts. The negotiations began with an overture by East Asiatic to Mr Cash in late 1981 and continued into 1982. On 29 January 1982 there were two meetings in Auckland. One was between Mr J. A. Robinson (the marketing operations manager for ScanCarriers, who was based in Wellington), and Mr B. K. Freer (of East Asiatic) and Mr Cash. The discussion was mainly about the freight rate for quantities of up to 1,000 tonnes of waste paper; Mr Robinson said in evidence-in-chief for the defendant that he agreed to go away and evaluate whether it was possible to provide Mr Cash with a very cheap rate. He added that when such a rate was quoted later 'We would expect the shipper to use that freight rate, acknowledge he is going to use the freight rate, and try to conclude sales based on that'.

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The second meeting on 29 January 1982 was between Mr Cash, Mr Nigel Wilson (a commission agent with experience of the paper industry and trade with India, who had come on a short visit to New Zealand from England to assist Mr Cash with his Indian project) and Mr D. W. Teskey (then the marketing manager of East Asiatic). At this meeting Mr Cash, according to his own evidence, wanted to make sure that sufficient space was available for about 1,000 tonnes and was told by Mr Teskey that the ships going northbound were only half full. (No doubt this remark was based on the experience of the old route, as the new service had not begun). Mr Wilson gave evidence to the same effect, saying that Mr Teskey told them that there would be no difficulty in carrying their projected monthly tonnage of around 1,000 tonnes. Mr Teskey, who was called for the defendant, accepted in cross-examination that there was discussion about space availability, during the next six months, for the sort of parcels Mr Cash was talking about. Asked whether he assured Mr Cash and 'the Englishman' that space would be available, he replied 'I can't actually remember having done so but again in the context

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of our discussions and in view of the fact that ScanCarriers was obviously looking for cargo, I am quite sure that some sort of assurance of that nature would have been sought and confirmed. But that would be normal practice'. There was also discussion about the freight rate, Mr Cash seeking a lower figure, \$120, than was currently being quoted by ScanCarriers, and it was left that this question would be referred to Wellington.

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10 On 3 February 1982 Mr Robinson, with the authority of Captain Oddvar Andersen (the general manager of ScanCarriers in New Zealand), sent from Wellington to Aotearoa in Auckland the following telex:

20 FLWG OUR DISCUSSION ON FRIDAY 29/1 WE AGREE TO A PROMOTIONAL RATE OF US\$120-00 PLUS ANY CAF AND BAF AND THIS RATE WILL BE HELD UNTIL 29/7/82. THIS RATE IS TO COVER YOUR PAPER WASTE WHICH IS TO BE SHIPPED ON YOUR PALLETS OR SKIDS AND WILL BE LOADED ONTO OUR VESSELS AS UNITISED CARGO. OVERALL PALLET HEIGHT (FROM GROUND TO TOP OF CARGO) NOT TO EXCEED 8.5 FEET.

30 (It is common ground that CAF and BAF refer to certain possible adjustment factors not relevant to any issue in the appeal.)

40 Mr Cash and Mr Wilson testified that they were delighted with this response. It is not in dispute that as a result, although Aotearoa already had some Indian business arranged, Mr Wilson went to India on his way back to England and arranged further sales to Indian merchants on behalf of Aotearoa, and that in March Mr Cash himself went to India for the same purpose. He also made arrangements to buy supplies in New Zealand. In consequence space was booked on the Barranduna about a fortnight before the March voyage and space would have been booked on the three later voyages commencing before the end of July. But Mr Cash was refused space on those voyages. At first he was not told bluntly that this was the policy of ScanCarriers. For instance Auckland would refer him to Wellington and vice versa. References were made to ships being fully booked. There were hints that space might be

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available to Aotearoa at \$150 per tonne but that even this was doubtful.

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By April 1982 Mr Cash had evidently begun to suspect the truth. The precise date on which he first complained of a breach of commitment is not clear; but an internal telex of 23 April from East Asiatic to ScanCarriers in Wellington reported that he felt that the telex of 3 February involved some commitment to offer him shipments to the end of July; the reply by ScanCarriers said that he had 'used this tack with us too'; and a letter to ScanCarriers from his solicitors dated 26 April expressly claimed that there had been a binding agreement on 3 February 1982. The reply, dated 4 May 1982 and signed by Captain Andersen, was to the effect that although it had been agreed that the waste paper would be carried at the promotional freight rate of US\$120 per tonne up to the end of July, such rate would apply only to confirmed bookings, and that indications on the respective sides as to the availability of space or cargo were not binding. The letter went on to claim that because of pressure on space ScanCarriers had been unable to confirm bookings made by Aotearoa subsequent to the initial Barranduna booking.

