In The Supreme Court of Bermuda

CIVIL JURISDICTION
2007: No. 275

BETWEEN:

EDWARD G. ROBINSON

Plaintiff

-and-

SOMERS ISLES SHIPPING LTD.

Defendant

Date of hearing: February 8, 2008
Date of Ruling: February 29, 2008

Mr. Ben Adamson, Conyers Dill & Pearman, for the Applicant/Defendant
Ms. Juliana Snelling, Mello Jones & Martin, for the Respondent Plaintiff

RULING

Introductory

1. The Plaintiff is a Bermudian resident in Bermuda and the Defendant is a local shipping company. The Plaintiff seeks damages of $154,054 for breach of contract, plus interest, arising out of the failure of the Defendant to deliver a sport fishing vessel purchased by the Plaintiff. The Plaintiff's yacht was lost overboard the Defendant's vessel '*Somers Isles*' not far from the coast of Florida, where the cargo was loaded for carriage to Bermuda.

2. The Plaintiff issued a Specially Endorsed Writ on October 3, 2007. The Defendant purportedly entered a Conditional Appearance, without seeking leave, on October 29, 2007[1]. By a Summons dated November 1, 2007, the Defendant applied for the action to be stayed and/or struck-out under Order 12 rule 8 on the grounds that it was brought in breach of an exclusive jurisdiction clause. The application for the matter to be transferred into the Commercial List was neither the subject of argument nor of the Consent Order made on November 21, 2007.

3. The present application raises, seemingly for the first time under Bermuda law[2], the following key questions:

> (a) was the Plaintiff merely a consignee, and not also the shipper. If so, can a consignee challenge the terms of a bill of lading?
>
> (b) if the Plaintiff is entitled to challenge the terms of the bill of lading, either as shipper or consignee, was the exclusive jurisdiction clause incorporated by reference?

4. To the extent that these issues arise on an interlocutory stay application, I accept Mr. Adamson's submission that the Defendant need only establish a good arguable case that the exclusive jurisdiction clause is binding to give the Court jurisdiction to exercise its discretion to grant a stay.

The Evidence

[1] By letter dated October 31, 2007, the Plaintiff's attorneys indicated that they regarded the appearance entered as unconditional. This issue fell as this Court clearly has personal jurisdiction over a Bermudian company.

[2] To the extent that the applicable contract did incorporate the standard terms set out in the bill of lading, under which US law applies, it has been presumed that US law is the same as Bermuda law in the absence of contrary evidence in this regard.

5. The Defendant supported its application initially by the Affidavit of Geoffrey Frith sworn on October 31, 2007 in his capacity as President of the company which manages the Defendant. He explains that both he and the Defendant Company have been in the shipping business for some 20 years. The Defendant operates the vessel '*Somers Isles*', which averages around 35 voyages per year, carrying containers and items which cannot be placed into containers ("*break bulk items*") from Florida to Bermuda. When a customer wishes to book a shipment, they or their broker or agent typically telephones the Defendant's agents in Florida, North Florida Shipping Inc., to make a booking. The Defendant's agents input the data into their computer system, which automatically generates a Bill of Lading. The latter document is usually sent to the shipper, by email, fax or mail, on the day the ship sails.

6. When the consignee wishes to collect his goods, Mr. Frith deposed, he will typically go to the Defendant's offices, settle any outstanding charges and receive a bill of lading and Delivery Order, which documents will be used to claim the cargo and clear it through Customs at the docks. At the bottom of the Bill of Lading is a reference to the standard terms and conditions under which the Defendant operates. The crucial clause provides in material part as follows:

> "*RECEIVED, the above described cargo…The Carrier, shipper, consignee, owner of the cargo and holder of the bill of lading hereby agree that the goods shall be transported subject to the terms and conditions printed, typed, stamped or referred to in this document or in the Carrier's long form bill of lading or tariff or any service contract between the Carrier and the shipper, including the U.S. Carriage of Goods by Sea Act, 1936 or the Hague or Hague-Visby Rules if incorporated therein. Copies of such bill of lading and tariff are available from the Carrier or its agents…*"

7. The deponent exhibits the Defendant's standard terms and conditions, clause 13 of which crucially provides as follows:

> "…*The United States District Court for the Southern District of New York shall be the exclusive forum for adjudication of any claim against the Carrier arising out of or relating to this Bill of Lading.*"

8. According to Mr. Frith, this exclusive jurisdiction clause is consistent with market practice in the shipping industry in Bermuda. The Bill of Lading itself limits liability to $500 unless a higher value for the goods is expressly stated. However, Mr. Frith states that shippers typically protect themselves against loss by purchasing insurance for the goods they are shipping to Bermuda. He stated that the Plaintiff was only the consignee and that the shipper was Northside Marine while the booking was made by Boat Max USA. The ship carrying the Plaintiff's cargo actually sailed on November 21, 2006, although scheduled to depart on November 17, 2006. The Plaintiff's cargo was swept overboard on November 22, 2006.

