HONG KONG HIGH COURT

May 24, 25, 28, 29, 30; June 1, 4, 5, 6; July 31, 2001

CENTER OPTICAL (HONG KONG) LTD.
v.
JARDINE TRANSPORT SERVICES (CHINA) LTD. AND PRONTO CARGO CORPORATION (THIRD PARTY)

Before STONE, J.

Bill of lading — Misdelivery — Identity of carrier — Goods misdelivered — Whether plaintiffs had locus to bring suit — Whether defendant true contracting party — Whether obligations under bills ceased on discharge or on storage of goods after discharge — Issues as to package limitation, causation, failure to mitigate loss and proof of loss.

The goods the subject of this claim consisted of two consignments of optical frames and sunglasses. Both consignments were shipped from Shanghai to Miami in mid-1998. The first consignment of 248 cartons of optical frames was carried under bill of lading No. SHA472927 dated May 25, 1998 on the vessel *Alligator Wisdom*. The second consignment of 348 cartons of sunglasses was carried under bill of lading No. SHA472986 on the vessel *Hanjin New York*.

The two shipments were part of a sequence of nine such shipments whereby the plaintiff exported spectacle frames and sunglasses which had been manufactured in China by an affiliated company, Wenzhou Centre Optical Co. Ltd. to a third party in Miami, Centre Optical HK Inc. (Miami Center Optical).

The first six shipments were sent by the plaintiff to Miami ex Hong Kong.

In March, 1998 the plaintiff suggested to the buyer that it should ship direct from Shanghai to Miami. This was agreed, the buyer suggesting the use of Jardine Freight Services (HK) Ltd. This company referred the plaintiff to the defendant (JTSC) in Shanghai.

On May 25, 1998 JTSC issued the *Alligator Wisdom* bill which was in "Dynamic Container Line" form, named the plaintiff as shipper, the consignee as "To Order" and the notify party as Center Optical HK Inc. The third party in the proceedings Pronto was named as "F/Agent", Shanghai China being named as the load port and the port of discharge as Miami. The number of packages represented by this bill was stated to be 248 cartons and the bill itself was marked "Freight Collect".

The issuance of this bill led to a chain of sub-bills which named JTSC as shipper and Pronto as consignee and notify party. A like sequence occurred with regard to the eighth shipment of 348 sunglasses on *Hanjin New York*.

On arrival at Long Beach the seventh and eighth shipments were railed from Long Beach to Miami at which point the relevant containers were de-stuffed. Thereafter, facilitated by presentation in each case of the respective bills Pronto were able to gain possession of these goods and via a power of attorney issued by Miami Center Optical, to clear these shipments through U.S. Customs.

On the evidence the two shipments were released from storage by Pronto to Miami Center Optical absent production of the original DCL bills of lading in respect of each shipment.

Attempts were made by the plaintiff to obtain payment for the goods from Miami Center Optical but without much success.

The plaintiff sought to recover the invoice value of the 596 cartons of optical frames and sunglasses contained in the seventh and eighth shipments.

Recovery was sought against the defendant in contract arising from the defendant's acceptance of the plaintiff's instruction to the defendant to ship these goods to Miami to the plaintiff's order, naming as notify party Miami Center Optical, such contract being evidenced or partly evidenced by the bills of lading issued for the seventh and eighth shipments. The plaintiff also sought recovery in conversion arising from the wrongful misdelivery of those goods.

The defendant disputed the plaintiff's claim arguing that (1) the plaintiff had no locus to bring suit in this case absent being party to the relevant contract of carriage, to which the plaintiff was not; (2) the plaintiff was not the shipper i.e. it was not a party to the contract of carriage and the correct entity to bring suit on the contract of carriage was Wenzhou Center Optical; (3) the carrier under these bills of lading was not JTSC but Dynamic Container Line Ltd. with whom the defendant JTSC had an agency agreement; (4) Pronto was the plaintiff's agent; (5) the obligations under the bills of lading ceased on discharge or on storage of the goods after discharge; (6) if the carrier did not stuff the container itself the container was the packing unit for the U.S.$500 Carriage of Goods by Sea limit; (7) the act of releasing the containers without production of the bill of lading was not causative of the claimed loss and the plaintiff failed to mitigate its loss; (8) the plaintiff had called no documentary evidence to establish a completed purchase of the goods or of a debt to Wenzhou or of any special damages.

