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# AMERICAN MARITIME CASES

NOVEMBER 2005 — No. 10 2705-3000



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**VASTFAME CAMERA LIMITED**

*v.*

**BIRKART GLOBISTICS LIMITED, *ET AL.***

Hong Kong, Court of First Instance, High Court, October 5, 2005
HCCL 63/2002

Before: Stone, J in Court

**AGENTS AND BROKERS — 13. Freight Forwarding Broker or Agent — BILLS OF LADING — 112. Parties to B/L — 1125. Carrier — 133. Signature of Charterer and Cargo Contractor — 176. Delivery without Requiring B/L — 19. Defenses, Exceptions and Burden of Proof.**

Where Hong Kong freight forwarder signed its multi-purpose form as a negotiable B/L without qualification on the face and the B/L was to be surrendered for delivery of cargo, the forwarder became the carrier, notwithstanding small print clauses on the reverse side of the B/L form stating that it did not act as a common carrier and principally acted as agent to arrange transportation. Thus, Hong Kong court finds forwarder is liable to shipper where its agent at destination delivered the cargo without surrender of the B/L, and it cannot take advantage of exonerating and limiting terms of the B/L which benefit some ''Agent'' that is not defined in the B/L.

David Stokes (Messrs. William K.W. Leung & Co.) *for Vastfame Camera*
Colin Wright (Messrs. Dibb Lupton Alsop) *for Birkart Globistics*

WILLIAM STONE, J.:

*The case*

1. This is a claim for misdelivered goods.

2. The plaintiff, Vastfame Camera Ltd ('Vastfame') is a Hong Kong company which makes, and exports, novelty cameras. The cameras with which this case is involved are fixed film units done up with the cartoon character 'Shrek' insignia.

3. The defendant, Birkart Globistics Ltd ('Birkart'), another Hong Kong company, is a freight forwarder which Vastfame used to effect carriage of 55,000 'Shrek' fixed film cameras from Hong Kong to Le Havre, France.

4. These cameras were the subject of two contracts for sale and purchase on FOB terms between Vastfame and a French buyer, H.P.I France ('HPI'). The payment terms under the contracts were ''LC at sight''.

5. On 10 August 2001 Vastfame issued its commercial invoice to HPI for the sum of US$143,815, with the remark ''Please T/T USD 143,815 immediately''.

6. On 17 August 2001 these cameras were shipped in a container aboard a vessel operated by Mitsui OSK Lines (Asia) Ltd, the *Hyundai Federal.*

7. In terms of the documentation regarding this shipment Mitsui issued to Birkart (who was named thereon as 'Shipper' ''O/B Vastfame Camera Ltd'') a Non-negotiable Way Bill, and in turn Birkart issued to Vastfame a 'To Order' bill of lading, number HKHKG61LEH18479, in which Vastfame was named as 'Shipper' and HPI France as 'Notify Party'.

8. After arrival of the container at Le Havre on or about 5 September 2001, on 10 September 2001 this consignment of cameras was released to the buyer, HPI, *without* production of the bill of lading, by a French company, Moiroud S.A. ('Moiroud'), an entity with which Birkart had entered into a 'Co-Operation Agreement' dated 23 May 2005.

9. This Agreement set out, *inter alia*, the agreement between the partners thereunder to ''50:50 profit/loss sharing for all shipments port to port'', and which further provided that the partners thereunder accepted full responsibility ''for delivery of goods against surrender of required shipping documents and collection of freight and disbursements.''

10. There is no dispute that Moiroud acted as it did in releasing the goods to HPI absent production of the bill of lading: an email from Moiroud to Birkart dated 7 November 2001 refers to this incident as ''an unintentional mistake'' and that ''unfortunately [it] was an isolated case of an oversight on Christelle's part'', the latter being a Moiroud employee at the relevant time.

11. HPI, the putative buyer, has refused to pay the purchase price of the goods thus obtained from Moiroud.

12. Accordingly, Vastfame has sued Birkart under what it has alleged to be a contract of carriage entered into between itself and Birkart.

13. The present claim is for the principal amount of US$143,815, representing the invoice value of the cameras under the Vastfame/HPI sale and purchase contract, together with interest and costs.