9. The Plaintiff's response to this Affidavit was sworn on November 29, 2007. He describes purchasing the boat in Fort Lauderdale in 2006 through a broker and travelling there to arrange repairs for the vessel, which he hoped to enter in the 2006 Christmas boat parade. He contacted Meyer Agencies, agents for the Defendant, and then called North Florida Shipping to arrange for them to collect his boat and ship it to Bermuda. He told the Defendant's agents the value of his boat when they asked him for this information prior to shipping. On or about November 20, 2006, he prepaid for the shipment and received a copy of the Bill of Lading which had the original shipping date of November 17, 2006 on it. When he learned the following day that the cargo would not be delivered, he immediately cancelled that cheque.

10. The Plaintiff further deposed that he found the exclusive jurisdiction clause surprising, was only partially insured for his loss and was having to pay off a loan for the purchase of the lost boat. Having regard to the fact that all parties

concerned were based in Bermuda, he considered it unfair to have to sue in New York. The Plaintiff also deposed to the fact that a Bermuda surveyor investigated the loss of the cargo in Bermuda when the Defendant's ship arrived on November 24, 2006.

11. In his Second Affidavit, Mr. Frith points out that the Bill of Lading is governed by US law, that the cargo was lost off the coast of Florida and that the US District Court has specialist maritime experience. Robin Bishop, the manager of the Defendant's Florida agents North Florida Shipping Inc., swore an Affidavit on December 5, 2007 dealing with his booking records. He states that he took the booking initially from Jerry at Boat Max USA, and recorded him as the shipper "*until I realized that he was booking it on behalf of Northside Marine*". He then recorded the latter entity as the shipper. He agrees that his office called the Plaintiff after the booking had been made to finalize certain details including the sale price because Northside Marine (who subsequently went out of business) could not be reached. He also stated that if an individual such as the Plaintiff had called to make a booking, mention would have been made of the need to prepare a bill of lading and an offer made to collate the documents for the customer for a small fee.

Legal findings: rights of parties to a contract for the carriage of goods by sea

12. Where A contracts with carrier or ship-owner B for goods to be shipped to C, from country D to country E, A is the shipper, B is the ship-owner and carrier and C is the consignee of the goods. However, where A contracts for goods to be shipped to himself, then A is both the shipper and the consignee. The terms of the contract of carriage will ordinarily be evidenced by a bill of lading, which may not be issued until after the goods have been loaded and the ship has sailed. These fundamental principles were essentially agreed.

13. The term "shipper" is not defined in any of the materials placed before the Court, but clearly means the other party to a contract of carriage with the carrier. According to Article 1 of the Carriage of Goods by Sea Act 1926, which applies to the carriage of goods out of Bermuda:

> "'*carrier' includes the owners or the charterer who enters into a contract of carriage with the shipper*…"

14. '*Scrutton on Charterparties and Bills of Lading*'[3] provides, in Article 33, as follows:

> "*The bill of lading is not the contract, for that has been made before the bill of lading was signed and delivered, but it is excellent evidence of the terms of the contract, and in the hands of the indorsee is the only evidence. But it is open to the shipper to adduce oral evidence to show that the true terms of the contract are not those contained in the bill of lading, but are to be gathered from the mate's receipt, shipping-cards, placards, handbills announcing the sailing of the ship, advice notes, freight notes, or undertakings or warranties by the broker or other agent for the carrier.*"

15. It seems clear from another text authority on which Mr. Adamson for the carrier relied, that in an ordinary commercial contract, the shipper and carrier will both be in the business of shipping and carrying. According to Cooke et al, '*Voyage Charters*'[4], the bill of lading is very strong evidence of the terms of the contract without express incorporation because:

> "*(a)A term is implied into the original contract between shipper and carrier that the goods will be carried upon the terms of the bill*

[3] Twentieth edition (Sweet and Maxwell: London, 1996).
[4] 3rd edition (Informa: London, 2007), paragraph 18.45.

of lading customary in the trade. Shippers or their agents are usually well aware of the terms of bills of lading used in any regular trade, and usually have supplies of blank bill of lading forms which they fill in and present to the carrier for signature.

(b)The bill of lading is usually filled in by the shipper or his agent and presented to the captain or some other agent of the carrier, who signs it. When this occurs, each party's conduct indicates that he assents to the terms of the bill of lading.

(c)A shipper who receives a bill of lading and raises no objection to its terms will be bound by them except those terms which are onerous and unusual."

16. There was, on the other hand, controversy as to whether or not a mere consignee could challenge the terms of a contract of carriage already consummated as between shipper and carrier. I accept Mr. Adamson's submission that the normal rule, which will probably almost invariably apply, is that if the terms of carriage are embodied in a bill of lading after a contract of carriage has been entered into, the consignee of the goods (or indorsee of the bill of lading) will not have standing to challenge the terms of the contract of carriage. This conclusion is supported both by statute and by the following passage from the judgment of Devlin J in *Pyrene Co. Ltd.-v-Scindia Navigation Co. Ltd.*[1954] 2 W.L.R 1005 at 1014:

> " *When parties enter into a contract of carriage in the expectation that a bill of lading will be issued to cover it, they enter into it upon those terms which they know or expect the bill of lading to contain. Those terms must be in force from the inception of the contract; if it were otherwise the bill of lading would not evidence the contract but would be a variation of it. Moreover, it would be absurd to suppose that the parties intend the terms of the contract to be changed when the*

bill of lading is issued: for the issue of the bill of lading does not necessarily mark any stage in the development of the contract; often it is not issued till after the ship has sailed, and if there is pressure of office work on the ship's agent it may be delayed several days. In my judgment, whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation "covered" by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the rules and to which the rules apply."

