*Privy Council Appeal No. 9 of 1985*

**Scancarriers A/S** *Appellants*

*v.*

**Aotearoa International Limited** *Respondents*

FROM

# THE COURT OF APPEAL OF NEW ZEALAND

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## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JULY 1985

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*Present at the Hearing:*

LORD KEITH OF KINKEL
LORD ROSKILL
LORD BRIGHTMAN
SIR JOHN MEGAW
SIR OWEN WOODHOUSE

*[Delivered by **Lord Roskill**]*

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This appeal arises out of a dispute between the appellants and the respondents as to the legal effect of the results of two meetings in Auckland on 29th January 1982 and of a telex sent by the appellants' marketing manager in New Zealand to the respondents on 3rd February 1982. The appellants are a Scandinavian liner company which has for many years been engaged in the European/Australasian trade. They are members of the New Zealand European Shipping Conference. The respondents at the material time carried on business in Auckland as exporters of waste paper. Their principal shareholder was a Mr. Cash. Mr. Cash was aware of a potential market for waste paper in India. But he was faced with problems of arranging the necessary transport from New Zealand to India at economic rates of freight.

The appellants' vessels sailing northbound to Europe had surplus capacity. It was suggested that the respective needs of the appellants and potential shippers including the respondents might be met by introducing a new service to Dubai, the servicing of which would only involve a short deviation from the normal route to Europe through the Suez Canal. Any necessary on-carriage thence to India or elsewhere on the Indian Continent would be provided by transhipment from Dubai.

At the first of the two meetings on Jan. 29, 1982, the discussion revolved round the appellants' surplus capacity and the likely tonnage of waste paper which the respondents would wish to ship. There were references to a figure of about 1000 tonnes per vessel. At the second of the two meetings, freight rates and packaging of waste paper were both under discussion.

On Feb. 3, 1982, the telex already referred to was sent. Since the principal dispute revolves around this single document which falls to be considered in the light of what had happened at the two meetings on Jan. 29 their Lordships set out its text in full:—

> Flwg our discussion on Friday 29/1 we agree to a promotional rate of US$120 . . . 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 question arising on the appeal is whether that telex properly construed against the background of the discussions gave rise to any binding legal obligations on the part of the appellants towards the respondents. The respondents who were the plaintiffs in the action before Mr. Justice Wallace asserted that it did. The appellants, the defendants in that action, asserted that it did not. Mr. Justice Wallace, in a long and careful judgment dated Aug. 17, 1983, accepted the appellants' submissions and dismissed the respondents' claim for damages. The Court of Appeal (Messrs. Justices Cooke, McMullin and Somers), in an equally careful judgment delivered by Mr. Justice Cooke which closely analysed the telex and the background to it, reached a contrary conclusion. The Court of Appeal held that the appellants had thereby assumed binding legal obligations to the respondents that they were in breach of those obligations and were thus liable to pay damages for that breach. Their Lordships were told that such damages had subsequently been assessed by Mr. Justice Wallace before this appeal was heard. It is against this decision of the Court of Appeal reversing that part of the judgment of Mr. Justice Wallace that the appeal is brought.

The appellants, as defendants in the action, also made a counterclaim against the respondents. This counterclaim succeeded before Mr. Justice Wallace and the respondents' appeal against that part of Ms judgment was dismissed by the Court of Appeal for the same reasons as those which the learned Judge had given. The respondents now cross-appeal against that part of the order of the Court of Appeal.

Their Lordships should mention that though other questions were raised both before Wallace J. and in the Court of Appeal the only questions raised in argument before their Lordships were first, whether the Court of Appeal had been correct in holding that the appellants were liable in damages to the respondents and secondly, whether the Court of Appeal was also correct in dismissing the respondents' appeal in relation to the appellants' counterclaim.

Though the history both of the negotiations and of the origins of the dispute is set out in both the judgments below, the narratives of which their Lordships gratefully accept and adopt, their Lordships must briefly repeat certain facts which are essential to the understanding of the rival submissions.

In March 1982 the respondents presented some 919 tonnes of waste paper for shipment on the appellants' vessel Barranduna. Of this quantity, for reasons presently irrelevant, some 271 tonnes were short-shipped. The short-shipped cargo, less about 9 tonnes, was in due course shipped on the appellants' next vessel, Tarago. The respondents paid neither the freight for some 250 tonnes of mixed waste shipped on Barranduna nor for the short-shipped cargo finally shipped on Tarago. The appellants then exercised their lien and power of sale under clause 12 of the bill of lading, carried that short-shipped cargo to Europe and eventually sold it in Gothenburg. The appellants thereafter refused all further bookings during the remainder of the period ending with 29th July 1982, this being the final date referred to in the telex.