14. Although named in the writ of summons, dated 9 September 2002, neither the 2nd defendant, Moiroud, nor the 3rd defendant, Aries World Maritime S.A., the owner of the *Hyundai Federal*, nor the 4th defendant, HPI, have been served out of the jurisdiction, and thus have not appeared to contest the present claim.

15. However, Moiroud, the French company which, on or about 10 September 2001, released the goods in question to HPI without production of the bill of lading, was joined by Birkart in Third Party proceedings pursuant to a Third Party Notice dated 16 May 2003, proceedings which duly were served upon Moiroud in France.

16. After taking a full part in interlocutory proceedings throughout this case (including the hearing in which the date for this trial was fixed), by letter dated 4 August 2005 Moiroud applied, through its then solicitors, Messrs Crump & Co., to adjourn this trial, an application which was refused by this court after an urgent *inter partes* directions hearing convened by the court on 8 August 2005.

17. On 12 August 2005 Messrs Crump & Co., solicitors for Moiroud, applied to come off the record: this was granted by Order of Chung J dated 16 August 2005.

18. Accordingly, the shape of the case as it now has taken place is that Vastfame and Birkart, plaintiff and defendant respectively, have been represented through counsel, and there has been no representation on behalf of Moiroud in the third party proceedings constituted between itself and Birkart, proceedings which have been tried at the same time as the head action.

*The evidence*

19. There are no primary disputes of fact in this case. Indeed, this trial virtually could have taken the form of legal submission upon the basis of agreed facts.

20. Be that as it may. Two witnesses of fact were called to give short *viva voce* evidence, one upon each side of the fence.

21. These were Ms Shirley Lam Yau Wah, Sales Manager of Vastfame, who gave two witness statements dated 31 January 2004 and 29 July 2005, and Ms Au Yuen Pik, Assistant Manager of the Operations Department of Birkart, who gave two witness statements dated 12 February 2004 and 30 June 2005 respectively.

22. Neither of these ladies was subject to extensive cross-examination, not least because that which factually transpired in this case is plain, the real scope for dispute between plaintiff and defendant lying in the legal characterization of those events which undoubtedly occurred.

*The issues*

23. Against this undisputed background, two main issues have arisen at this trial of the head action between Vastfame and Birkart.

*(1) The nature of the contractual relationship*

24. Vastfame's claim against Birkart is put forward on the basis that the release of the goods without production of the bill of lading was a

breach by Birkart of the contract of carriage evidenced by the bill. The claim also is pleaded in conversion and bailment.

25. Birkart's first pleaded line of defence is that it ''did not undertake to carry the goods as contractual carriers''.

26. Particulars given by Birkart on 2 October 2003 identify Clause 10 of the reverse side terms of the bill as the provision relied upon, and in particular the following:

> Notice is hereby given that the Company is a private ''freight forwarder'' and/or ''forward agent.'' All transactions and contracts which are entered into with the Company incorporate the company's printed terms and conditions herewith contained and the Company does not accept any liability of a common carrier.

In terms of the Conditions therein referred to, Birkart here emphasise Conditions 3(i) and 3(ii):

> (i) The Agent is not a carrier (common or private, actual or contracting), and may on its sole and absolute discretion refuse to other (sic) its service to any person. The Agent does not contract hereunder for the carriage of goods.
>
> (ii) The Agent is a forwarding agent whose principal business is to act as an agent in arranging for the transportation of goods on behalf of Customers from Hong Kong to overseas destinations principally by means of air and sea transportation.

27. The clauses thus relied upon are at variance with the front of this bill of lading.

28. This document, No HKHKG61LEH18479, is a Birkart Globistics document, and bears Birkart's former name, 'Birkart-East West Freight Ltd.' described as 'International Forwarders Hong Kong'.

29. It is intituled 'Through-Bill of Lading'. The Shipper is named as 'Vastfame Camera Ltd', the Consignee as 'To Order', and the Notify Party 'HPI France'.

30. The Ocean Vessel is named as the *Hyundai Federal*, the Port of Loading Hong Kong, the Port of Discharge Le Havre, the Place of Destination Le Havre, the Freight Terms FOB, and the No of Originals Issued is stipulated as '3/Three'.