17. Section 1 of the Bills of Lading Act 1863 provides as follows:

> "*Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom property in the goods therein mentioned passes, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and shall be subject to the same liabilities, in respect of such goods, as if the contract contained in the bill of lading had been made with himself.*"

18. None of the authorities cited by Ms. Snelling supported the proposition that, absent some form of collateral contract, a mere consignee could avoid the terms of a contract previously entered into between the shipper and the carrier. I find that section 1 of the Bills of Lading Act places a consignee in the same position as the shipper, unless otherwise agreed by the carrier.

Legal findings: principles governing incorporation of standard terms into a contract of carriage

19. The Defendant broadly contended that it would undermine stability in the law relating to the international carriage of goods by sea if this Court were to disturb

established principles under which bills of lading are regarded as reflecting the conditions of carriage in the absence of proof of any express contrary agreement. The Plaintiff essentially countered that the law in this area was subject to modification in relation to a contract entered into by an ordinary consumer with a commercial concern.

20. I accept as highly persuasive the Supreme Court of Canada decision in *Anticosti Shipping Company-v-Viatur St.-Amand* [1959] 1 Lloyd's Rep 352, which concerned a truck owner shipping a truck under a contract of carriage negotiated by an agent who was "*generally familiar*" with the carrier's "*customary mode of undertaking transportation.*"[5] The central holding of Rand J (at page 357)in that case was:

> "*As the judgment of the Court of Appeal for the Province of Quebec states, the authority given Riddell was general and unrestricted, and the first inquiry is this: from the simple facts placed before us, which undoubtedly truly describe what happened, what is the proper inference to be drawn from them: that the contract so arising was one for the carriage to be made under the terms of a bill of lading, or, on no terms beyond those implied by law? In this we are in as good a position as the Courts below; and on it I have no doubt. In the absence of evidence to the contrary, the shipping clerk's authority was to accept articles for transportation on the basis only of the company's bill of lading, following which he proceeded to fill out the standard form with the required matter. His and the company's understanding was therefore beyond question. When Riddell requested the shipment to be made, what terms could he possibly have had in mind other than those on which invariably goods were carried by the company? His bald request implies, "Carry this truck according to your regular practice". How can we possibly say that anything else could be intended? It was an ordinary transaction, and if,*

[5] At page 357.

as the respondent's agent, he did not see fit to demand a bill of lading -- as by Art. III, Rule 3, he had the right to do -- it cannot affect what on both sides was contemplated."

21. Where a shipper or his agent is familiar with the customary terms upon which goods are carried, a "*bald request*" to carry goods will ordinarily result in the standard terms and conditions of carriage set out in the bill of lading subsequently issued being incorporated into the contract.

22. The Plaintiff's counsel relied upon a contract of carriage case involving a passenger travelling on a ship where a telephone booking, which was not the customary way of incorporating standard terms and conditions (including an exclusion clause) into the contract, was the exceptional manner in which the contract was made: *Hollingworth-v-Southern Ferries Ltd. ("the Eagle")* [1977] 2 Lloyd's Rep 70. The holding that the exclusion clause was not effectively incorporated was based on the House of Lords decision in a case concerning a carriage of a car by sea (but not across national boundaries under a bill of lading):*McCutcheon-v-David MacBrayne Ltd.* [1964] 1 All ER 430. Here the Appellant's brother-in-law orally arranged to ship the Appellant's car from an offshore island to the Scottish mainland, and the carriers departed from their usual practice of requiring the shipper to sign a risk note containing the standard contractual conditions. Ogden J in "*The Eagle*"[6] cited with approval the following dictum of Lord Devlin in the *McCutcheon* case:

> "*If a man is given a blank ticket without conditions or any reference to them, even if he knows in detail what the conditions usually exacted are, he is not, in the absence of any allegation of fraud or of that sort of mistake for which the law gives relief, bound by such conditions. It may seem a narrow and artificial line that divides a ticket that is blank on the back from one that says "For conditions see time-tables", or*

[6] At 76-77.

something of that sort, that has been held to be enough notice. I agree that it is an artificial line and one that has little relevance to every day conditions. It may be beyond your lordships' power to make the artificial line more natural: but at least you can see that it is drawn fairly for both sides, and that there is not one law for individuals and another for organisations that can issue printed documents. If the respondents had remembered to issue a risk note in this case, they would have invited your lordships to give a curt answer to any complaint by the appellant. He might say that the terms were unfair and unreasonable, that he had never voluntarily agreed to them, that it was impossible to read or understand them and that anyway, if he had tried to negotiate any change, the respondents would not have listened to him. The respondents would expect him to be told that he had made his contract and must abide by it. Now the boot is on the other foot. It is just as legitimate, but also just as vain, for the respondents to say that it was only a slip on their part, that it is unfair and unreasonable of the appellant to take advantage of it and that he knew perfectly well that they never carried goods except on conditions. The law must give the same answer: they must abide by the contract which they made. What is sauce for the goose is sauce for the gander. It will remain unpalatable sauce for both animals until the legislature, if the courts cannot do it, intervenes to secure that when contracts are made in circumstances in which there is no scope for free negotiation of the terms, they are made on terms that are clear, fair and reasonable and settled independently as such. That is what Parliament has done[7] *in the case of carriage of goods by rail and on the high seas.*"[8]

23. These cases illustrate that when considering whether or not standard terms and conditions are incorporated into a contract of carriage, courts will take into

[7] Article III paragraph 8 of the Schedule to the Bermudian Carriage of Goods by Sea Act 1926 seemingly prohibits exemption clauses.
[8] [1964] 1 All ER 430 at 438-439.

account previous dealings between the parties (if any) and consider whether on the facts of each case the relevant conditions have been incorporated. And where it is the custom of a carrier to incorporate general conditions in a particular manner, they cannot claim that incorporation has taken place when they depart from their customary practice.

