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The Dual Role of the Freight Forwarder: Vastfame Camera Ltd v Birkart Globistics Ltd, 2005 High Court of Hong Kong 117, Stone J, 5 October 2005; 2005 AMC 2864 (High Court of Hong Kong, 2005)

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I
INTRODUCTION

The increased activity of freight forwarders and the expanded diversity of their work are striking facts of modern carriage of goods. This increase is a result of the container revolution, the emergence of multimodal systems of inland carriers, terminal owners and sea carriers, the long term over-availability of tonnage in the world shipping market coincidental with the rapid and unprecedented development of the global logistics industry. Freight forwarders have fitted into this new global logistics order and provide a valuable service both to the carriers and to their shippers, hence their new importance.

Freight forwarders, despite or perhaps because of their new-found fortune, are faced with a dilemma—will they present themselves as "principal contractors" or as "agents?" At times, they even flirt with the term "carrier."

II
THE DUAL ROLE OF THE FREIGHT FORWARDER

The freight forwarder traditionally acts as an agent who arranges for the shipment of goods belonging to his customer, the shipper. The freight forwarder, as agent, arranges for transportation, pays freight charges, insurance, packing, customs duties etc., and then charges a fee, usually a per-

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centage of the total expenses. All the costs are (or should be) disclosed to his customer, the shipper.

Sometimes, the freight forwarder acts as principal contractor arranging the carriage in his own name. The fees, payable by the shipper, are a straight freight charge. They then arrange to pay lower freight rates to the carrier and obtain their profit from the rate difference between the two. Very often, the freight forwarder consolidates the cargoes of a number of shippers into a single container, resulting in savings which benefit the freight forwarder and the shippers. On these occasions, the freight forwarder's responsibility to the shipper is often that of a carrier.

Whether acting as agent or principal, the freight forwarder (as is normal in commerce) usually attempts to contract out of as much responsibility as possible. This has often resulted in very confusing standard trading conditions where the two contradictory roles and kinds of responsibility – that of agent and that of principal–are set out in the contracts attempting to define the dual roles of the freight forwarder.

III
AGENT OR PRINCIPAL?

Whether the freight forwarder is contracting as an agent or a principal will depend on the facts of each case and on the law in the particular jurisdiction in question. One must look at all the circumstances of the arrangements between the freight forwarder and the shipper, including but not limited to contract, telephone calls, correspondence, tariff, bill of lading issued (if any), previous dealings, etc. between the freight forwarder and sub-carriers, as well as the correspondence between the freight forwarder and the shipper, consignment note, and bill of lading.

Merely because a freight forwarder issues a document entitled "bill of lading" does not necessarily mean that the freight forwarder is a carrier. The forwarder might have issued a bill of lading and the ocean carrier issued an ocean bill of lading as well. The contract between the shipper and freight forwarder, however, might have explicitly provided that the latter acted only as agent. Furthermore, the forwarder might have been paid a commission from the shipper or a brokerage from the carrier rather than making a profit from a difference in the freight rates.

The significance of whether the freight forwarder is contracting as an agent or as a principal is that, where the freight forwarder acts as an agent, it will not be liable for any breach of the terms of the shipment contract between the shipper and the carrier. If the freight forwarder is a principal, the freight forwarder will be liable. This may be especially significant

should misdelivery of the shipper's cargo take place, which is a serious (or fundamental) breach of the shipment contract.