31. The body of the bill describes the goods as '688 cartons 35 mm Single Use Camera', the bill bears the stamp 'Freight Collect', and states that the goods were shipped on board on 17 August 2001.

32. The bottom left hand box on the bill stipulates Moiroud SA as the party to be applied to for delivery of the goods, the Number of Packages Shipped being specified at Six Hundred and Eighty-Eight.

33. The bill is signed without qualification under the legend 'Birkart-East West Freight Limited', and the Place and Date of Issue is 'Hong Kong 17 August 2001'. Opposite the signature of Birkart there appears the statement:

> In witness whereof we have signed three(3) original Through-Bill of Lading if not otherwise stated above, one of which being accomplished the other(s) to stand void

Thereunder appears the name of the Birkart employee who prepared the document, one Chu Kon Wah.

34. Finally, at the head of the document, underneath Birkart's name, title and Hong Kong address, appears the following significant statement:

> We hereby certify having taken over from the aforementioned shipper in external apparent good order and condition the consignment detailed below for irrevocable transportation according to consignee order. One of these Through-Bill of Lading must be surrendered duly endorsed in exchange for the goods.

35. It was against this factual backdrop that Mr Wright, who appeared for Birkart in this case, invited the court to conclude that notwithstanding the title and specific terms of this bill of lading, and notwithstanding also the fact that Mitsui Lines had issued to Birkart a Non-negotiable Waybill containing the declaration that ''This Waybill is not to be construed as a Bill of Lading or any other similar document of title . . .'', that nevertheless in all the circumstances Birkart was *not* a contractual carrier.

36. Mr Wright's submission is that the only obligation undertaken by Birkart was limited to *arranging* for the carriage of goods, and that in so arranging such carriage, Birkart engaged the actual ocean carrier, who was responsible physically for carrying the goods by sea from Hong Kong to Le Havre.

37. On the true construction of the parties' relationship, said Mr Wright, Birkart indeed may have owed an obligation to exercise reasonable care and skill in selecting a competent carrier, but that this was *not* the case put up against it, and the hard fact was that Birkart owed no personal obligation to the plaintiff *qua* contractual carrier.

38. Mr Wright went so far as to submit that the fact that Birkart had issued a document entitled ''bill of lading'' represented ''an entirely neutral

consideration'', and that the general rule is that a 'house bill of lading' issued by a freight forwarder is not technically a bill of lading at all but, as *Scrutton* (20th ed.), page 376 suggests, is ''at most a receipt for the goods coupled with an authority to enter into a contract of carriage on behalf of the shipper'', and is not a document of title.

39. In this regard reliance was also placed on *Tetley on Marine Cargo Claims* (3rd ed.) at 693, which notes, *inter alia*, that ''merely because a forwarder issues a document entitled 'bill of lading' does not necessarily mean that the forwarder is the carrier''.

40. Mr Wright argued that since a freight forwarder may perform different roles, this would explain the creation of contractual documents capable of serving more than one purpose, but the fact that freight forwarders seek to use, as he invitingly put it, ''versatile contractual documents'', does not mean that the documents should be treated as evidencing a contract which the parties plainly did not intend.

41. Thus, he said, in the present case all the surrounding circumstances indicated that neither Vastfame nor Birkart intended that Birkhart would assume the obligations of a contractual carrier, given that the contract of sale between Vastfame and HPI was on FOB terms, that Vastfame's delivery obligations under that contract were limited to delivering the goods on board a ship nominated by or designated by HPI, and that the expense of the carriage of these cameras from Hong Kong to France was to be for the account of the buyer. It was clear that HPI had nominated Moiroud to arrange the carriage, and equally clearly that HPI had requested Vastfame to use Birkart, Moiroud's partner, to make arrangements for the sea carriage.

42. It followed, Mr Wright submitted, that to the extent that there was a contractual relationship at all between Vastfame and Birkart, such could only properly be described as an agency relationship, a view which was reinforced by the terms of Clause 10 and Clause 3 on the reverse side of the bill. Thus, Birkart must be the ''Agent'' to which reference was made on the reverse of the bill in Clause 3, and if, as the defendant asserted, it was the intention of Vastfame and Birkart that Birkart was to act as a freight forwarder, the 'bill of lading' as issued by Birkart could and should be regarded as but a forwarder's receipt for the goods, which Birkart had taken over in order to arrange shipment.