24. Where standard terms are incorporated into a contract of carriage evidenced by a bill of lading, Ms. Snelling rightly submitted that care must be taken to bring the unusual clause to the shipper's attention: *Crooks-v-Allan* (1879) 5 QBD 38. But this case also illustrates that the courts take a particularly strict view of exemption clauses, and no similar authority dealing with an exclusive jurisdiction clause in the shipping context was cited by counsel. In the present case there is no evidential basis for concluding that the exclusive jurisdiction clause relied upon by the Defendant is "*so novel* [as to] *deprive… the shipper of an ancient and well understood right*."[9] The Defendant's evidence that such a clause is a usual one in the local market was not contradicted. The relevant complaint the Plaintiff is entitled to make is that he was not aware of the standard conditions at all.

Legal findings: principles applicable to enforcing exclusive jurisdiction clauses

25. The approach to a stay application based upon an exclusive jurisdiction clause through which the parties have agreed to litigate in another jurisdiction is governed by the following principles upon which Mr. Adamson relied. Gross J in *Import Export Metro-v-Compania Sudamericana de Vapores* [2003] 1 Lloyd's Rep 405 at 409 described the correct approach as follows:

> "*(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to*

[9] Per Lush J at page 40.

grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising its discretion the Court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:

> *(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.*
>
> *(b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.*
>
> *(c) With what country either party is connected, and how closely.*
>
> *(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.*

> *(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.* "[10]

26. In restraining litigants subject to this Court's jurisdiction from breaching agreements to arbitrate either in Bermuda or elsewhere, this Court has frequently recognised the importance of holding parties to their contractual dispute resolution bargains. In the instant case there is no evidential basis for concluding that the Plaintiff would not obtain a fair trial, although his counsel suggested that he could not afford to pursue a claim in New York. A contractual claim would be time –barred but the Defendant's counsel indicated that an undertaking would be given, if required, to waive any such limitation defence.

27. The issue raised for consideration is (assuming the clause does bind the Plaintiff) whether the Court should exercise its discretion to decline to honour the clause because the links with Bermuda are strong and the Defendant is seeking to obtain a procedural advantage by litigating abroad.

Findings: was the Plaintiff merely a consignee and not also the shipper?

28. I find that all the evidence clearly points to the conclusion that the Plaintiff was the shipper who contracted with the Defendant to carry the goods in question to Bermuda. The suggestion that the shipper is whomever the carrier records in its own documentation as the shipper must be rejected. On the Defendant's own

[10] Per Brandon LJ in *The El Amria* [1981] 2 Lloyd's Rep 119 at 123-124.

evidence, there is no objective basis for rejecting the Plaintiff's positive assertions that he contracted with the Defendant to bring his boat to Bermuda. Indeed, his assertion that he discovered who the Defendant's Florida agents were through an employee of the Defendant in Bermuda was not challenged in the Second Frith Affidavit.

29. All the Defendant's evidence potentially supports is a finding that the contract of carriage was entered into through a telephone booking made by an agent on the Plaintiff's behalf. There is no or no credible evidence that some other party contracted with the Defendant on their own behalf to carry the goods to Bermuda. According to Mr. Frith, the normal course of business is for a contract of carriage to be entered into orally over the telephone with the particulars entered on the carrier's booking sheet and then entered in the computer system. The bill of lading would typically be issued later, on the day the ship was due to sail.

30. The Booking Sheet exhibited to the First Frith Affidavit lists "*Jerry*" as shipper, but has two telephone numbers and the name "*Boat Max USA*" struck out. "*Northside Marine*" is listed as freight forwarder, but an arrow beneath two telephone numbers points to the Plaintiff's Bermuda telephone number. The Plaintiff is listed as consignee. So the Booking Sheet itself does record the Plaintiff as consignee, but does not clearly record any other person or entity as the shipper. The Bishop Affidavit explains the normal booking process, but does not explain the booking sheet his company, the Defendant's agents, actually completed in the Plaintiff's case. In paragraph 3, it is deposed that Northside Marine would not have been recorded as shippers in the bill of lading if the Plaintiff was in fact the shipper. But he is unable to positively state that he ever received any communication from this entity at all. The most he can state is that he "*realized*" that "*Jerry..was booking it on behalf of Northside Marine*". It is unclear what the basis of this realisation is-whether facts within his personal knowledge or otherwise. Moreover, paragraph 4 of the Bishop Affidavit is consistent with the booking sheet in describing Northside Marine not as "shipper"

but as "freight forwarder", a term more consistent with this entity merely being the shipper's agent:

> "*If the booking was made with Mr. Robinson, which it was not, we would have followed the procedure for telephone bookings involving an export shipment where the* **shipper** *is not using a* **freight forwarder**." [emphasis added]

31. It is implicitly admitted that there are two typical legal scenarios. One where the shipper is using a "*freight forwarder*" (which Northside Marine was described as on the booking sheet in the present case) who makes the booking on the shipper's behalf, and another where the shippers make the booking directly with the carrier's agents themselves. Having regard to the contents of the booking sheet in the present case, and the evidence contained in the Bishop Affidavit, there is no basis for finding (based essentially on the contents of the Bill of Lading alone) that Northside Marine contracted with the Defendant as principals.

