In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2014: CIVIL APPEAL NO: 32

BERMUDA FORWARDERS LTD

Appellant

-v-

WINNAE WALES

Respondent

JUDGMENT
(In Court) [1]

Date of Hearing: March 31, 2015
Date of Judgment: April 10, 2015

Mr. Kai Musson, Cox Hallett Wilkinson Ltd, for the Appellant
Mr. Kenville S. Savoury, Savoury Associates, for the Respondent

Introductory

1. By an Ordinary Summons issued by the Magistrates' Court on June 30, 2011, the Respondent sued the appellant for $22,000 plus $250 in costs for "*loss of earnings and business opportunity; as a result of the Defendant's breach of implied terms and negligence when shipping goods to Bermuda on behalf of the Plaintiff*". Following a trial at which the Respondent was legally represented and the Appellant, surprisingly, was not, the Magistrates' Court (Worshipful Juan Wolffe) granted judgment to the Respondent (the Plaintiff below) in the amount of $5400 on July 19, 2013.

[1] The Judgment was circulated without a formal hearing for handing down.

2. It seems surprising that a limited company of longstanding which is generally perceived to have some commercial substance to it should have chosen not to retain attorneys to represent it in light of the highly technical legal argument which was effectively advanced for the first time in the present appeal. In addition, the duration of the proceedings below were protracted by the fact the Appellant made an application for a stay which was ultimately refused, but which it was conceded before this Court ought not to have been made.

3. Although the Appellant accepted that certain goods it was involved in shipping to Bermuda for the Respondent did not arrive, it argued at trial that the parties had compromised the claim in the amount of $1196.30, and that if this defence was rejected it was entitled to counterclaim for the monies already paid and accepted by the Respondent. The already rejected preliminary stay argument based on the exclusive jurisdiction clause contained in a bill of lading was reiterated at trial. On appeal, however, it was contended that the Appellant was not party to the contract of carriage at all and conceded that, if this was the true legal position, the Appellant had no right to assert the shipper's contractual rights under the bill of lading at all.

4. The essence of the case on appeal was that the Appellant did not contract with the Respondent in relation to the shipment in question, but was merely the shipper's delivery agent. It was contended that this principle had significance beyond the facts of the present case in that it was important that Bermudian law be demonstrated as consonant with internationally recognised principles governing contracts for the carriage of goods.

5. In support of the appeal, an opposed application was made to admit fresh evidence on appeal in the form of various documents exhibited to the Affidavit of Nicholas Kempe. It was deposed that until the deponent was cross-examined at trial, the relevance of the documentation was not appreciated.

The decision in the Magistrates' Court

6. The Respondent (the Plaintiff below) testified that in June 2010 she ordered a quantity of goods from the Appellant which were due to be shipped to Bermuda on the 'Oleander'. On July 22, 2010, the Appellant informed her that the goods (a cotton candy machine, floss pan and cones) had been lost. She was invited to put in a claim and claimed for loss of revenue because she was unable to use the items for business purposes over the Cup match holiday. Although the Appellant tendered a cheque in the amount of $1,196.30 in full and final settlement of the Respondent's claim, the Respondent cashed the cheque without accepting it on the proposed terms. Under cross-examination, the Respondent:

(a) admitted she had imported good before for non-commercial purposes;

(b) admitted placing the order for the goods with 'Snappy Popcorn';

(c) stated that she requested Snappy Popcorn to ship the goods to the United States address the Appellant's Mr. Forbes had supplied her, namely 'WLG';

(d) admitted that she received the bill of lading issued by WLG ("the Bill of Lading") and that she was described as the consignee;

(e) stated that she did not receive the goods until the end of season, explained that it made no sense to rent a machine and estimated her daily earnings from the equipment at $690.