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Captain Andersen and Mr Kaare Moen, Deputy Managing Director of ScanCarriers and resident in Norway, both gave evidence. From their evidence and documentary material it is plain that Oslo was displeased with the freight rate agreed by Wellington; that the Arabian Gulf service proved to be well supported; and that better paying cargo than the plaintiff's waste paper was available. As early as 26 March and 1 April 1982 internal telexes from Oslo to Wellington gave instructions that ScanCarriers must be more selective in this trade and were not prepared to accept any further waste paper bookings at this stage. Mr Moen gave extensive evidence of his company's policy to select cargo according to its contribution to the financial return from the voyage, while having regard also to other factors such as the stability of the ship. In fairness to him it should be mentioned that in cross-examination he said that he had not seen the telex of 3 February 1982 until after the litigation had

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commenced. To the question whether it was usual for his company to ask for a higher freight rate during a period when it had agreed to a specific rate, he replied that they were not asking for increased rates 'but it might happen that a shipper in order to lift his commodity a bit on the priority list would pay a higher rate'.

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10 In its statement of claim the plaintiff pleaded as follows:

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2. ON or about the 29th January 1982 the Plaintiff and Defendant agreed to a special base rate of \$US 120 per tonne to cover the freight charge on waste paper to be shipped from New Zealand to India until the 29th July 1982.

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20 3. THE agreement referred to in the preceding paragraph was partly oral and partly in writing. The Plaintiff will refer to the Defendant's Telex advice to it dated 3 February 1982 and to matters agreed orally between P.A.D. Cash on behalf of the Plaintiff and D. Teskey and J. Robinson on behalf of the Defendant, more especially in and about the month of January 1982 at the offices of the Defendant's Auckland agent, the East Asiatic Company (New Zealand) Limited, Princes Street, Auckland, and at the Plaintiff's own offices
30 at Fox Street, Auckland. The Defendant's said servants or agents represented and/or warranted the availability of space on a monthly basis to fulfil the probable requirements of the Plaintiff to ship not less than 1,000 tonnes on every sailing during the period up to and including July 1982.

40 The statement of claim then pleaded that the plaintiff arranged sales and purchases in reliance on those arrangements.

Wallace J. found against the partly written and partly oral contract so alleged by the plaintiff, but as he said 'without any approbation of the defendant's actions'. He said that it appeared that the defendant was not prepared to ship the plaintiff's cargo (except the short-shipped paper) on the three sailings after the Barranduna and that the primary reason was that

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the defendant was able to obtain other better paying cargo. But he rejected the contract as pleaded because, viewed against the whole factual background, he regarded Mr Teskey's assurance as no more than an indication.

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Wallace J. did not consider that a reasonable person experienced in shipping would have thought that Mr Teskey, or Mr Teskey and Mr Robinson by the telex, had committed the defendant to hold available such a large tonnage for one shipper who had no obligation to ship or pay dead freight if cargo did not eventuate. This was a reference to acceptance by Mr Cash in cross-examination that he could vary the tonnages below 1,000 tonnes to suit himself and could even ship with someone else if he wanted to. The Judge also said that he did not consider that Mr Cash at the time believed either that Mr Teskey was contractually committing the defendant to 1,000 tonnes per vessel or that he had secured in some other way a firm contract to carry that amount. The foregoing is only a summary of the Judge's reasons, but it covers the main points.

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There is no doubt that the defendant was keenly soliciting business for its re-routed service. In the light of that factor and the virtual concurrence of the evidence of Mr Cash and Mr Wilson and Mr Teskey as to the substance of what was said at their meeting on 29 January, it would have been open to the trial Judge to find that Mr Teskey did give an oral warranty as pleaded. But he did not so find, and on appeal we are not prepared to go as far as to hold that he was bound to do so. Allowance has to be made for any advantage he may have had in seeing and hearing the witnesses, and he would be slow to disturb his view on a question so closely linked with his impressions of the witnesses and of the primary facts.