32. The bill of lading describes the shipper as "*Northside Marine Sales for Michael & Joy Blount*", but since there is no suggestion in any other evidence that the Blounts entered into a contract of carriage with the Defendant in respect of this cargo, I place no reliance on the bill of lading's description of who the shipper was. The bill of sale the Defendant's agents initially received showed the Blounts as two of the four vendors of the boat the Plaintiff purchased, but even the booking sheet does not record them as the shippers. In fact, the Defendant's evidence looked at as a whole suggests that the Defendant does not properly distinguish in its booking sheets and bills of lading between who the law recognises as the shipper (generally the party who owns the cargo and is paying for it to be shipped) and the shipper's agent and/or freight forwarder, who merely makes a booking (and perhaps delivers the cargo to the carrier) on the shipper's behalf.

33. Accordingly, I find that the Plaintiff was very arguably the shipper and not merely a consignee.

Findings: were the Defendant's usual contractual terms (including the exclusive jurisdiction clause) incorporated into the parties' contract of carriage?

34. In my judgment there is nothing unusual about the exclusive jurisdiction clause requiring carriers to take special steps to bring it to the shipper's notice. The crucial factual question which falls for determination is whether the standard terms and conditions in the bill of lading as a whole were incorporated into the contract of carriage. I find this question to be a difficult one, particularly in light of Mr. Adamson's eloquent plea for the need for certainty and stability in this area of the law. It must be correct that international trade would be potentially disrupted if the law were to require excessive formalities for the consummation of high volumes of standard commercial shipping transactions. Absent highly unusual facts, the courts should probably be reluctant to conclude that the standard terms and conditions of carriage are not reflected in a bill of lading which is duly issued in respect of a contract of carriage.

35. As far as the course of dealing described in the Defendant's evidence, I would be inclined to conclude, for the purposes of the present stay application, that there was, very marginally, a good arguable case that the standard terms and conditions were incorporated if I was satisfied that there was a good arguable case for concluding that the booking was made by Northside Marine on the Plaintiff's behalf. Mr. Frith's First Affidavit's assertion that this entity has shipped goods to Bermuda before is not contradicted by any other evidence, although the Bishop Affidavit suggests that the bill of lading may list as shipper the shipper's agent or "*freight forwarder*". The Bishop Affidavit, generously read, suggests that freight forwarders are generally familiar with the terms and conditions of contracts of carriage. Whether Northside Marine did in fact make the booking on the Plaintiff's behalf is far from clear, bearing in mind the facts that (a) the Defendant's evidence suggests that no direct communications took place between the carrier and the purported agent at all, and (b) the Plaintiff deposes that he

contracted with the Defendant personally, and implicitly denies authorising Northside Marine to contract on his behalf.

36. Paragraph 14 of the First Bishop Affidavit states in relevant part as follows: "*I understand from Robin Bishop at North Florida Shipping, our agents, and believe that Boatmax USA made the actual booking. Again, I have no personal knowledge of BoatMax USA, but understand that it is a yacht brokerage.*" The Plaintiff himself admits purchasing his boat through Northside Marine, but does not expressly deny that the initial booking was made by BoatMax USA. He does implicitly deny this because he states (paragraph 13) that before contacting the Florida agents, he spoke to the Defendant's Stephen Paynter about the shipping procedure and likely costs. As a result of these discussions, he "*contacted North Florida Shipping*" (paragraph 14) and was called by them about contract details. It seems clear that the Plaintiff paid the Defendant on or about the date the ship departed after confirming that the cargo had been loaded on board. His Affidavit was sworn before the Bishop Affidavit, so I draw no adverse inference from the Plaintiff's failure to challenge the very weak assertion that the Defendant's agent "*realized*" that Boat Max were booking on behalf of Northside Marine.

37. Taking the Defendant's case at its highest, an entity unknown to the Defendant made an initial booking on behalf of an agent of the Plaintiff who never made any direct contact with either the Defendant or its own Florida agent at all. It is unclear on what basis Mr. Bishop concluded that Jerry or Boat Max USA had apparent authority to act on behalf of Northside Marine, because of the curiously obtuse assertion made by the deponent that he "*realized*" that Jerry was merely an agent for the freight forwarder. Assuming that the deponent was being scrupulously honest having no independent recollection of the transaction without reference to the booking sheet and the bill of lading, it does seem arguably clear that Boat Max USA must have contacted the Defendant's Florida agents in connection with the Plaintiff's contract of carriage, left their telephone contact details and made some mention of Northside Marine. It is not to my mind

arguably clear that Boat Max did more than possibly deliver the boat for shipping, leave their contact details, and then explain (when contacted about the contract details) that they had only delivered the boat on behalf of Northside Marine, who appear to have been the brokers through whom the Plaintiff purchased the boat. Equally plausibly, Boat Max USA may have called up to make an initial booking, but when contacted for further information referred the Defendant's agents to Northside Marine. When the Defendant's agents attempted to contact Northside, it is conceded that they could not contact them, necessitating a long distance call to the Plaintiff in Bermuda.