IV
LEGAL PRINCIPLES RELEVANT TO ASCERTAIN THE NATURE OF A FREIGHT FORWARDER'S CONTRACTUAL ROLE

In deciding who is the principal under a bill of lading, the following principles are relevant:

Firstly, the transaction must be examined on its facts. Whether a person has acted as principal or agent depends on the intentions of the parties to be determined in each case as a matter of construction from the terms of the contract as a whole.[1] The decision whether a defendant was a principal or an agent turns on the impression formed by the wording of the contract and the evidence of surrounding circumstances.[2]

Secondly, where a person has signed a contract in his own name without qualification, he is deemed to have contracted personally unless a contrary intention plainly appears from other portions of the document.[3] Much weight is generally attached to the mode of signature.[4] The evidence required to counter the predominant significance of the signature must be clear. It must establish without obscurity or ambiguity that the person who signed without qualification did not intend to contract with personal liability.[5]

Thirdly, in determining the identity of a contracting carrier, statements on the face of a bill of lading are generally to be given greater weight than provisions printed on the reverse of the bill.[6]

Fourthly, the way in which the parties describe themselves is not conclusive: "*There is no magic in the word 'agency'. It is often used in commercial matter where the real relationship is that of vendor and purchaser.*"[7] The

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[1] *See, for example:* Bowstead & Reynolds on Agency (17th edition) at §1-032; Scrutton on Charterparties (20th edition) pages 45 and 54-55; *Universal Marine v McKelvie* [1923] AC 492 (HL).

[2] *Hair + Skin Trading v. Norman Air Freight* [1974] 1 LLR 443, 445 per Bean J.

[3] *See* Bowstead & Reynolds on Agency (17th edition) §9-037 (a); Scrutton on Charterparties page 45.

[4] *See* Gaskell on Bills of Lading: Law and Contracts §3.10.

[5] *Internaut Shipping v. Fercometal SARL* [2003] 2 All ER (Comm) 760 (CA), per Rix LJ at §§33, 34,46, 47, 50 to 53; *The "Frost Express"* [1996] 2 LLR 375 (CA), per Evans LJ at 378 column 2, 379, 381 column 1; *Universal Steam Navigation v McKelvie* [1923] AC 492 (HL); *The "Starsin"* [2003] 2 WLR 711 (HL) §§7,8, 128, 176.

[6] *The "Starsin"* [2003] 2 WLR 711 (HL), §§11, 15, 16 per Lord Bingham, §45 and 47 per Lord Steyn, §§71-73, 75, 81-83, 85 per Lord Hoffmann, §§178, 188 per Lord Millett.

[7] Bowstead & Reynolds on Agency (17th edition) at §1-032, *citing to Exp. White, re Neville* (1871) LR 6 Ch. App 397 at 399) and at §9-037(b).

substance of the matter is more important than the form. A contract describing the parties as principal and agent is not conclusive that they are such.[8]

Fifthly, the fact that a person is described as a "freight forwarder" is of limited relevance. It is a matter of interpretation and of the facts underlying the contract whether a forwarder has acted as a principal or an agent in respect of any particular consignment. There is no objection in principle to a forwarder being liable as a contracting carrier.[9] Scrutton[10] addresses the position of forwarders as follows:

> "Whether the forwarding agent has contracted as an agent or as a principal will turn on the construction of his contract with the shipper and the surrounding circumstances, particularly the relationship between the forwarding agent and the actual carrier. No single factor can be decisive, but the fact that the forwarding agent issues his own "house bills of lading," that he is remunerated by taking his profit from a lump sum[11] freight rather than on a commission basis, that he has contracted for a lien in his own name [*citing to Landauer & Co v. Smits & Co,* (1921) LLR 557, at 572 column 2.], that the carrying ship was owned by an associated company and managed by the forwarding agent, that the forwarding agent agreed "to collect" rather than "to arrange for the collection of goods from the shipper, and that the forwarding agent held himself out as a "haulage, wharfage and lighterage contractor" although not owing any lighters, have all been held to point towards the forwarding agent being a principal".[12]

Sixthly, the possibility of a forwarder making a profit from the margin between his charges and his costs (as opposed to an agent's commission) has been identified as being of importance in more than one case.