Held, by H.K. Ct. (STONE, J.), that (1) on its face, the suggestion that a named shipper on a bill of lading, and in fact the current holder of the two DCL bills, did not possess locus to bring the suit under these bills seemed to be both ambitious and wrong; the fact that the plaintiff did not fall within the definition of "lawful holder" under the Bills of Lading and Analogous Documents Ordinance Cap. 440, which statute was designed to determine the rights of transferees of bill of lading contracts, was nothing to the point and certainly did not mean that the plaintiff as holders of these bills was not as such entitled to delivery; and given that the plaintiff asserted its title as owner of the goods under normal f.o.b. rules, as such owner and as the holder of the bills of lading the plaintiff had an immediate right to possession and an entitlement to sue in tort as well as contract (*see* p. 683, col. 1);

(2) the submission that Wenzhou Center Optical was the other party to the contract of carriage and thus ought

to have been named as plaintiff or indeed as shipper on the bills of lading issued by JTSC would be rejected; the plaintiff contracted with Wenzhou for the purchase of these optical goods for the purpose of onsale by the plaintiff to Miami Centre Optical; the plaintiff was correctly named as shipper in the DCL bills of lading issued by JTSC; the goods were shipped by Wenzhou from Shanghai through JTSC on the instructions of the plaintiff; the property in the goods passed to the plaintiff and the plaintiff remained indebted to Wenzhou so that the plaintiff had locus to sue for the loss and damage occasioned by their premature and wrongful release; on these facts it and not Wenzhou Center Optical was the correct plaintiff (*see* p. 683, col. 2; p. 684, col. 1);

(3) the submission that the defendant's mode of signature failed to indicate that JTSC was not contracting as carrier and was not simply using the name "Dynamic Container Line" as a trade name, would be accepted; if the defendant was an agent at all, it was an agent for an unnamed principal and non-disclosure of the principal's name led to the liability of the alleged agent; and notwithstanding the profession of agency status the defendant was the real principal to this "contract of carriage" evidenced by these two bills; DCL was no more than the barest cipher for JTSC; and in all the circumstances it was plain that the real principal under the DCL bills which were forwarder's bills was the defendant (*see* p. 685, cols. 1 and 2);

(4) the incontrovertible evidence was that Pronto had worked for a considerable period with Jardine companies; and on this matrix of facts it could not be suggested that JTSC entered into a contract with Pronto as an agent for the plaintiff; Pronto was at all material times acting as JTSC's agent in Miami and Pronto was not appointed by JTSC as agents for the plaintiff (*see* p. 686, col. 1);

(5) the Court declined to hold that the delivery clause (cl. 14) was sufficiently clear to impinge on the cardinal principle requiring delivery by the owner or his agent *only* against production of an original bill of lading; and the Court declined to find that the import of cl. 14 when taken either alone or in conjunction with cl. 6(2) (port to port shipment) was sufficient to empower the carrier intentionally to deliver the goods without notice to anyone he wished and without subsequently being called to account for such action; it may be that a clause could be designed to excuse a deliberate decision to make delivery without production of a bill of lading but cl. 14 did not so succeed (*see* p. 687, col. 2; p. 688, col. 1);

(6) it was clearly established that the packages for calculating the limit were the number of cartons stated on the face of the bills of lading and not the number of containers and it was accepted by the defendant that the limitation under the Hague Rules would be greater than the value of the claim; with regard to the stuffing of the containers, it was not clear that the containers were not stuffed for and on behalf of the carrier; the defendant had not called any evidence which might assist on this matter and the defendant's contention as to package limitation under the bills would be rejected (*see* p. 688, cols. 1 and 2);

———*The River Gurara*, [1998] 1 Lloyd's Rep. 225, applied.