38. The only clear evidence of any contractual discussions at all prior to the cargo being loaded relates to discussions between the Defendant's agents and the Plaintiff relating to the value of the cargo. It is true that an internet printout which forms part of Exhibit "GF-2" to the First Frith Affidavit suggests that Boat Max USA is an unincorporated firm of "*Yacht Brokers*". Can the Court properly, without speculating, infer from an internet advertisement printed out for the purposes of this litigation that Boat Max was familiar with the standard terms and conditions of contracts for the international carriage of goods by sea adopted by the Defendant, a Bermudian company? Bearing in mind that Northside Marine were subsequently found to have gone out of business on a date uncertain and were not contactable while the contractual terms were being negotiated, is there a good arguable case that (a) Jerry of Boat Max had apparent authority to enter into a binding contract with the Defendant's Florida agents incorporating standard terms known to Northside Marine (assuming that entity still existed and had both the capacity and authority to contract on the Plaintiff's behalf) and that (b) the knowledge of Northside as the Plaintiff's agent may properly be imputed to him?

39. Having regard to the unusual fact that the entity which the Defendant contends contracted with them as a principal (or, properly analysed as the Plaintiff's agent) never, by the Defendant's agent's own implicit admission, directly communicated with the Defendant at all, the evidence that the Plaintiff's agent contracted with

the Defendant on his behalf in a manner consistent with a prior course of dealing is more speculative than real. The inference that the Court could otherwise draw in the Defendant's favour is further weakened by the facts that (a) the Plaintiff's alleged agent went out of business, possibly within the relevant time-frame, and (b) the Defendant admits discussing certain contractual details with the Plaintiff directly at a time when the contract was very arguably not yet concluded. It is also interesting that the Defendant's booking sheet includes at the bottom what appears to be the Plaintiff's email address. This suggests that it was at least contemplated that it might be necessary to send some written communication to the Plaintiff in circumstances where the Defendant did not (according to their booking sheet) have any other relevant party's address[11].

40. The First Frith Affidavit implies that contractual terms are not settled until the cargo is taken on board. He deposes that the booking is usually made over the phone, data inputted into their computer system, but a bill of lading is not usually mailed out until "*the day the ship sets sail, as there are often last minute changes which need to be recorded in the Bill of Lading*" (paragraph 6). He then deposes: "*It is not practicable to ask each customer to sign a formal contract prior to taking their cargo on board*" (paragraph 11). This appears to be consistent not just with the Defendant's own shipping practice, but with practice generally. The learned authors of '*Voyage Charters*' observe (at paragraph 18.45):

> "*An express contract of carriage is often made between the shipper of the goods and the carrier before loading commences and, in the absence of an express agreement, a contract may be implied from the acts of the shipper in presenting the goods for loading and the carrier in receiving them on board.*"

[11] The Bill of Sale exhibited to the Bishop Affidavit does include the Florida address of two couples who seemingly sold the boat to the Plaintiff, as well as the Plaintiff's Bermuda address. But this is not a contractual document prepared as part of the Defendant's booking process. The booking sheet contained telephone numbers only for Boat Max and Northside Marine.

41. In the present case, the evidence available at this stage, albeit marginally, points more strongly to the view that the contract of carriage should be construed as having been concluded by the Plaintiff personally when he admittedly spoke to the carrier's Florida agents about the value of the cargo. At this juncture, the Defendant's agents appear clearly to admit that (a) they realised that Boat Max USA were neither the shipper nor the Plaintiff's "freight forwarder", and (b) they had been unable to communicate directly with the entity which they believed was the Plaintiff's freight forwarder. Ordinarily, evidence that a freight forwarder familiar with the terms on which a carrier shipped goods to Bermuda had made a booking on behalf of a shipper/consignee in Bermuda would suffice to justify the inference (or a good arguable case that such an inference could be drawn at trial) that a contract of carriage was entered into on the usual terms. But this threshold is not reached on the facts of the present case, having regard to the carrier's own booking sheet. Whether or not the standard terms and conditions were incorporated into the contract made between the Plaintiff and the Defendant accordingly turns substantially upon an analysis of the communications which took place between the Plaintiff himself and the Defendant and its Florida agents.