7. Nicholas Kempe, the Appellant's Vice-President, testified that despite what may have appeared to the Respondent to be the position, WLG was a separate entity to the Appellant. He explained that under international shipping practice goods are shipped with a bill of lading. The shipper is the original source of the goods, the carrier transports the goods and the consignee is the final recipient. In the present case, WLG received the goods from Snappy Popcorn and the Respondent was the consignee. The Appellant's sole function was to effect delivery of the goods and collect fees. As WLG lost the goods, they decided to offer a settlement even though liability under the Bill of Lading was capped at $50 (from the Judgment it appears that the limit was said to be $500). Under cross-examination, Mr. Kempe:

(a) admitted that the Respondent would not have received the Terms and Conditions referred to on the front page of the Bill of Lading before the goods were shipped. She could have requested those details had she been interested;

(b) stated that in a legal sense WLG were not the Appellant's agents;

(c) insisted that references made by Mr. Forbes, who was not a lawyer, in correspondence to "our Warehouse" did not signify the Appellant's ownership of the warehouse;

(d) conceded that in the Defence it had been admitted that WLG were the Appellant's agents. This admission was made because the parties did have a commercial relationship, again without appreciating the legal significance of the admission ;

(e) stated that the Bill of Lading designated the Appellant as the 'Delivery Agent' and represented the Appellant's contract with WLG;

(f) asserted that the Respondent should have sued WLG and that "*WLG chose Bermuda Forwarders to bring Ms. Wales items in.*"

8. The Respondent's case, advanced by her counsel, was essentially that (1) there was a contract between the parties in relation to the delivery of the goods, (2) the Appellant's was in breach of this contract, (3) she was not bound by the exclusive jurisdiction clause or any other terms incorporated by reference into the Bill of Lading, *inter alia*, because she was not an experienced shipper (4) she had not accepted the cheque tendered in full and final settlement of all claims and (5) she was entitled to compensation in the amount $11, 674.26 ($640 per day for 18 days).

9. The Appellant's case, advanced by its sole witness Mr. Kempe himself was the converse position in respect of each limb of the Respondent's case, reiterating the jurisdiction arguments that had already been rejected prior to trial. The Court accepted Mr. Savoury's submission that the exclusive jurisdiction clause was not incorporated into the contract. It is unclear from the record precisely how the jurisdiction argument was advanced. Exclusive jurisdiction clauses can only directly be enforced as a contractual right by a contracting party, not by a third party, so advancing this argument may well have created the impression that the Appellant accepted that it and the Respondent were indeed contracting parties. Reliance was also placed on my judgment in *Robinson-v- Somers Isles Shipping Ltd.* [2008] SC (Bda) 8 Civ (29 February 2008); [2008] Bda LR 5, which dealt with the legal effect of a bill of lading.

10. The main issues in dispute at trial were the existence of a contract between the parties and, if a contract existed, whether the Respondent was entitled to seek to recover more than the sum tendered in full and final settlement. The Learned Magistrate found:

(a) having regard to the fact that the Appellant had admitted on the pleadings and in correspondence that WLG was its agent, as well as negotiating a settlement of the Respondent's claim, the relevant contractual relationship was between the Appellant as principal and the Respondent;

(b) the tendered sum represented the replacement cost of the goods which were not delivered, leaving outstanding the Respondent's claim for loss of profit. The Appellant had knowledge of the business purposes to which the goods were intended to be put. A realistic assessment of the profit the Respondent lost was $300 per day (for 18 days), not the $640 she claimed. The Respondent was accordingly entitled to $5400 for loss of profits;

(c) the Appellant had failed to prove it was entitled to the return of the $1,196.30, which had not been accepted in settlement of the claim, and in

any event would have been liable to pay that sum by way of compensation for the replacement costs incurred by the Respondent.

Grounds of Appeal

11. The Appellant advanced two main grounds of appeal in support of its contention that the damages award should be set aside and the $1196 retained by the Respondent should be repaid:

    (1) the Learned Magistrate erred in finding that a contract for the carriage of goods was entered into between the parties; and

    (2) the Learned Magistrate erred in finding that the Respondent did not accept the Appellant's cheque in full and final settlement of all claims.