43. This contention was reinforced, said Mr Wright, by the fact that Birkart had charged no freight for the carriage of these goods, and in fact the only remuneration received by Birkart as the result of this transaction was the sum of US$150 payable in terms of profit share by its co-operation

partner, Moiroud, and a small sum of Hong Kong dollars in respect of container handling fees and export handling charges.

44. Thus, he concluded, in making the contract of carriage with the ocean carrier Birkart had acted as agent on behalf of Vastfame, and, if this be correct, there could be no liability of Birkart under any contract of carriage, as Vastfame now alleged.

45. I reject this contention as firmly as I may. Notwithstanding Mr Wright's able efforts to convince me of the rectitude of his argument, I decline his invitation not to recognize that which otherwise strikes me as tolerably clear.

46. In light of all the evidence I find that Birkart was the contractual carrier under the bill of lading issued by Birkart to Vastfame. In my view it is as plain as a pikestaff that this is the position, and in the circumstances it is somewhat surprising that a vigorous defence in this case has been conducted on the basis that Birkart was not the contractual carrier.

47. It is difficult to grasp how a Commercial Court, faced with a bill of lading issued by Birkart bearing on its face the terms hereinbefore described, could arrive at a contrary conclusion.

48. So far as Vastfame was concerned, as indeed Ms Lam stated in evidence, Birkart contractually was charged with effecting the carriage of these cameras from Hong Kong to Le Havre, and once this had taken place, Vastfame clearly had no interest, in context of an FOB contract and a bill stamped 'Freight Collect', in how the goods were to get to France — as long, of course, as they arrived safely.

49. Pursuant thereto Birkart had issued the bill of lading to Vastfame, had secured a Mitsui Lines vessel to effect the ocean carriage, and had caused these goods to be delivered to its international partner and agent, Moiroud — which, as we now know, was the entity which, wrongly (and to its considerable embarrassment, as is apparent on the face of discovered Moiroud/Birkart email correspondence) had permitted delivery to the buyer, HPI, absent production of an original bill of lading, an action which directly contravened the specific statement on the face of the Birkart bill of lading that ''One of these Through-Bill of Lading must be surrendered duly endorsed in exchange for the goods.''

50. Small wonder, therefore, that when Vastfame was apprised of the situation of the wrongful delivery, in email correspondence with Moiroud, that the Vastfame staff initially had failed to comprehend what had occurred: ''please let us know you released the cargo against what docu?? original b/l?? bank indemnity??'', and later ''why u released cargo to cnee without original b/l??'', and still later again, this time from the head of the Vastfame

shipping department ''Do you take a joke with me? What's wrong? Full set of original are still hold on my hand, but you have released the goods to the consignee. Do you know how about goods releasing procedure??''

51. When viewed against these contemporary exchanges, it might be thought that Mr Wright's suggestion that neither Birkart nor Vastfame had intended that Birkart would assume the obligations of a contractual carrier represents a submission that fails to command much resonance.

52. On behalf of the plaintiff, Ms Lam, whose evidence I accept, was in no doubt of the position, and in cross-examination she found it difficult to comprehend the nature of the contrary case being suggested to her in the prevailing circumstances.

53. In this regard, however, the *viva voce* evidence was *not* in conflict. For her part, Ms Au, of the Birkart sales staff, also made no bones about the position.

54. She specifically accepted in her evidence that indeed this *was* a bill of lading, describing it in terms. In cross-examination she further accepted that Birkart had issued the bill as principal, and that Moiroud was Birkart's agent in relation to ensuring that goods were released only against an original bill.

55. This evidence is consistent with the fact that Birkart's signature on the bill was unqualified, making it tolerably clear that that Birkart signed *qua* principal. In itself, the use of the term ''forwarder'' or ''forwarding agent'' does not mean that a party is not signing as principal, and it is well-established on the authorities that a freight forwarder indeed can (and often does) contract as such.