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That, however, is not an end of the matter. It was accepted for the respondent during the argument of the appeal that, at least in his opening in the High Court, counsel for the plaintiff had put forward a contention to the effect that even if an express contract as alleged by the plaintiff in the statement of claim was not

made out to the full, what was expressly agreed would carry an implied term. Mr Clark's recollection was that he repeated the submission in his closing address. If so, it is obvious that, the express warranty argument naturally being in the forefront, he did not give the implied term argument major emphasis. Certainly it is not mentioned by the Judge; and in the welter of evidence and submissions with which he had to deal this is not surprising. At all events it was fully argued in this Court on both sides, and counsel for the respondent rightly accepted that it was open to the appellant.

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In the memorandum of grounds of appeal the contention was put as follows, with reference to shipping space from February to July 1982:

III. Alternatively, the learned Judge was wrong in failing to imply against the Respondent a contractual term requiring it to provide such space or at least not to arbitrarily deny space.

In view of the history of the case, during the argument we asked counsel for the appellant to formulate in writing the precise terms of the contract for which he contended - using alternatives if he so wished. What was then put in included a rather more elaborate version of III, worded as follows:

By agreement, partly oral and partly in writing, it was agreed between the parties that any paper waste shipped by the Plaintiff as unitised cargo etc from New Zealand to India during the period until 29 July 1982, would be carried by the defendant at a special base freight of US\$120 per tonne and it was implied in such agreement against the defendant that it would receive and carry (or not arbitrarily refuse to receive and carry) such cargo up to the level of approximately 1,000 tonnes during such period on each sailing of its vessels from New Zealand and that both parties would do all that was necessary by way of reasonable notice and co-operation to promote the carrying into effect of their agreement.

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In considering this approach, in either its simple form or the more elaborate form, the starting point is that there was certainly what appeared to be a promotional freight agreement for a definite period. It is naturally described as a freight rate agreement and was so described in the prepared submissions for the respondent in this Court. For instance it was there said 'Respondent's case was and is that the only agreement between appellant and respondent was essentially a freight rate agreement'. And it proved difficult in counsel's presentation of the argument for the respondent to avoid that description.

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Similarly in the evidence led for the defendant at the trial, Mr E. J. Hobbs, a shipping and marketing consultant called as an expert witness, was asked: 'Once the freight rate has been struck by one of the methods you told us about, in practical terms what is the significance of the freight rate?' He answered: 'That freight rate is then binding on the shipper and the shipping company under the terms in which it is quoted'. And Mr Moen himself said in cross-examination: 'These rates which is mentioned in document 39 (the telex of 3 February 1982) is a rate agreed by ScanCarriers. And we stand by the obligations which we have undertaken'.

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Yet, if the argument submitted for the defendant and upheld by the Judge is right, it is illusory to speak of a freight rate agreement; for nothing binding had been agreed. According to that view, unless and until a contract for a particular consignment of cargo on a particular ship was concluded there was no contract of any kind. The company remained free not to honour the rate agreement. Mr Carruthers put it that until a particular consignment was accepted on the wharf for carriage on terms including that rate there was no contract. He preferred to analyse the 'freight rate agreement' as merely an offer to treat. Alternatively he saw it as an offer which the shipping company was free to withdraw at any stage until, by some form of acceptance in relation to a specific consignment, it became incorporated in a contract. These analyses have

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to be judged against the background that, as Wallace J. found in his judgment, after the telex of 3 February 1982 both Mr Teskey and Mr Robinson 'expected the plaintiff to seek orders for supply of waste paper to India, thereby no doubt expending effort and money in obtaining the orders which the Plaintiff was likely to ship with the Defendant'.

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There is a disarming frankness in the defence evidence of single-minded pursuit of economic self-interest, but in our opinion the law would fail to give effect to legitimate commercial expectations if it were held that this freight rate agreement had no binding effect whatever. To give business efficacy to the telex in its context an implied term appears essential. There is no call to review yet again the principles and authorities about implied terms in cases where the suggested term involves more than a filling-out or elucidation of the meaning of the actual words used by the parties. What has to be kept steadfastly in mind in the field of implied terms not derived from the actual language of the parties is that it is not enough that the suggested term is reasonable. An implication must be truly necessary and the term formulated must go no further than the reasonable dictates of necessity. These tests are passed in the present case if the obvious inference is drawn that it was impliedly agreed that, during the period for which promotional rate was expressly agreed to be held, the shipping company would not arbitrarily refuse the customer space at that rate.