Seventhly, where the facts show that a person made a contract as agent, he may still be deemed to have contracted personally (that is, to have added his liability to the liability of his principal). The question whether he did so and, if so, the extent of his liability, depends on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances. As in all matters of formation of contract, the test is objective.[13]

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[8]Bowstead & Reynolds on Agency (17th edition) at §2-032; *also see Electronska v Transped* [1986] 1 LLR 49, per Hobhouse J at 52 column 2.

[9]Bowstead & Reynolds on Agency (17th edition) at §9-024; *Electronska v Transped, supra,* at 50 column 2 and 52 column 2*; Hong Kong Hua Gang v. Mideay* [2000] 2 HKC 353 (CA) at 356C per Rogers JA.

[10]Scrutton on Charterparties (20th Edition).

[11]*See Elektronska, supra, at 53 column 2; Hong Kong Hua Gang v. Midway, supra, at 356 F-H. Also see Comalco Aluminium Ltd v. Mogal Freight Services Pty Ltd, 113ALR at 697 line 35 to 700 line 25 [P30].*

[12]Scrutton on Charterparties (20th edition) page 55.

[13]Bowstead & Reynolds on Agency (17th edition) at §§9-005, 9-036.

Eighthly, it is arguable that where an agent acts for a principal who is not identified the agent is, unless otherwise agreed, a party to the contract in addition to his principal.[14] It has also been held that a person who claims to be an agent but has no principal is liable on the contract on the basis that he is his own principal, although this may be doubted on the ground that the correct cause of action is for breach of warranty of authority.[15]

V
FREIGHT FORWARDERS AS CARRIERS

A freight forwarder will be held to be the contractual carrier of goods where a bill of lading issued by the freight forwarder expresses, on its front page, an intention that the freight forwarder will be the contractual carrier.

In the Hong Kong case *Vastfame Camera Ltd v Birkart Globistics Ltd*[16] may shed some light on the issue. This case involving the mis-release of a consignment of "shrek" cameras made in China and exported to Le Harve, France. The Hong Kong claimant exporter, Vastfame contracted with the French buyer, HPI France ("HPI"), for the sale of 55,000 cameras on FOB Hong Kong terms. Vastfame invoiced HPI the sale price of US$143,815.00. The payment terms under the contracts were "documents against payment." The claimant exporter then arranged with Birkart Globistics Limited ("Birkart"), an international freight forwarder having an office in Hong Kong, to carry the cameras from Hong Kong to Le Havre, France. Birkart made a booking for carriage of the goods through Mitsui O.S.K. Lines (Asia) Ltd ("Mitsui Asia"). Mitsui Asia sent Birkart a booking confirmation. These cameras were shipped in a container aboard a vessel operated by Mitsui O.S.K. Lines (Asia) Ltd, the "*Hyundai Federal*."

In terms of the documentation regarding this shipment, Mitsui O.S.K. Lines ("Mitsui O.S.K."), the parent of Mitsui Asia issued to Birkart (who was named thereon as 'Shipper' "O/B (operated by) Vastfame Camera Ltd") a non-negotiable waybill, and in turn Birkart issued to Vastfame a 'To Order' house bill of lading, numbered HKHKG61LEH18479, in which Vastfame was named as 'Shipper' and HPI France as 'Notify Party' ("House Bill").

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[14] Bowstead & Reynolds on Agency (17th edition) at §§9-016, 9-045; *Center Optical (Hong Kong) Ltd v. Jardine Transport Services (China) Ltd,* [2001] 2 LLR 678 at §42 per Stone J.

[15] Bowstead & Reynolds on Agency (17th edition) at §§9-019, 9-037, 9-081, 9-082, 9-085, 9-087, 9-088, 9-089.

[16] *Vastfame Camera Ltd v. Birkart Globistics Ltd* [2005] High Court of Hong Kong 117, Stone J, 5 October 2005) also reported at 2005 AMC 2864; and European Transport Law [2006] XLI No.2 Page 182; and Hong Kong Cases [2005] HKC Page 117.