Application to adduce fresh evidence on appeal

12. Mr. Musson sought to rely upon fresh evidence not adduced at trial to fortify the argument advanced at trial that the Appellant was merely the carrier's agent, not vice versa. He relied on section 14(5) of the Civil Appeals Act 1971 as interpreted in *Regula Dobie-v-Interinvest (Bermuda) Limited* [2010] Bda LR 25. In that case, I merely held that it was arguable that a more flexible approach to fresh evidence applied in the context of an application for leave to appeal where this Court's appellate powers and the Court of Appeal's were the same. The relevant authority on this issue is the decision of the Court of Appeal for Bermuda in *Interinvest (Bermuda) Ltd.-v-Black and Dobie* [2010] Bda LR 41 where Ward JA opined as follows:

> "*8…it was conceded that in Bermuda the test with respect to fresh evidence is less restrictive than that which operates in England following Ladd v Marshall [1954] 3 All ER 745. This is because the language of Section 8 (2) of the Court of Appeal Act 1964 and section 14 (5) of the Civil Appeals Act 1971 confers on the Court full discretionary power to admit fresh evidence on appeal without the constraints of the English Order 59 Rule 10 (2) of the Rules of the Supreme Court 1999 under which further evidence on appeal would only be admitted "as to matters which have occurred after the date of the trial or hearing except on special grounds." So the question now before the Court is not whether fresh evidence can be admitted but rather whether leave should be granted for its admission in the circumstances of this case.*"

13. In that case the application to adduce fresh evidence was refused on the grounds that the appeal was clearly unmeritorious and the Court of Appeal was "*not satisfied that*

the introduction of fresh evidence would materially affect the outcome." It was not necessary for the Court of Appeal in that case, because the existence of a broader discretionary power to admit fresh evidence on appeal, to lay down a comprehensive list of conditions under which fresh evidence may be admitted. In the present case, the Appellant submitted that the further evidence should be submitted because:

(1) The overriding objective required the Court to give due weight to the importance of achieving the right result. Regard should be had to the fact that the Appellant was not legally represented at trial; and/or

(2) the traditional *Ladd-v-Marshall* test was met because prior to the trial, the Appellant had no notice of the contract argument which succeeded at trial, nor the assertion found by the Learned Magistrate that the 'Oleander' was owned by the Appellant.

14. In my judgment the traditional *Ladd-v-Marshall* test is not met and the Appellant could with reasonable diligence have adduced the evidence it now seeks to rely upon at trial. As Mr. Savoury rightly submitted, it was clear on the pleadings that the Respondent's case was that she contracted with the Appellant as principal. Prior to trial, it was formally admitted by the Appellant that WLG was its agent. It is admitted in paragraph 3 of the Kempe Affidavit that he actually appreciated the contractual claim which was being asserted in the course of his own cross-examination. At that juncture, the Appellant had a further opportunity to apply to the trial Court for an adjournment in order to adduce documentary evidence in support of its case.

15. The reference in the Judgment to the Appellant's referring to the 'Oleander' in possessive terms, which was not expressly relied upon in cross-examination, was hardly a pivotal finding, because it was simply one of a number of factors listed as indicating that the Appellant at all material times were acting as principals. Indeed, an almost identical point was put to Mr. Kempe about the reference in the same email chain to "*our Warehouse*" which he explained was not intended to suggest ownership. Had the Appellant retained a lawyer as it ought to have done, Mr. Kempe would probably have been invited to comment on the "*our ship*" reference in the email chain as well.

16. The Appellant cannot pray in aid the fact that it was not legally represented at trial. No explanation as to why an apparently substantial trading company was unable to (or had elected not to) retain counsel was advanced by Mr. Musson. In this Court a limited company can only appear through counsel. The same position ought in principle to apply in the Magistrates' Court as an artificial person cannot appear 'in person'. Order 5 rule 6 provides as follows:

> "*(2) Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by an attorney.*"

17. An appellate tribunal ought not to lightly admit fresh evidence in circumstances where it is not embarking upon a full rehearing. It would be an abuse of the appellate

jurisdiction of this Court to permit a civil appellant to have a 'second bite of the cherry' by adducing new evidence on appeal as a matter of course where he has had a fair trial at first instance and lost. Such an approach would be wholly inconsistent with the overriding objective, the main focus of which is a fair and efficient procedural approach which is likely to produce the right result rather than achieving a substantively just result. I accept the submission of the Appellant's counsel, who cited *Singh-v-Habib* [2011] EWCA Civ 599 on this point, that the judicial task striking a "*fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result…is one which accords with the overriding objective*" (at paragraph 10). Fresh evidence was admitted in that case, amongst other considerations, because of widespread public concerns about insurance fraud and new evidence which cast suspicion on the entire case advanced at trial.