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We adopt the formulation of the implied term. It would make no practical difference if, by analogy with Devonport Borough Council v. Robbins [1979] 1 N.Z.L.R. 1, the implication were expressed to be that there would be reasonable co-operation between the parties in implementing their freight rate agreement. For instance, if Aotearoa failed to take reasonable advantage of the concession rate - as by substantially by-passing ScanCarriers in favour of competing shipping lines, or neglecting to make a timely booking for a particular voyage, or even making no attempt to build up Indian business - ScanCarriers would not be arbitrary in declining space. And

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for a variety of other causes not of their own making ScanCarriers might be unable to offer space for carrying waste paper to the Gulf or on to India on a particular voyage. These cannot be exhaustively listed, but typical examples would be industrial disputes or the international situation. It is even conceivable that the new service might receive so little general support that it would have to be abandoned.

This limited implied term against arbitrary refusal imposes no unduly burdensome restrictions on the shipping company's freedom to manage its own business. It is far from tantamount to an absolute warranty or an unqualified commitment to carry 1,000 tonnes of wastepaper or thereabouts on each of the four voyages. So it is consistent with the Judge's view that Mr Cash did not believe at the time that he had a firm contract for such carriage. On the other hand it is equally consistent with the evidence suggesting that Mr Cash did believe that at least some commitment had been made to him - evidence not specifically mentioned in the judgment under appeal, but provided by the defendant's own internal documents. A layman would readily sense a commitment but might have difficulty in defining it precisely. Articulation of the implied term is the responsibility of lawyers.

As a subsidiary argument Mr Carruthers submitted that there was no consideration. Wallace J. inclined to the view that consideration was to be found in detriment to the plaintiff, in the expenditure of effort and money in obtaining orders for shipment to India, as expected by the defendant. On this point we agree with the Judge. These actions by the plaintiff were the very kind of steps that the promotional rate was intended to induce. The defendant soon had notice that some of them had been performed, knowing of this at least by the time of the initial Barranduna booking and probably earlier. It is immaterial whether, in legal analysis, the contract for the period until the end of July came into existence because the telex amounted to acceptance of an implicit offer by the plaintiff to use reasonable endeavours to find cargo or because the telex amounted to an offer accepted by

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the plaintiff's subsequent conduct. In the light of the course of these particular negotiations, however, we think that the first alternative is the preferable one.

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10 On the evidence, refusal of space to the plaintiff on the three voyages after the first Barranduna voyage (except as to the short-shipped paper) was, as the trial Judge said, for the primary reason that the defendant was able to obtain other better paying cargo. This can only be seen, in our opinion, as subversive of the agreement of the parties and arbitrary. It follows that the defendant was in breach of contract. Wallace J. recorded that he had no doubt that, if the plaintiff had been able to ship the paper for which it had obtained orders, it would have realised a reasonable profit thereon, though not as great a profit as alleged in the statement of claim. In this Court it was common ground that in the event of a decision that there was breach of contract the case should be remitted to the High Court for the assessment of damages. Failing a settlement between the parties (to be encouraged after this quite lengthy litigation) it is to be hoped that Wallace J. will be available. If not, arrangements will have to be made for another Judge to deal with the issue.

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30 Before leaving this part of the case it may be mentioned that at the hearing of the appeal we refused the appellant leave to introduce a cause of action in tort for alleged negligent misrepresentations, as it would have been an entirely new basis of claim, involving allegations which the defendant's witnesses had not been called upon to answer. We also indicated, and counsel agreed, that the Contractual Remedies Act 1979, s.6, does not affect the outcome of the case. If there was a contract, as we hold there was, the plaintiff does not need to rely on s.6. If there was no contract, s.6 cannot apply.