Birkart issued an invoice to Vastfame for a total of HK$3,050 in respect of terminal handling charges (of HK$2,750), an export handling fee and a documentation charge. No invoice was issued to Vastfame for freight. The House Bill was marked freight collect. A receipt issued by Mitsui Asia to Birkart indicates that Birkart paid freight of HK$2,865 for the carriage of the goods on the "*Hyundai Federal*." Birkart issued an invoice to Moiroud for a profit share of US$150. That was done pursuant to a Cooperation agreement between Birkart and Moiroud dated 23rd May 2000.

After arrival of the container at Le Havre on or about 5th September 2001, on 10th 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 23rd May 2000. 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*." There is no dispute that Moiroud acted as it did in releasing the goods to HPI absent production of the bill of lading. HPI, the putative buyer, has refused to pay the purchase price of the goods thus obtained from Moiroud. Accordingly, Vastfame has sued Birkart under what it alleged to be a contract of carriage entered into between itself and Birkart. The claim was 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.

As between Vastfame and Birkart the carriage was on a "Freight Collect" basis. The House Bill stated that applications for delivery of goods should be made to Moiroud S.A., the French local agent of Birkart. The House Bill was signed by Birkart without qualification. It was printed on a form headed with Birkart's name and also headed with the words "THROUGH BILL OF LADING." The boxes marked place of receipt and place of destination were both completed. The box in the top right hand corner of the House Bill included Birkart's address and the following words:

> "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."

The manner in which the Bill was signed and all other indications on the front of the Bill point to Birkart as the contracting carrier. Birkart signed the Bill without qualification. They did not sign "as agents."

The reverse of the House Bill is divided into two parts.: the first eleven provisions on the reverse principally define a variety of terms; the bulk of the terms appear under the heading "*Conditions of Contract*." To distinguish the two sets of provisions reference is to be made to the first set as "Points" and the second as "Conditions." The following definitions set out in the points printed in the first part of the reverse side terms, located in the top left of the reverse side of the Bill, may be relevant to Birkart's role:

(1) The definition of the "Customer", at Point 2, includes any person "who . . . enters into any relationship with the Company . . . for performance of services or operation on their behalf to . . . deliver . . . goods." This indicates that a relationship arises between shipper and Birkart and that Birkart's responsibility under that relationship extends to delivery. It does not state that Birkart's role is limited to arranging transportation and delivery.

(2) "International Forwarding" is defined, at Point 6, to include ". . . acts and services . . . to convey . . . goods . . . from point of receipt to point of destination utilizing the whole or any part of the transportation, the services of common carriers . . . " This is consistent with the carriage including transportation to destination (and not just sea carriage). The words "or any part of the transportation" indicate that Birkart may use carriers for part of the transportation while carrying out other parts by itself.

(3) Point 10, (which Birkart heavily relied upon, see below) provides that the "Conditions of Business shall apply to . . . all persons . . . who enter into ant (sic) relationship with the Company." It also provides that notice is 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 of business herewith contained and the Company does not accept any liability of a common carrier." This does not say that Birkart acted only as agents. The terms "freight forwarder" and "forward agent" used are not inconsistent with Birkart contracting as principals. Similarly, even Birkart says that they are not "common carriers", but that is not inconsistent with them acting as contracting carriers.[17]

(4) Point 11 states: "Allgememe Deutsche Spediteurbeningungen (ADSP) West Germany and The Institute of Freight Forwarders Ltd United Kingdom The German Forwarding Agents Organization and/or the United Kingdom Institute whose latest edition of the general conditions define the position, its right and responsibility of a freight forwarder/forwarding agent shall apply."

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[17]A "*common carrier*" holds himself out as willing to carry for reward and at a reasonable price, so long as he has room, goods of all persons indifferently who send him goods to be carried: Halsbury's Laws of England, volume 5(1) (4th edition reissue) §402 at page 310. It is perfectly possible to be a contracting carrier without being a "common carrier."