Against this background their Lordships turn to consider the principal issue. The case for the respondents is remarkable by reason of the variety of ways in which their Lordships have been invited on their behalf to interpret the telex. Notwithstanding the basis upon which the Court of Appeal decided this issue in the respondents' favour, to which their Lordships will refer in more detail shortly, counsel for the respondents adopted the view of the case taken by the Court of Appeal only as an alternative submission. As his primary submission he urged that the telex ought not to be construed as creating a binding legal obligation on the appellants, but as an offer by the appellants capable of acceptance by conduct by the respondents in due course and in fact so accepted by the respondents by conduct as in particular by their thereafter doing what was expected of them by the appellants, namely procuring cargo and delivering that cargo to the appellants for carriage to India. Their Lordships note in passing that this submission involves the assumption by the respondents of binding legal obligations towards the

appellants for any breach of which the appellants could have sued the respondents. An alternative version of the same legal analysis of the telex was that it gave rise to an offer by the appellants to keep space available for the respondents, that offer to be accepted by the first tender of cargo made by the respondents for carriage-on the appellants' first vessel, the appellants thereafter remaining bound to have shipping space available for the whole of the remainder of the period until 29th July 1982.

The view which appealed to the Court of Appeal was however different. Their view of the suggested contractual relationship seemingly had not been included in the forefront of the argument before Wallace J. It was based upon implying into the telex terms which certainly were not expressed in that document. The only express terms in the telex related to period, freight rate and manner of stowage. The telex contains no references to any quantity of cargo. It contains no references to any number of shipments nor to dates of any suggested shipments before 29th July 1982, nor does it refer to intervals between any such shipments. Following this approach the Court of Appeal felt able, by adding implied terms to the few express terms already mentioned, to create a contractual relationship which certainly the parties had not expressed for themselves. Their Lordships sympathise with a wish not to allow parties who have made a firm but uneconomic bargain too readily to escape from its bonds when it subsequently proves financially disadvantageous. But the first question must always be whether any legally binding contract has been made, for until that issue is decided a court cannot properly decide what extra terms, if any, must be implied into what is *ex hypothesi* a legally binding bargain, as being both necessary and reasonable to make that legally binding bargain work. It is not correct in principle, in order to determine whether there is a legally binding bargain, to add to those terms which alone the parties have expressed, further implied terms upon which they have not expressly agreed and then by adding the express terms and the implied terms together thereby create what would not otherwise be a legally binding bargain.

Further the implication of a term "not arbitrarily to refuse to receive and carry cargo" as formulated by counsel for the respondents in the Court of Appeal, appears to their Lordships, with profound respect, to raise more problems than it solves for what is "arbitrary" in the eyes of one party may well be a matter of ordinary business prudence in the eyes of the other.

As regards the alternative submission advanced by counsel for the respondents that the telex was an

offer open for subsequent acceptance, their Lordships find it quite impossible, as no doubt did the Court of Appeal, to put this construction upon the telex. To suggest that following the receipt of the telex the respondents came under any contractual obligations to the appellants is to read into the telex provisions which are not to be found in its language.

Indeed the very difficulty which the respondents found in formulating an analysis of the telex which gave contractual efficacy to it (including let it be added any consideration moving from the respondents to support any promise made by the appellants) suggests to their Lordships that no contractual relationship was in truth ever intended to be created when the telex was transmitted to the respondents.

In their Lordships' view and in most respectful disagreement with the Court of Appeal but in agreement with Wallace J., this telex was no more than a quotation of a freight rate which was to prevail down to 29th July 1982 as the rate which the appellants would charge for any cargo of waste paper which might subsequently be sold by the respondents and be accepted by the appellants for shipment from New Zealand to India. Put colloquially the telex was "a quote" and no more.

It follows that the appellants' appeal should be allowed and the judgment of Wallace J. in favour of the appellants in respect of the respondents' claim for damages against the appellants restored.

Their Lordships can deal more briefly with the respondents' cross-appeal for they respectfully agree with the views of both courts below that it fails. Indeed it was foredoomed to failure. Their Lordships do not find it necessary to set out the provisions of clauses 11 and 12 of the bill of lading in full. Freight was earned on the receipt of the goods. The goods did not even have to have been shipped on board the vessel before the freight was earned. The goods were in fact received. Freight was then and there earned in accordance with the contractual terms. Clause 11 is too clear to permit of argument. So is clause 12, which deals with lien and power of sale. It was sought to argue that because the contractual voyage was not performed the right to exercise the lien and the power of sale given by this clause never arose since it was suggested that those rights and that power only arose at destination on completion of the contract voyage. Here again, with respect, the language of clause 12 is also too clear to permit of argument. At one moment, though the point was never pleaded or argued below, it was faintly suggested that these two clauses offended against the Hague Rules. This argument was rightly not pursued since it

could not possibly succeed, even had the point been open.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be allowed and , as already stated, the judgment of Wallace J. in favour of the appellants in regard to the respondents' claim restored. Their Lordships will further humbly advise Her Majesty that the respondents' cross-appeal must be dismissed. The respondents must pay all the costs of the appellants in respect both of the claim and counterclaim in both courts below and before this Board.