18. I am in all the circumstances of the present case satisfied that the additional evidence sought to be adduced would not in any event "*materially affect the outcome*": per Ward JA in *Interinvest (Bermuda) Ltd.-v-Black and Dobie* [2010] Bda LR 41; [2010] CA (Bda) 8 Civ (17 June 2010) (at paragraph 14). The additional evidence either confirms evidence placed before the Court at trial or responds to a point (the ownership of the 'Oleander') which was clearly not a pivotal issue at trial.

19. The application for leave to adduce fresh evidence is accordingly refused.

Findings: is the finding that the contract of carriage was between the Appellant and the Respondent liable to be set aside?

20. The principal ground of appeal essentially requires the Court to determine whether a Bermudian importer of goods from abroad which are shipped under a bill of lading issued by an overseas carrier in circumstances where a delivery is effected through a local company (designated as delivery agent) may properly be treated as having contracted directly with the importer for the carriage of the goods in circumstances where:

    (a) the bill of lading is the only document which purports to evidence the terms and conditions of the contract of carriage;

    (b) the goods were purchased by the importer directly from a foreign shipper or supplier;

    (c) the local company recommended the overseas carrier to the importer who passed on the carrier's contact details to the shipper/supplier of the goods;

    (d) when the goods were lost and not delivered , the local company agreed to receive the importer's claim and negotiated with the importer in a manner which strongly suggested that it was, <u>at this point at least</u>, acting as a principal and that the overseas carrier was its agent.

21. Mr. Musson's central argument was that contracts for the international carriage of goods were governed by special internationally accepted rules and commercial certainty made it important that Bermudian law should conform to international commercial expectations. Reliance was placed at trial and in the present appeal on *Robinson-v- Somers Isles Shipping Ltd.* [2008] SC (Bda) 8 Civ (29 February 2008); [2008] Bda LR 5 for certain broad propositions which I accept inform how the evidence in the present case ought to be assessed. That case involved a Bermudian consumer suing a local shipping company and contending that he was not bound by conditions in a bill of lading of which he was unaware. Here the question in controversy is a more fundamental one: who were the contracting parties?

22. In *Robinson*, the first general legal finding I made was the following:

> "*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…*"

23. This suggests that the contract of carriage is generally recognised as being entered into between a party who contracts for the goods to be shipped and a carrier, and the former party is known as the shipper. Where the recipient of the goods is the party contracting initially with the carrier, the consignee and shipper will be the same person. The second legal finding recorded in the *Robinson* case was the proposition that a bill of lading will usually afford the best evidence of the terms of the contract of carriage:

> "*15…According to Cooke et al, 'Voyage Charters'*[2]*, 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 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,*

[2] 3rd edition (Informa: London, 2007), paragraph 18.45.

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.'"

24. The third legal finding in *Robinson*, and the most significant for present purposes, was that where goods are shipped under a bill of lading, the consignee or ultimate recipient of the goods is bound by the pre-existing contract entered into by the shipper and the carrier. Moreover, this position is derived from Bermudian statute law, not simply common law principles informed by commercial practice:

> "*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."*
>
> *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.'"

25. These principles are crucial to the present case, because they require the following approach, depending on the applicable facts:

(a) if the original contract of carriage was entered into between a shipper who was not also the consignee and the carrier, in contrast to the position in *Robinson* where the consignee contracted directly with the carrier, it is <u>not</u> possible for the consignee to challenge the terms of the contract for carriage based on his or her own experience or knowledge of standard terms and conditions incorporated by reference into the contract;

(b) if the original contract of carriage was entered into by the consignee himself or herself, then it is open to the consignee to contend that standard terms and conditions were not incorporated into the contract of carriage and/or, potentially, to contend that the original contractual terms were modified through the course of dealings between the parties; and

(c) in every case, the key timeframe to be analysed for determining who the parties to the original contract of carriage are is before the goods are shipped when the shipping arrangements are made. What happened after delivery (or the time scheduled for delivery) will only ordinarily be relevant to the extent that it sheds light on the capacities of the relevant legal actors when the initial contract was concluded.