The following matters or provisions arise or are relevant in relation to the conditions set out on the reverse of the Bill under the heading "*Conditions of Contract*":

(1) Condition 3, which is titled "*Contractual status of the Agent*" (on which Birkart placed great reliance in advancing the "forwarding agent" argument), states in sub-paragraph (i) that "*the Agent is not a carrier (common or private, actual or contracting), and may on its sole and absolute discretion refuse to offer its service to any person. The agent does not contract hereunder for the carriage of goods*" and in sub-paragraph (ii) that "*it is a forwarding agent whose principal business is to act as an agent in arranging the transportation of goods on behalf of Customers from Hong Kong to overseas destinations principally by means of air and sea transportation*." Sub-paragraph (iii) of Condition 3 identifies various "*ancilliary services*" which "*the Agent also arranges . . . for the securing of ancillary services on behalf of the Customer including . . . .*" Those services include "*transporting the goods to places where the goods will be collected by the consignees or other persons designated by the Customers or consignees and attending to such collections*" and warehousing of the goods prior to their collection. Sub-paragraph (iv) of Condition 3 states that "*the Agent is entitled to perform any or all of the ancilliary services specified therein, by itself. The Agent is not a professional hauler, carrier, packer, warehousemen, customs broker or insurance broker.*"

(2) Condition 6 states that the Agent shall not be a carrier for the purposes of various international conventions notwithstanding that it enters into contracts in its own name with other persons. It also provides that the Agent does not "*make or purport to make any contract for the carriage (overseas or local), storage, packing or otherwise handling of goods with the Customer as a principal*."

(3) Condition 21 states: "*Except as otherwise specifically instructed by the Customer in writing the Agent shall arrange for the goods to be delivered only to the consignee named on the front side hereof, or to a party authorized by such consignee*."

The surrounding circumstances relevant to Birkart's contractual role (in addition to the terms of the House Bill) also include the fact that there was a Cooperation Agreement between Birkart and Moiroud dated 23rd May 2000 (though this did not give Birkart authority to conclude contracts with shippers of goods on behalf of Moiroud). Clause 1.6 of the Cooperation Agreement stated: "*Partners agree to 50:50 profit/loss sharing for all shipments port to port*."

Birkart's main line of defence was that, under all the circumstances, Birkart was not a contractual carrier. Birkart's submission was 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. On the true construction of the parties' relationship, as submitted by Birkart, 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 argued against it, and the hard fact was that Birkart owed no personal obligation to the plaintiff *qua* contractual carrier. Birkart submited that the fact that it 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 stated by Scrutton:

> "A 'house bill of lading' issued by a forwarding agent acting solely in the capacity of an agent to arrange carriage is not a bill of lading at all, but at most a receipt for the goods coupled with an authority to enter into a contract of carriage on behalf of the shipper. It is not a document of title nor within the Carriage of Goods by Sea Act 1992, and it is unlikely that it would ever be regarded as a good tender under a c.i.f. contract."[18]

Similarly, Tetley states:

> "Merely because a forwarder issues a document entitled "bill of lading" does not necessarily mean that the forwarder is a carrier. In *Zima Corp. v. Roman Pazinski*, 493 F. Supp. 268, 1980 AMC 1552 (S.D.N.Y.1980), the forwarder issued a bill of lading and the ocean carrier issued an ocean bill of lading as well, the contract between the shipper and freight forwarder, however, explicitly provided that the latter acted only as agent."[19]

Based on these learned writers' opinion, Birkart argued that the fact that a freight forwarder might perform different roles explains the creation of contractual documents capable of serving more than one purpose. In some instances, a freight forwarder might be the contractual carrier, for all or part of the carriage. The fact that freight forwarders seek to use versatile contractual documents cannot mean that the documents should be treated as evidencing a contract which the parties plainly did not intend, simply because they could be used for a different purpose in different factual situations.[20]

Birkart further argued that all the surrounding circumstances indicate that neither Vastfame nor Birkart intended that Birkart would assume the obligations of the contractual carrier: the contract of sale between Vastfame and HPI was on FOB terms; Vastfame's delivery obligations under the contract

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[18]Scrutton on Charterparties (20th Edition) at 376.