56. I bear in mind in this context, of course, that Mr Wright strongly advances the 'forwarding agent' argument on the strength of, for example, the content of Clause 3 of the 'Conditions of Contract' on the reverse of the bill, the terms of which have been quoted above. There seem to me to be two answers to this.

57. First, the signature on this bill of lading is in no sense equivocal, and it strikes me that in a circumstance in which, as here, Birkart has signed this bill absent qualification, this must indicate implicit agreement that ostensibly inconsistent clauses on the reverse must be regarded as overridden. Second, and putting to one side the curious fact that the term ''The Agent'', upon which reliance here is placed, remains *undefined* on the reverse side of the bill—an omission of which Mr Stokes, for the plaintiff, makes much, not least because Birkart is defined as ''The Company''—in any event I would firmly decline to accept any submission

based upon the small (and, in this instance, virtually illegible) print on the reverse of this document in light of the clear statements appearing on its face.

58. On this issue I bear in mind the observations of their Lordships in the *The Starsin* 2003 AMC 913, [2003] 2 WLR 711 (HL) to the effect that when a bill of lading contains on its face an apparently clear and unambiguous statement of who is the carrier it is difficult to accept that a shipper would expect to have to resort to the detailed conditions on the reverse of the bill in an attempt to discover with whom he was contracting. As Lord Steyn noted (*op cit.*, 2003 AMC at 932, [2003] 2 WLR at 728), when commenting on the problem of an inconsistency as to identity of carrier between that which appears on the face of the bill and that which is ''tucked away in barely legible tiny print on the back of the bill of lading'':

> How is the problem to be addressed? For my part there is only one principled answer. It must be approached objectively in the way in which a reasonable person, versed in the shipping trade, would read the bill. The reasonable expectations of such a person must be decisive. In my view he would give greater weight to words specially chosen, such as the words that appear above the signature, rather than standard form printed conditions.
>
> Moreover I have no doubt that in any event he would, as between provisions on the face of the bill and those on the reverse side of the bill, give predominant effect to those on the face of the bill. Given the speed at which international trade is transacted, there is little time for examining the impact of barely legible printed conditions at the time of the issue of the bill of lading. In order to find out who the carrier is it makes business common sense for a shipper to turn to the face of the bill, and in particular to the signature box, rather than clauses at the bottom of column two of the reverse side of the bill.
>
> Taking advantage of their knowledge of the way in which the market works two commercial judges—Colman J and Rix LJ in the Court of Appeal—adopted the mercantile view. The majority in the Court of Appeal—Sir Andrew Morritt VC and Chadwick LJ—in effect gave preponderant effect to the boilerplate clauses on the back of the bill. In my view it would have an adverse effect on international trade if the latter approach prevails. . . . As Rix LJ [2001] Lloyd's Rep 437, 451 observed, commercial certainty and indeed honesty is promoted by giving greater effect to the front of the bill of lading. . . .

59. I would respectfully adopt this approach. I also accept the submission of Mr Stokes that the argument advanced on behalf of Birkart that they

did not contract as principal begs the question as to the identity of the contracting party if in fact it was not Birkart; in particular, who was it, if not Birkart, who had contracted to fulfil the obligation, prominently stated on the face of this bill of lading, not to release these goods save against production of an original bill of lading? Certainly it was not Mitsui, the ocean carrier, whose obligation under its waybill terminated when the goods were delivered to Moiroud (as Ms Au accepted in her testimony), and it could hardly have been Moiroud, Birkart's obviously negligent agent.

60. At the end of the day there is no reasonable conclusion, on this evidence, other than that this was a 'To Order' bill of lading issued by Birkart, as principal, to Vastfame. I so hold.

61. The goods represented by this bill of lading clearly were not to be delivered to any person save upon production of one of the originals, and if possession is parted with absent such production and absent alternative security, as here undoubtedly was the position, then liability inevitably will follow. Were the position to be otherwise, international carriage of goods could no longer function with the degree of certainty which international commerce demands.