42. It seems clear that the Plaintiff was not given a copy of the bill of lading referring to the standard terms and conditions including the exclusive jurisdiction clause until after he (a) confirmed that his goods had been loaded on the ship, and (b) paid for the shipment. In accordance with what the Defendant contends is the standard practice, these documents were supplied not as an incident of concluding the contract of carriage, but to facilitate his clearing the cargo from the docks in Bermuda when it arrived. The Bishop Affidavit admits that if the carrier's agents had known they were dealing with an inexperienced individual shipper such as the Plaintiff, mention would have been made of the fact that documentation relating to the contract had to be prepared although the contents of the contractual terms would not have been mentioned. The presently available evidence suggests that there was confusion as to who was actually making the booking on the Plaintiff's behalf and that by the end of the process the Defendant ought to have known that

the Plaintiff himself was concluding the contractual arrangements. In these circumstances can a term be "*implied into the original contract between the shipper and carrier that the goods will be carried upon the terms of a bill of lading customary in the trade?*"[12]

43. The authorities the Defendant relied upon suggest that the courts will readily make this inference where the shipper or his agent may be presumed to know that a bill of lading will be issued and that the contract will be governed by terms customary in the trade. There is no suggestion that such knowledge will be presumed in cases where the shipper is an ordinary consumer and there is no suggestion that he has previously entered into a similar contract of carriage. The Plaintiff's evidence is that he made enquiries of the Defendant as to what the shipping procedure was, and was put in touch with their Florida agents. It is entirely believable that he had no idea that he was agreeing to refer any dispute about the contract of carriage with a Bermuda company for goods to be delivered in Bermuda to the exclusive jurisdiction of a New York Court. There is no suggestion that the Plaintiff was told to refer to the company's website for its standard terms and conditions of carriage, either by the Defendant's representatives in Bermuda or in Florida. The express contract he made was to pay the Defendant's customary charges for delivery of the cargo in Bermuda. He accepted the bill of lading without protest when he paid for the shipment after the goods had been loaded, but the contract would by this point have been already concluded. The Defendant's telephone booking system appears to be designed for bookings with commercial agents, not for the perhaps exceptional individual consumer acting on their own behalf. Can it be inferred that customary terms of which the Plaintiff was unaware were incorporated into the contract of carriage without doing violence to the fundamental principles underlying the law of contract formation?

[12] '*Voyage Charters*', paragraph 18.45(a).

44. Mr. Adamson's submissions appeared to invite the Court to ignore the minutiae of the parties' actual dealings in relation to a comparatively small shipping transaction, and instead to make a pragmatic decision designed to protect the far larger institutional framework within which international trade operates. Ms. Snelling's submissions appeared, at first blush, to invite the Court to apply by analogy the consumer protection principles applicable to contractual contexts in which consumers are typically involved, in a legal context which is not designed for consumers at all. However, counsel did also rely on general principles extracted from cases in the commercial shipping context which I find instructive for the purposes of the present case. Firstly, according to '*Halsbury's Laws*', 4th edition Reissue, Volume 43(2) at paragraph 1539:

> "*Where, as is usually the case, there is a bill of lading relating to the goods, the terms of the contract on which the goods are carried are prima facie to be ascertained from the bill of lading. Except in certain specified cases, the bill of lading is not, however, conclusive evidence of those terms, and the person accepting it is not necessarily bound by all its terms but may be entitled to repudiate them on the grounds that, as he did not know, and could not reasonably be expected to know, of their existence, his assent to them is not to be inferred from his acceptance of the bill of lading without objection.*"

45. The first case cited in Halsbury's as authority for this proposition is *Crooks-v-Allan* (1879) 5 QBD 38, a case where the shipper was a shipping company. This case illustrates that, even in a commercial context, the Court cannot ignore the reasonableness of inferring that the disputed terms where actually agreed to by the shipper. In this reported case, the bill of lading did not merely evidence a prior oral contract. It contained a clause which read: "*In accepting the bill of lading, the shipper, or other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or*

printed."[13] The Court held that even though the shipper was aware that the goods would be shipped under a bill of lading, an agreement would only be implied in respect of customary terms, and the exemption clause in question was so unusual that the shipper ought to have been given special notice of it either (a) before the goods were shipped, or (b) before the goods were delivered. In the present case, the Plaintiff must be entitled to contend that he ought to have been made aware of the existence of the Defendant's customary terms before he concluded his contract of carriage, on or before November 20, 2006 when he (a) confirmed that the goods were loaded and (b) paid for the cargo in advance of delivery, being given a copy of the bill of lading merely by of receipt for payment.

46. Another case relied upon by Ms. Snelling dealing with the carriage of goods by sea under a contract between two commercial parties illustrates the sort of booking procedure which can be adopted to eliminate doubts over the terms of the contract of carriage. In *Armour and Company, Limited-v-Leopold Walford (London), Limited* [1921] 3 KB 473, the shippers approved a booking slip issued by the carriers which expressly stated: "*All engagements are made subject to the conditions, terms and/or exceptions of our Bills of Lading*..." and the plaintiffs had previously "*made several shipments with the defendants under similar bills of lading with a like clause.*"[14] The claim that the shippers were not bound by a standard clause embodied in the bill of lading entitling the carrier to carry the goods on the deck was rejected. I accept that an oral booking system may suffice, when dealing with a shipper (or shipper's agent) who is familiar as a result of prior dealings with the carrier's standard terms, to incorporate such terms into the contract of carriage : *Anticosti Shipping Company-v-Viatur St.-Amand* [1959] 1 Lloyd's Rep 352. But when a carrier such as the Defendant is dealing with a shipper who cannot be shown to have contemplated a bill of lading containing standard terms, let alone to have been actually or constructively aware of those terms before the bill of lading was issued, there is no or no arguable basis for

[13] At page 41.
[14] At pages 474, 476.

concluding that the parties agreed to embody the standard terms and conditions of the bill of lading into their contract of carriage.