[19]Tetley on Marine Cargo Claims (3rd Edition), at 693.

[20]*See The Maheno* [1973] 1 LLR 81.

of sale were limited to delivering the goods on board a ship nominated by or designated by HPI; the contract of carriage of the goods from Hong Kong to France was to be for the account of HPI. Birkart went on to argue that in view of the fact that the involvement of Vastfame, as an FOB seller was minimal, the inference should be drawn that HPI (the French buyer) nominated Moiroud to act as freight forwarders in arranging the carriage. In turn, Moiroud would have informed HPI of the arrangements with Birkart under the Cooperation Agreement. Birkart submitted that Vastfame did not select Birkart as the forwarder and HPI requested Vastfame to contact Birkart to make the arrangements for the sea carriage of the goods from Hong Kong. The intervention of Birkart as freight forwarder removed any requirement on the part of Vastfame to make the shipping arrangements for the benefit of HPI as their FOB buyer.

Birkart also submitted that to the extent Vastfame made any contract of carriage at all, Vastfame would have intended to contract with owner of the Vessel "*Hyundai Federal*" ("the Vessel Owners") and not with Birkart since firstly, a direct contractual relationship with Vessel Owners would give Vastfame more effective rights over the goods; secondly, if the contract of carriage were made with Vessel Owner, it would give a direct contractual right of action in the event of loss of or damage to the goods. This right of action would include a right of action *in rem* providing far more effective security than an *in personam* action against a freight forwarding company; thirdly, if the contract of carriage was with the Vessel Owner, the bill of lading issued on behalf of the Vessel Owner would always be accepted under a letter of credit; a mere freight forwarder's bill of lading might be rejected.

Birkart went on to submit that from the point of view of Vastfame's buyer, HPI, there would be positive disadvantages if Birkart were to be the contractual carrier. Any action for breach of the contract of carriage would have to be brought outside HPI's own jurisdiction, France, and at the same time, there would be no possibility of an action for breach of the contract of carriage being brought in France against the Vessel Owner with the security of a right to arrest the Vessel. Moreover, Birkart argued that it would be unclear whether Birkart or Moiroud would be responsible for any inland haulage of the goods in France.

Birkart therefore concluded that the surrounding circumstances strongly indicated that the parties did not intend Birkart to be the contractual carrier. To the extent that there was a contractual relationship at all between Vastfame and Birkart, it should be properly described as an agency relationship. As a general principle, an agency relationship will arise between two parties if they consent to the creation of such a relationship between them:

> "Where there is an express agreement, whether contractual or not, between the principal and agent, this will constitute the relationship of principal and agent and the consent of both parties will be contained in it."[21]

The consent required for the formation of an agency relationship need not be express, Birkart argued, but can be implied from the conduct of the parties and the circumstances of their dealings:

> "While agency must ultimately derive from consent, the consent need not be to the relationship of principal and agent itself (indeed the existence of it may be denied) but it may be to a state of facts upon which the law imposes the consequences which result from agency."[22]

The intention indicated by the surrounding circumstances was, as submitted by Birkart, strongly supported by the express words of the contractual document, the House Bill in which Birkart's role was expressly defined in the aforesaid Point 10 and Condition 3.

Since the parties intended Birkart to act merely as a freight forwarder and not as a contractual carrier, the Bill would, as noted in *Scrutton,*[23] merely be a receipt for the goods. Birkart would sign the receipt on their own behalf to confirm that they had received the goods, in the words of the top right hand box of the House Bill "having taken over . . . the consignment." This merely indicates that Birkart, as a freight forwarder, had taken over the consignment in order to arrange shipment. It would have been unnecessary (and indeed inappropriate) for Birkart to sign the Bill as agents since in their capacity as freight forwarders they were acting on their own behalf.