Alleged Economic Duress

40 This issue can be disposed of shortly. As regards the mixed waste carried on the Barranduna and that which was left behind but ultimately shipped on the Tarago, there were negotiations

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between Aotearoa, ScanCarriers, East Asiatic and Aotearoa's bank (the Commercial Bank of Australia Limited) as a result of which a draft form of agreement, annexed to a letter dated 8 April 1982, came into existence. It included a mutual release of claims between the plaintiff and the defendant. Wallace J. found that a settlement had been reached between the plaintiff and the defendant on the terms set out in the draft agreement. On appeal the plaintiff accepts that finding but contends, as in the High Court, that the contract of settlement should be set aside for economic duress. The duress alleged is that, knowing that the plaintiff was suffering severe liquidity problems, the defendant refused to issue to the plaintiff any shipping documentation at all - even bills of lading marked freight collect or unpaid - for the mixed waste in fact shipped on the Barranduna, unless the plaintiff agreed to waive all claims against the defendant regarding the mixed waste.

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In Moyes & Groves Ltd v. Radiation N.Z. Ltd [1982] 1 N.Z.L.R. 368 this Court recognised that in New Zealand law economic duress can be a ground for setting aside a contract, but stressed that this is something not to be found lightly. In the present case the defendant's normal form of bill of lading contemplated payment of freight on receipt of the goods by the carrier. Moreover there was evidence that it is not the defendant's policy to issue bills of lading on a freight-collect footing in the trade to the Arabian Gulf or India. Both the plaintiff and the defendant had legal advice before entering into the settlement. The situation was a confused one; probably neither side was completely confident about the legal position. Wallace J. declined to find that the defendant's attitude amounted to blackmail or improper pressure. He thought that the plaintiff was willing to negotiate with the defendant and that the arrangements were reasonably acceptable to the plaintiff.

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We are not prepared to disturb Wallace J.'s conclusion on this issue. Like the Moyes & Groves case, the present is an instance of a prudent and sensible compromise in good faith, with which

there is insufficient ground for the Courts to interfere.

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The Tarago Freight

10 In the end this is also a short issue. It is common ground that, although apparently bills of lading were not in fact issued to the plaintiff, the remaining waste paper eventually shipped on the Tarago was subject to the terms of the defendant's normal bill of lading. The relevant provisions in the bills are:

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11. Freight and Charges

(1) Freight shall be deemed fully earned on receipt of the Goods by the Carrier and shall be paid and non-returnable in any event.

...

20 12. Lien

The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable to the Carrier under this contract ... and for that purpose shall have the right to sell the Goods by public auction or private treaty without notice to the Merchant.

30 On 9 June 1982, the day before the vessel was due at Dubai, ScanCarriers gave notice by telex to Aotearoa that unless the outstanding freight was received by 10 June they might have no option but to try to sell the paper. There was no response. As Mr Moen explained in evidence, ScanCarriers were apprehensive of incurring the costs of storage in Dubai or of carriage to and storage in Bombay, so it was decided to take the paper on to Europe and sell it there.

40 At common law freight is not earned unless and until the goods are carried to and made available for delivery at the port of discharge, and the shipowner's lien is a right to retain possession of the goods until payment; but there is nothing to prevent the alteration of these rights by agreement: see Kirchner v. Venus (1859) 12 Moo.P.C. 361; McLean & Hope v. Fleming (1871) L.R. 2 Sc. & Div. 128; Ex parte Nyholm (1873) 29 L.T. 634; Kish v. Taylor [1913] A.C. 614.

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Wallace J. held that the clauses incorporated in the present case entitled the defendant to act as it did and that the defendant had acted reasonably in deciding not to unload the goods at Dubai. We entirely agree with the Judge on these points, which require no elaboration and dispose of the contention that the defendant would have had no contractual right to sell the goods except after carrying them as far as Bombay.

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In the result we dismiss the appeal on the second and third issues but allow it on the first; so that the defendant will hold its judgment on the counterclaim but the judgment for the defendant on the first issue will be vacated and that issue will be remitted to the High Court for determination of the damages recoverable by the plaintiff. Leave is reserved to the parties to apply by memorandum to this Court for further directions in the event of Wallace J. not being available to deal with the remitted issue. For costs in this Court the appellant will have \$1,500 together with disbursements, including the reasonable travelling and accommodation expenses of counsel, to be settled by the Registrar. Costs in the High Court will be settled by that Court.