26. What facts were found here which bear on the issue of the identity of the parties to the contract of carriage evidenced by the Bill of Lading? The Learned Magistrate most significantly found that:

(a) "*There was no dispute that….In or around June 2010 the Plaintiff ordered a quantity of items from an overseas company known as 'Snappy Popcorn…The Plaintiff's Items were delivered to WLG for onward shipment to Bermuda via the Defendant's shipping business. Particularly, the Plaintiff's Items were to be shipped on the Defendant's ship known as the 'Oleander'*";

(b) "*I find, that at all material times the Defendant was the principal company contracting with the Plaintiff and that WLG acted as their agents in dealing with the Plaintiff. Mr. Forbes' constant reference to WLG as 'our NJ warehouse' firmly supports that finding.*"

27. These findings were clearly based on an analysis of the Appellant's interactions with the Respondent after the goods were shipped. The notes of the submissions made by the Appellant's Vice-President on the law do not suggest that the Learned Magistrate was in any meaningful way assisted with the applicable legal principles summarised above, in particular the importance to be placed on analysing the Bill of Lading and determining who the parties were <u>at the outset</u> of the shipping transcation. Instead, the confusingly inconsistent positions of relying on exclusionary provisions in the

contract of carriage while denying the Appellant was a party were advanced. Having regard to the applicable legal principles first clearly identified by Mr. Musson before me on appeal, the proper inferences to be drawn from the evidence adduced at trial are as follows:

(1) the Bill of Lading was the most significant single documentary source of the terms of the contract of carriage;

(2) the Bill Of Lading relating to the relevant shipment of goods was by its terms issued by WLG USA, LLC as "Carrier" on or about July 9, 2010. It described the exporter as "Assembly Shipment" of Linden, New Jersey, described the Respondent as the "Consignee" and described the Appellant as "Delivery Agent";

(3) the Bill of Lading was the best available evidence of not simply the terms and conditions of the contract of carriage but also the identity of the parties to that contract. Construed in s straightforward manner, it constituted strong *prima facie* evidence that:

(a) the Respondent was merely the consignee,

(b) the "Exporter" was the shipper who had contracted with WLG to carry the goods,

(c) WLG contracted to carry the goods as principal; and

(d) the Appellant was merely WLG's delivery agent;

(4) the capacities of the parties as recorded in the Bill of Lading were broadly consistent with the Respondent's own evidence under cross-examination when she admitted that she placed the order for the goods with 'Snappy Popcorn' and requested them to forward the goods to WLG. The position was admittedly blurred by the fact that Snappy Popcorn did not select the carrier themselves and that the Respondent sourced the name of carrier from the Appellant. But these incidental matters were insufficient to displace the strong legal policy-laden presumption that the Bill of Lading was evidence of the terms of the contract of carriage and the parties to that contract;

(5) the conduct of the Appellant after it emerged that the Respondent's goods had been lost, particularly the legally inappropriate language used to describe its relationship with WLG, was entirely consistent with the finding that the Appellant acted as principal as the Learned Magistrate found. However, this conduct was also consistent with a delivery agent who had an ongoing commercial relationship with WLG acting in such agency capacity and simply using inappropriate legal language in the context of communications between non-lawyers;

(6) at first blush, the fact that the Appellant admitted that WLG was its agent in its pleading was the most significant factor of all, as it formally 'corroborated' the similar language used by the Appellant in correspondence with the Respondent in relation to the non-delivery dispute. However, the Appellant's witness explained that the term "agent" had in each instance not been used in a legalistic sense;

(7) once one has regard to the legal primacy to be given to the Bill of Lading as evidence of the contract, based in part on the fact that such documents are assignable and holders in due course are entitled to rely upon their terms, there was no sufficient evidential basis for concluding that the clear terms of the Bill of Lading should be regarded as having no operative legal effect. After all, there was no competing legal document relied upon by the Respondent which evidenced alternative terms and conditions of a contract for the international carriage of goods between the Appellant as carrier and the Respondent as shipper;

(8) against this legal and commercial background, in other words, it was simply inherently improbable that the Appellant would have entered into an oral contract with the Respondent on terms which were wholly at variance with established market practice and the documented basis on which the goods were shipped.