62. At one stage it appeared that it was also to be suggested that by failing to insist on compliance with the original contractual payment term of ''LC at sight'', and by being prepared to accept in lieu thereof a telegraphic transfer in the relevant sum, that Vastfame thus impliedly had authorized release of the goods absent production of the bill of lading. However, this argument—depending upon the premise that waiver of the obligation to open the L/C meant that the bill was never a document of title in that it was never intended by Vastfame to be used as part of the credit mechanism by which property in the goods was to be transferred, and that without delivery of the goods HPI never would have been obliged to pay the price—has not been pursued in final submission by Mr Wright, and I mention the point at this stage only to dismiss it.

63. Having arrived at the primary contractual characterization, therefore, the question consequentially arising is whether and to what extent Birkart can take advantage of the specific exclusion and limitation clauses on the back of this bill? It is to this aspect of the case to which I now turn.

*(2) Exclusion and limitation provisions*

64. Mr Wright submits that if the court is against him on the issue of whether the document in issue is a bill of lading and upon the identity of the contracting carrier, nevertheless that Birkart is entitled to rely upon

the exclusion clause contained in Condition 24(i)(a) of the bill of lading conditions and also the limitation provision contained in Condition 24(iii)(b).

65. Clause 24(i)(a) reads:

> The Agent shall not be liable to the Customer or the consignee or the Owner:
>
> (a) for loss or damage (physical or otherwise), including but not limited to loss or damage resulting from non-delivery of the goods or mis-delivery of the goods to a wrong party, caused by any failure to carry out or negligence in carrying out the Customer's or the Consignee's or the owner's instructions, or by any failure to perform or negligence in performing the Agent's obligations (whether such obligations arise by contract or otherwise), unless such loss or damage is due to the willful misconduct of the Agent or its own servants and to circumstances within its control. . . .

whilst Clause 24(iii) reads:

> In no case whatsoever shall any liability of the Agent, howsoever arising and notwithstanding that the cause of loss or damage (physical or otherwise) be unexplained, exceed
>
> (a) the invoice value of the relevant goods calculated on f.o.b. basis, or (b) a maximum of Hong Kong $500.00 (Dollars Five hundred) in respect of any one consignment or any package of goods whichever shall be the lesser.

66. On this basis, says Mr Wright, his client is not to be held liable for the misdelivery by Moiroud. And as for the quantum limit, Condition 24(iii) was intended to set the limitation figure at a maximum of HK$500 in respect of any one consignment or package, with the result that in this case the maximum financial liability would be HK$344,000 (688 cartons times $500 per carton).

67. And in any event, and without prejudice to these arguments, Mr Wright further maintained that Vastfame was not entitled to claim the invoice value of these goods, namely US$143,845, and that the correct measure of damage in cases of misdelivery is the sound arrived value, and that no attempt had been made by Vastfame properly to prove such sound arrived value.

68. As to this latter contention, I am unable to see why the court should be precluded from accepting the invoice value as evidence of the sound arrived value — argument to the contrary does *not* conform with established

principle (*see, for example, Hecny Transportation Limited v. Chang Li Wen* [1967] HKLR 70 (Full Court)) or, for that matter, current practice — and I reject this submission. In terms of liability in this case, it seems to me that either the defendant gets home on its exclusion and limitation arguments, or it does not, and accordingly I approach the case on this basis.

69. It is well settled that exemption clauses are to be construed strictly, and that very clear wording is necessary to escape liability for breach of an obligation considered to be of fundamental importance to the contract. As Clarke J (as he then was) noted in *The ''Ines''* [1995] 2 Lloyd's LR 144, at 154, the proposition that the requirement to deliver goods only against an original bill of lading is one of the main objects of the contract supports the further proposition that it is permissible, as a matter of construction, to limit the ambit of a particular clause in light of that fact.