(7) there was no doubt that these goods were wrongfully released and that causes of action accrued to the plaintiff as a consequence; the plaintiff was entitled to stand on its own cause of action for the admitted misdelivery; and the fact that its efforts to secure redress in obtaining payment failed so markedly, or that on becoming aware of the situation it did not embark on expensive litigation in the United States was nothing to the point; the standard required from a plaintiff was not high and did not include an obligation to litigate against a third party; on the facts of this case the defendant had failed to discharge the burden of proving that the claimant ought to have taken certain steps to mitigate its loss (*see* p. 688, col. 2; p. 689, col. 1);

(8) the Court rejected the claim that Wenzhou was the true owner of the goods and if not probably had forgiven any debt or treated it as a paper loss; no evidential basis had been established for these assertions; nor did the fact that the plaintiff had not paid Wenzhou the price for the goods preclude recovery or restrict recovery to profit only; on the balance of probabilities the plaintiff had established its loss as claimed (*see* p. 689, cols. 1 and 2);

(9) the Court rejected the defendant's primary contentions that this was "a true agency case" wherein the plaintiff referred or arranged others to perform the shipments; that Pronto's error was not JTSC's error; and that the plaintiff's remedy was and had always been in terms of an action against Pronto in Hong Kong or Miami; on the contrary in the circumstances of this case the plaintiff's causes of action against the defendant were well founded both in contract and tort; on the balance of probabilities it had successfully made out its claim against the defendant (*see* p. 690, col. 1);

(10) third party proceedings were commenced, the Court granting an order permitting the defendant to serve a third party notice on Pronto; Pronto had not acknowledged service nor responded to the third party notice and there was no reason why judgment should not follow against Pronto consequent on the decision to hold the defendant liable to the plaintiff (*see* p. 690, col. 2).

This was an action by the plaintiff Center Optical (Hong Kong) Ltd. against the defendant Jardine Transport Services (China) Ltd., a freight forwarder based in Shanghai for damages in respect of goods transported to America by the defendant and released subsequent to discharge without production of original bills of lading. There were also third party proceedings brought by the defendant against Pronto Cargo Corporation of Miami, the forwarding agent.

Mr. David Stokes (instructed by Messrs. William K. W. Leung & Co.) for the plaintiff; Mr. Nigel Kat (instructed by Messrs. Clyde & Co.) for the defendant.

The further facts are stated in the judgment of Stone, J.

Judgment was reserved.

Tuesday July 31, 2000

JUDGMENT

STONE, J.:

Introduction

1. In this action the plaintiff, a Hong Kong exporter, claims against the defendant, a freight forwarder based in Shanghai, for the principal sum of U.S.$301,102,70, together with interest thereon, representing the value of goods transported to America by the defendant and released subsequent to discharge without production of original bills of lading.

2. While factually unremarkable, this is a case which has spawned a welter of legal points, the defendant vigorously disputing virtually every facet of the claim, ranging from the plaintiff's locus to sue to an alleged failure to mitigate and failure to establish proof of loss. Before considering these aspects of the case, however, I should outline the primary facts as they have emerged.

The undisputed facts

3. The goods the subject of this claim consisted of two consignments of optical frames and sunglasses. Both consignments were shipped from Shanghai to Miami in mid-1998. The first consignment, of 248 cartons of optical frames, was carried under bill of lading No. SHA472927 dated May 25, 1998 upon the vessel *Alligator Wisdom*. The second consignment, of 348 cartons of sunglasses, was carried under bill of lading No. SHA472986 dated June 9, 1998 aboard the vessel *Hanjin New York*. The identity of the parties to these bills of lading is one of the many issues in dispute in this case.

4. It is, however, not in dispute that the two shipments the subject of this claim were part of a sequence of nine such shipments whereby the plaintiff exported spectacle frames and sunglasses which had been manufactured in China by an affiliated company, Wenzhou Center Optical Company Ltd. to a third party in Miami named Center Optical HK Inc. The latter was a company controlled by one Mr. Solomon Ovadia, with whose companies the plaintiff had had prior business dealings. Notwithstanding the similarity in name, it is important at the outset to recognize that there is no corporate connection between the plaintiff, Center Optical (HK) Ltd., and its Miami customer, Center Optical HK Inc. My attention has been directed to a letter written by the Miami company (I shall call it "Miami Center Optical") wherein the reason for this choice of similar name is canvassed, a letter which Mr. Kat for the defendant maintains is indicative of the beginnings of a fraud being put into place, but whether or not this is so is not in my view germane to the present claim.

5. Of the nine shipments that were sent by the plaintiff to Miami, those presently in question are shipment Nos. 7 and 8, which were in fact the first ones to be shipped from Shanghai rather than ex Hong Kong. The first two of the nine shipments had been sent by air, and the next four (that is Nos. 3 to 6) by sea from Hong Kong, the plaintiff having collected the goods from Wenzhou Center Optical, which had delivered them to the Shenzhen border, and arranged for them to be sent through Jardine Freight Services (HK) Ltd. It is clear also — although again in my view not of great import — that by the time of the conclusion of the first six shipments the buyer, Miami Center Optical, was falling considerably behind in payment to the plaintiff for the goods thus far supplied.