28. Accordingly, the finding that the contract of carriage was between the Appellant and the Respondent and the related award of damages are liable to be set aside.

Is the decision of the Magistrates' Court to dismiss the Appellant's counterclaim liable to be set aside?

29. The Appellant's Counterclaim was essentially based on the premise that if there was found to be no binding settlement agreement, it followed that the Respondent should be required to refund the $1,196.30 as money had and received or paid under a mistake of fact. Its primary case was that a binding agreement for the settlement sum was reached. The Magistrates' Court implicitly the settlement agreement argument based upon an analysis of the correspondence. This finding was open to the Learned Magistrate, not simply because the cheque was cashed by the Respondent subject to an express reservation of rights. The terms on which the cheque was tendered did not demand the return of the cheque if it was not accepted.

30. Should the Appellant be entitled to recover a sum it contended at trial the Respondent was bound to accept in circumstances where its primary case (that it was WLG's agent) has been upheld on appeal? That would be a perverse result. There is no inconsistency between setting the award of damages and permitting the Respondent to retain the monies the Appellant tendered on behalf of the carrier and primarily contended the Respondent was bound to accept. The Counterclaim was dismissed on three bases:

(a) there was no binding settlement agreement;

(b) no payment under a mistake of fact had been proved; and

(c) the Respondent was entitled to apply the monies in partial settlement of her damages claim.

31. Although the third basis for dismissing the Counterclaim has fallen away, the basis for the first two limbs of the decision has not been effectively undermined. This ground of appeal fails. In reaching this conclusion, I have regard to the provisions of section 14(4) of the Civil Appeals Act 1971:

> "*(4) No appeal shall succeed on the ground merely of misdirection or improper reception or rejection of evidence unless in the opinion of the Court substantial wrong or miscarriage of justice has been hereby occasioned in the court of summary jurisdiction.*"

Conclusion

32. For the above reasons, the Appellant's appeal against the Judgment of the Magistrates' Court awarding the Respondent damages in the amount of $5400 is allowed but the appeal against the refusal of the Court to order the Respondent to repay the $1,196.30 settlement cheque tendered by the Appellant is dismissed.

33. This appeal was, it seems to me, primarily brought to clarify the law and advance Appellant's commercial interests. It appears that the Appellant's business entails acting as a delivery agent for companies involved in shipping goods to Bermuda for ordinary consumers and commercial importers as well. The international carriage of goods takes place under internationally recognised rules which form part of Bermuda law the centrepiece of which is a bill of lading issued by the carrier which will almost invariably evidence the terms on which the goods are being shipped. The person importing the goods (the consignee) will generally be bound by the terms and conditions of the contract of carriage, even in circumstances where the 'fine print' has not been seen and examined. Where the ultimate recipient of the goods has indeed contracted directly with the carrier which issues the bill of lading and is an ordinary consumer, more leeway for disputing the incorporation of standard terms and conditions into the contract may, depending on the particular facts, exist.

34. In most cases, it is likely that the Bermudian importer will only be able to sue the local or overseas carrier who issued the relevant bill of lading and transported the goods to Bermuda, not the local delivery agent with whom they directly interfaced. The right to sue in Bermuda will likely be excluded, while a limit on the amount of damages which can be recovered will likely be imposed. The policy underlying these legal rules is to promote international trade by protecting those engaged in the

carriage of goods from unpredictable levels of financial risk flowing from the loss of or damage to goods while in transit.

35. The present appeal might not have been necessary if the Appellant, an established limited company, had retained counsel in the Court below, although disputes about whether parties to transactions have been acting as principals or agents have routinely bedevilled judges and lawyers alike over the years. The Respondent is legally aided. Unless either party applies by letter to the Registrar within 21 days to be heard as to costs, no Order shall be made as to the costs of the appeal.

Dated this 9th day of April, 2015 _____

IAN R.C. KAWALEY CJ