70. Moreover, consistent with the 'contra proferentem' principle, any ambiguity in an exemption clause will be resolved against the party seeking to rely upon it. As Lord Hobhouse expressed the position in *The Starsin, op cit.*, 2003 AMC at 976, at paragraph 144:

> Before examining the decided cases and the principles which they disclose, it is as well be bear in mind a basic rule of construction of contracts of carriage. If a party, otherwise liable, is to exclude or limit his liability or to rely on an exemption, he must do so in clear words. Unclear words do not suffice: *see e.g. Pera Shipping Corpn v. Petroship SA (The Pera)* [1985] 2 Lloyd's Rep 103. Any ambiguity or lack of clarity must be resolved against that party. Further the ''standard conditions'' of bills of lading are not the subject of negotiation or amendment by the shipper; they are printed conditions which the shipper is required to accept (i.e. a contract of adhesion); the wording is chosen by the issuer of the bill of lading. Here the printed words relied upon by the shipowners are anything but clear, partly by reason of their context in the printed conditions and partly because, owing to misprints, they do not as printed make sense. As transferable documents of title needing to be understood internationally, merchants must be able to take them at face value. For the transferee the relevant document is the bill of lading itself. . .

71. Reverting, therefore, to the clause in issue in the present case, namely Clause 24(1)(a), I am unable to construe that clause in the manner that Mr Wright has suggested should be the case.

72. I earlier have noted that the term ''Agent'' is nowhere defined in the bill, and could, perhaps, refer to Moiroud SA, or to an agent signing

the bill, if it had been signed ''As Agent'', or to the sea carrier engaged by Birkart to perform the carriage. Birkart itself is defined (at Clause 1 on the reverse of the bill) as ''the Company'', and it seems strongly arguable that its definition as ''the Company'' indicates that ''the Agent'' is another entity. Indeed, as Mr Stokes submitted, the juxtaposition of the terms ''the Agent'' and ''the Company'' in Clause 24(v)—which purports to provide a blanket preclusion against claims brought against any servant or agent of the Agent or against any other parties employed by the Company—is consistent with there being two different entities, and it seems to me, also, that if the words ''the Agent'' indeed were to be applied to Birkart, the natural interpretation would be to accord protection to Birkart only where in fact it was contracting *qua* agent and not *qua* principal.

73. I fail to see that the terms of the Shipping Order, upon which Mr Wright also placed reliance, is of assistance in construing the bill, not least because a bill of lading is a transferable document and must bear the same meaning regardless of to whom it is transferred, so that its true meaning must be apparent within the document itself; as Lord Millett observed in *The Starsin, op cit.*, 2003 AMC at 994, at 175: ''. . . bills of lading are transferable documents of title, and the claimants are holders of the bill by endorsement. Consequently the evidence [as to identity of the parties] must be found within the four corners of the bills themselves.''

74. I further accept Mr Stokes' contention that the reference to ''misdelivery to a wrong party'' within Clause 24(i)(a) is insufficient to make it clear to users of the carrier's services that the carrier specifically is seeking to exclude liability for releasing goods absent production of a bill of lading, given that, for example, such term also could be taken to refer to misdelivery to a wrong carrier or warehouseman or haulier.

75. It also strikes me as incontrovertible that if Birkart, as now contended, was to be regarded as ''the Agent'', the terms of Clause 24(i)(a) would be in direct conflict with the provision on the face of the bill that ''One of these Through-Bill of Lading must be surrendered duly endorsed in exchange for the goods'', and also with the description of the document as a bill of lading; consistent with the reasoning in *The Starsin, op cit*, 2003 AMC at 961, (*see*, for example, Lord Hobhouse at paragraph 128), there must here be implicit agreement that special words override inconsistent standard printed conditions.

76. It follows from the foregoing, therefore, that I am against the defendant in terms of the argument based upon Clause 24(i)(a).

77. I have formed a like view with regard to the submission based on Clause 24(iii), which is the quantum limitation now relied upon by the defendant.

78. Notwithstanding Mr Wright's submission as to that which the draftsman ''must have meant'', it is clear on the face of the clause itself that the phrase ''whichever is the lesser'' relates to the lesser of the two limits specifically referred to in subparagraph (b), that is, one amount calculated per consignment and the other calculated per package, and not to the limit based on invoice value. Thus, the limit specified in subclause (a) applies, namely the invoice value of the relevant goods calculated on an f.o.b. basis — which, as earlier observed, represents the normal measure of loss in claims for delivery of goods without production of a bill of lading.