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Solicitors:

Earl Kent & Co., Auckland, for Appellant
Chapman Tripp, Wellington, for Respondent

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No. 11

No. 11

Formal Judgment
of Court of
Appeal

FORMAL JUDGMENT OF THE COURT OF APPEAL

28 September
1984

THIS APPEAL coming on for hearing on 27, 28, 29 and 30 August 1984 AND UPON HEARING Mr Clark of counsel on behalf of the appellant and Mr Carruthers and Mr Broadmore of counsel on behalf of the respondent, THIS COURT HEREBY ORDERS in relation to the appeal brought by the appellant against the judgment of the High Court of New Zealand delivered by the Honourable Mr Justice Wallace at Auckland on 17 August 1983 that -

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1. on that part of the appeal relating to the claim by the appellant, the appeal is allowed and the case is remitted to the High Court for determination of the damages recoverable by the appellant. Leave is reserved to the parties to apply by memorandum to this Court for further directions in the event that the Honourable Mr Justice Wallace is not available to deal with the case as remitted;
2. on that part of the appeal relating to the counterclaim by the respondent, the appeal is dismissed;
3. the respondent pay to the appellant the sum of \$1,500 and disbursements (including the reasonable travelling and accommodation expenses of counsel) to be fixed by the Registrar for its costs of and incidental to this appeal;
4. costs in the High Court are to be fixed by that Court.

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Formal judgment of Court of Appeal

28 September 1984

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BY THE COURT

"G.A. Thatcher"

"Deputy" Registrar

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No. 12

No. 12

Order granting Final Leave to Appeal

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ORDER GRANTING FINAL LEAVE TO APPEAL
TO HER MAJESTY IN COUNCIL

4 February 1985

UPON READING the notice of motion of the respondent dated 30 January 1985 the affidavit of Thomas John Broadmore and the memorandum dated 31 January 1985 on behalf of the appellant filed herein AND UPON HEARING Mr Carruthers of counsel on behalf of the respondent there being no

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appearance of the appellant THIS COURT HEREBY
ORDERS by consent that final leave be granted to
the respondent to appeal to Her Majesty in Council
from the Judgment of this Honourable Court
delivered on 28 September 1984.

No. 12

BY THE COURT

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"Gordon Thatcher

"Acting" Registrar

No. 13

No. 13

Order granting
Final Leave to
Cross-Appeal

ORDER GRANTING FINAL LEAVE TO CROSS-APPEAL TO
HER MAJESTY IN COUNCIL

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4 February 1985

UPON READING the Notice of Motion of the
Appellant dated 31st January 1985 filed herein
AND UPON HEARING Mr Carruthers of Counsel on
behalf of the Respondent THIS COURT HEREBY
ORDERS by consent that final leave be granted to
the Appellant to cross-appeal to Her Majesty in
Council from those parts of the Judgment of this
Honourable Court delivered on the 28th September
1984 which dismissed certain parts of the appeal
against the judgment of the High Court, namely the
second issue relating to economic duress and the
third issue relating to "Tarago" freight and which
sustained the decision of the High Court on the
Defendant's counterclaim.

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BY THE COURT

"Gordon Thatcher"

"Acting" Registrar

No. 14

CERTIFICATE OF REGISTRAR OF COURT OF APPEAL

In the Court of
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No. 14

Certificate of
Registrar of
Court of Appeal

15 February
1985

I, GORDON ALLAN THATCHER, Acting Registrar of
the Court of Appeal of New Zealand
DO HEREBY CERTIFY that the foregoing 443 pages of
printed matter contain true and correct copies of
all the proceedings, evidence, judgments, decrees
and orders had or made in the above matter, so far
as the same have relation to the matters of
appeal, and also correct copies of the reasons
given by the Judges of the Court of Appeal of
New Zealand in delivering judgment therein, such
reasons having been given in writing:

AND I DO FURTHER CERTIFY that the appellant has
taken all the necessary steps for the purpose of
procuring the preparation of the record, and the
despatch thereof to England, and has done all
other acts, matters and things entitling the same
appellant to prosecute this Appeal.

As witness my hand and Seal of the Court of Appeal
of New Zealand this 15th day of February 1985.

G A Thatcher
ACTING REGISTRAR