47. In the present case there is no evidence, let alone sufficient evidence to support a good arguable case, that the Plaintiff knew or ought to have known that the standard terms and conditions of the Defendant's bill of lading, including the exclusive jurisdiction clause, formed part of the oral contract of carriage he concluded with the Defendant and its Florida agents before the cargo was loaded on board. Applying the dictum of Devlin J in *Pyrene Co. Ltd.-v-Scindia Navigation Co. Ltd.*[1954] 2 W.L.R 1005 at 1014, upon which the Defendant's counsel relied, the acceptance of a copy of the bill of lading by the Plaintiff after the shipment had been paid for is not in these circumstances evidence of his acceptance of that document as evidencing the terms of the parties' contract. The position would be otherwise if, as in the ticket cases to which the Plaintiff's counsel referred, a document making reference to the standard terms contained in the bill of lading was supplied to the shipper as part of the contract formation process.

48. Even if the Defendant's agents had appreciated from the outset that they were dealing with the Plaintiff personally, and not an experienced agent with knowledge of their standard contractual terms, it is doubtful whether the indirect reference to the bill of lading which the Bishop Affidavit suggests would have been made in such a case would have sufficed to incorporate the standard terms into a contract with a non-commercial first time shipper. The entire edifice of international trade will not collapse, with all due respect to Mr. Adamson's submissions, if the Defendant's Florida agents (and possibly other carriers with similarly informal booking systems) were to be required to adopt a policy of either (a) taking bookings exclusively from specialist freight forwarding agents, or (b) sending out booking sheets containing a concise reference to the bill of lading and where the carrier's standard terms and conditions may be found. The booking sheet produced by the Defendant in the present case included the Plaintiff's email

address, which illustrates that, in the internet age, written communications can easily be sent with minimal expense.

Findings: should the Defendant's stay application be granted?

49. Having found that the exclusive jurisdiction clause was not incorporated into the contract of carriage between the parties, it follows that the Defendant's stay application must be refused.

50. If I were required to find that the parties were bound by the exclusive jurisdiction clause, I would have rejected the Plaintiff's submissions that a stay should be refused on discretionary grounds. I would have had to bear in mind that the exclusive jurisdiction clause appears to be similar to that employed by other Bermudian ship-owners, that the contract would have been governed by US law, that the incident giving rise to the Plaintiff's claim took place within US waters, the strong public policy in favour of holding parties to their contractual bargains and the fact that the US District Court for the Southern District of New York has special maritime law expertise. These factors would in my judgment have outweighed, somewhat narrowly, the strong connections with Bermuda (both parties and the availability of at least some witnesses here), combined with the suspicion that the Defendant (in what for it appears to be a small money case but which for the Plaintiff seems to be a big money case) is in part invoking the exclusive jurisdiction clause for tactical reasons[15].

Conclusion

51. In summary, I find that the Plaintiff was very arguably the shipper who contracted with the Defendant to carry the goods owned by the Plaintiff to Bermuda. The Defendant has failed to make out a good arguable case that the Plaintiff was

[15] These factors would not, absent the engagement of an agreement to refer disputes elsewhere, have supported a finding that the action should be stayed on general *forum non conveniens* grounds.

merely a consignee unable to challenge the terms of a contract of carriage entered into between the Defendant and a third party shipper.

52. I further find that the contract of carriage was more arguably negotiated by the Plaintiff personally, than it is arguable that the contract was negotiated by an agent on the Plaintiff's part. The evidence as to who made the booking with the Defendant's agents was too unclear to make it possible to properly conclude that the Defendant had made out a good arguable case that the Plaintiff's purported agent with knowledge of the Defendant's standard terms and conditions of carriage had entered into the contract on his behalf.

53. The question of whether the Defendant's standard terms and conditions of carriage, including the exclusive jurisdiction clause providing for disputes to be resolved in New York, were incorporated into the contract of carriage accordingly fell to be considered with reference to the communications between the Plaintiff and the Defendant in a transaction which was unconnected with any prior course of dealing. The Defendant conceded that nothing was done to bring these terms and conditions to the Plaintiff's attention until after the contract was concluded when the cargo had been loaded and he was given a copy of the bill of lading as a receipt for payment. Clearly, the Defendant was unable to make out a good arguable case for holding that the exclusive jurisdiction clause formed part of the contract of carriage entered into between the parties.

54. In the ordinary case where clear evidence is adduced that a contract for the carriage of goods by sea was made by a principal or agent familiar with the conditions of carriage which are customary in the trade, no special steps need be taken to bring such terms to the shipper's attention. If companies who carry goods by sea elect to do business with ordinary consumers, and do not insist that they use professional agents, some simple means must be devised to ensure that standard contractual terms are brought to the customer's attention before the goods are shipped. In the present case it is clear that, from the beginning of the

contractual relationship, there was uncertainty on the Defendant's agents' part as to precisely whom they were contracting with.

55. For these reasons the Defendant's application to stay the present action on the grounds that it is improperly brought in breach of contract is dismissed. Unless either party applies to be heard within 14 days hereof , I would order (a) that the Plaintiff be awarded the costs of the present application, and (b) that the present action be transferred into the Commercial List.

Dated this 29th day of February, 2008

KAWALEY J