79. In truth, even Mr Wright was constrained to add a gloss to the construction he urged on the court, given that HK$500 was the figure which logically followed on the face of his argument, by submitting that in fact the correct sum in this case should be $344,000.00, that is, 688 (cartons) times $500. However, notwithstanding this laudable attempt to inject an element of common sense into a submission which, taken to its logical conclusion, struck me as wholly lacking in merit and common sense, I remain against him on the point. If and in so far as the carrier wishes to make an argument of this nature, such behoves reliance on a precise and unambiguous clause which leaves no room for doubt.

80. I hope it is not unhelpful to observe that the printed conditions on the reverse of this bill of lading — which in novel fashion is divided into two parts, namely 'Interpretation' and 'Conditions of Contract' — strike me as muddled and imprecise in addition to harbouring patent inconsistency with those provisions appearing on the face of this bill; also, and not least, these conditions pose a very real problem of legibility. I do not wish to be unfair to the draughtsman, but the impression created is as if someone has surrounded himself with differing precedents and thereafter has attempted to incorporate into this one document exemptions of every stripe without any real attempt to harmonise the concepts gathered therein — the absence of any definition of ''Agent'' is perhaps the prime example of this difficulty.

81. It is because, as a matter of construction, I have found no difficulty in rejecting the exclusion/limitation arguments propounded by Mr Wright, that I consider it unnecessary specifically to deal in this judgment with Mr Stokes' 'back up' argument involving reliance upon the provisions of the Control of Exemption Clauses Ordinance, Cap. 71.

82. There has been considerable detailed argument as to the scope of this statute, and whether Schedule 1, paragraph 3, taken in juxtaposition

with schedule 1, paragraph 2, applies to periods outside sea carriage under contracts involving carriage of goods by sea.

83. Resolution of this particular debate must await a case which otherwise is less obviously resolved than that of the present. However, whilst there is no need to make a decision on the point, suffice to say that that part of Mr Stokes' extended argument relating to the applicability of CECO to the element of Birkart's contractual obligation *not* forming part of the sea carriage did not strike me as obviously incorrect, and that in my view there is at least room for argument that there is no reason why CECO should apply to on-carriage after the end of sea carriage but not also to activities (for example, warehousing, destuffing of containers, delivery arrangements) occurring after the conclusion of such sea carriage. And certainly, if and in so far as CECO were to apply, it strikes me that the court would have had little hesitation in characterizing as unreasonable the particular exemption clauses invoked by Birkart during argument in this case. Nevertheless, as I have indicated, a specific finding on this issue has not been required for determination of the present case, and I refer to this aspect of the argument solely for the sake of completeness.

*Conclusion*

84. It follows from the foregoing that I find the plaintiff's claim against the defendant to be established, and accordingly I hold that the plaintiff, Vastfame, is entitled to judgment against the defendant, Birkart, in the sum of US$143,815.00.

*Third Party Proceedings**

* * *

*Orders*

97. As the result of the foregoing judgment, therefore, the order of this court in the head action is as follows:

(i) Judgment is to be entered in favour of the plaintiff, Vastfame Camera Limited, against the 1st defendant, Birkart Globistics Limited, in the sum of US$143,815.00;

(ii) There is to be an order *nisi* that the 1st defendant is to pay interest on the said sum, such interest to run from the date of the institution

*Discussion finding Moiroud required to indemnify Birkart is omitted — Eds

of proceedings herein until the date of judgment at the rate of 2% over US dollar prime rate from time to time prevailing;

(iii) There is to be an order *nisi* that the 1st defendant is to pay the plaintiff the costs of this action upon a common fund basis, such costs to be taxed if not agreed.

98. As to the third party action between the 1st defendant, Birkart, and the third party, Moiroud SA, the order of this court is as follows:

(i) That the 3rd party do pay to the 1st defendant the sum of US$143,815.00, together with interest on such sum to be paid by the third party to the 1st defendant at the rate of 2% over US dollar prime rate from time to time prevailing from the date of institution of proceedings in the third party action until the date of judgment herein;

(ii) There is to be an order *nisi* that the third party further do pay to the 1st defendant the costs of the third party proceedings, such costs to be taxed and paid on a common fund basis, together with 80% of the costs incurred by the 1st defendant in defending the plaintiff's claim, such costs to be taxed and paid on a common fund basis.