Birkart highlighted the fact that that the only remuneration Birkart received as a result of the transaction was the sum of US$150 payable by Moiroud. Birkart did not charge freight directly in respect of the carriage of the goods but only its fees in the capacity as a freight forwarder, an all-inclusive fee for the services they provide as forwarders which was a modest sum of HK$185 in respect of container handling fees and export handling charges.

Birkart therefore concluded that in making the contract of carriage with the ocean carrier, Birkart acted as agent on behalf of Vastfame. It was relevant that Birkart might have obtained a seawaybill from Mitsui naming itself as shipper as there were many examples in the decided cases of freight forwarders, acting as agents, obtaining bills of lading naming themselves as shipper and in such cases, evidence might be given to show that the nomi-

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[21]Bowstead & Reynolds on Agency (17th Edition) states at paragraph 2-007.

[22]*Branwhite v. Worcester Works Finance Ltd*. [1969] 1 A.C. 552 at 587, per Lord Wilberforce.

[23]Scrutton on Charterparties (20th Edition) page 376.

nal shipper was in fact acting as agent for another party in which case the contract would be with the forwarder's principal.[24]

Therefore, Birkart submitted that it was not subject to any obligation to carry the goods to the destination port and to deliver them on production of the Bill.

The court's answer to Birkart's 'forwarding agent' argument was of twofold. First, the signature on the House Bill was unequivocal, absent qualification this must indicate implicit agreement that ostensibly inconsistent clauses on the reverse must be regarded as overridden. Second, the small (and, in this instance, virtually illegible) print on the reverse of the House Bill will not be allowed to prevail in light of the clear statements appearing on its face. The court cited English authorities, making reference to the observations of their Lordships in *The* "*Starsin,*"[25] 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,[26] 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 bot-

[24]See *Evergreen Marine Corp. v. Aldgate Warehouse* [2003] 2 L1. Rep. 597 at 602; *Carrington Slipways Pty. Ltd. v. Patrick Operations Pty. Ltd.* (1991) 23 N.S.W.L.R.745. Further, and noted in Tetley's Marine Cargo Claims (3rd Edition) at 694: "Even where the freight forwarder acts as agent of the shipper, it may be the reasonable custom in some places (e.g. the London freight market) that, in quickly finding space for its principal, the freight forwarder binds himself personally to the carrier. In such a case, the carrier can recover the dead freight from the freight forwarder when the cargo does not arrive on time at the place of shipment. The freight forwarder, in turn could recover from his shipper/principal."

[25]*The* "*Starsin*" [2003] 2 WLR 711 (English House of Lords).

[26](*op cit*., at 728).

tom 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 – Coleman 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 . . . "

The court, in deciding the case, adopt the approach in *The* "*Starsin*"[27] and concluded that on this evidence, the House Bill issued by Birkart was a 'To Order' bill of lading issued by Birkart, as principal, to Vastfame. 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, then liability inevitably will follow. The court reinforced its stance by commenting that "were the position to be otherwise, international carriage of goods could no longer function with the degree of certainty which international commerce demands."

V
A LESSON TO BE LEARNED BY ANY CARGO OWNER

The broad and wide terms on the reverse side of the Bill of Lading may not be as onerous as they sometime seem to be during a legal claim for misdelivered cargo by its owner against a freight forwarder.

VI
A LESSON TO BE LEARNED BY ANY FREIGHT FORWARDER

Freight forwarders must bear this decision in mind in formatting and preparing their house bills of lading. In particular, freight forwarders must consider whether or not the front of the bill of lading sufficiently notifies the shipper of the forwarder's status as agent only. Any document named "bill of lading" issued by a freight forwarder is not lightly to be viewed otherwise than a document of title issued by a carrier, with all of the attendant liabilities which normally flow therefrom.

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[27] *The Starsin* [2003] 2 WLR 711 at 728.