6. In March, 1998, the plaintiff had suggested to the buyer that it should ship direct from Shanghai to Miami, given that this would shorten the shipping time involved. This was agreed, the buyer suggesting the like use of Jardine Freight Services, which had been used for the earlier shipments. This company in turn referred the plaintiff, in the person of its sales manager and director, Mr. Cheung Chi Man, to the defendant Jardine Transport Services (China) Ltd. ("JTSC") in Shanghai. It is at this stage that the present case has its origin.

7. On May 25, 1998 the defendant, JTSC, issued bill of lading No. SHA472927, the *Alligator Wisdom* bill. This bill, which was in "Dynamic Container Line" form, named the plaintiff as shipper, the consignee as "To Order", and the notify party as Center Optical HK Inc. The third party in these proceedings, Pronto Cargo Corporation of Miami, was named as "F/Agent", Shanghai, China being named as the load port and the port of discharge as Miami, U.S.A. The number of packages represented by this bill was stated to be 248 cartons of optical frames, and the bill itself was marked "Freight Collect".

8. The issuance of this bill led to a chain of sub-bills. On the same day, that is May 25, 1998, a CFS/CFS bill of lading No. 21–8050500330 was issued in Shanghai on an "Air-Sea Transport Inc." form bearing the title "Multimodel Transport Bill of Lading". This bill, which appears to be the bill of a Miami forwarding agent, Air Sea Container Lines Inc., referred to the cargo of 248 cartons on board

Alligator Wisdom, and in turn named JTSC as shipper, and Pronto Cargo Corporation as consignee and notify party. Once again, this bill was marked "Freight Collect", and was issued on a like port to port basis.

9. While this Air-Sea Transport Inc. bill is in evidence, the final bill in this sequence is not. Neither party has had sight of a copy of this bill, which has been able to be inferentially identified (from the arrival notice issued by Pronto) as bill of lading No. HDMUSQLB377961. This was, no doubt, issued by the actual carrier on the ocean voyage from Shanghai to Miami, although no other details of this bill are available.

10. A like sequence occurred with regard to the eighth shipment of 348 cartons of sunglasses on board *Hanjin New York*. Once again the defendant issued a freight collect bill of lading No. SHA472986 dated June 9, 1998 in Dynamic Container Line form, naming the like shipper, consignee and agent as for the seventh shipment. In turn this caused the issuance of a freight collect CFS/CFS bill No. SHA812258 in China Container Line Ltd. form, which bears the stamp June 11, 1998, with the defendant named as shipper and Pronto Cargo Corporation as consignee and notify party. The final bill in the sequence, which again must have been issued by the ocean carrier, bears the number (also gleaned from a Pronto arrival notice) SENUSHA812225. As in the previous instance, this bill has not emerged on discovery, and no other details are available.

11. Upon arrival at Long Beach, the broad sequence of events with regard to both cargoes is tolerably clear. The seventh and eighth shipments were railed from Long Beach to Miami, at which point the relevant containers were de-stuffed. Thereafter, facilitated no doubt by presentation in each case of the respective Air-Sea Transport and China Container Line bills, Pronto Cargo was able to gain possession of these goods and, via a Power of Attorney issued by Miami Center Optical for this purpose, to clear these shipments through U.S. Customs.

12. Had matters gone to plan so far as these two shipments were concerned (unlike the situation with earlier shipments, which had been *consensually* released to the buyer without production of original documents) they would not have been released to the buyer, Miami Center Optical, until payment on a D/P basis had been effected, which thus would have enabled the buyer to present to Pronto the original DCL bill of lading for each of the seventh and eighth shipments.

13. This did not occur. The evidence is that the two shipments the subject of the present claim were released from storage by Pronto to Miami Centre Optical absent production of the original DCL bills of lading in respect of each shipment. It is established that this was done as the result of the acts of a certain Mr. Daniel Veitia of Pronto, for which errors Mr. Veitia subsequently lost his job. So that there is no doubt in this case as to precisely how and why the buyer obtained these two shipments of goods without payment therefor.

14. Consequent upon these incidents, attempts were made by Mr. Cheung Chi Man of the plaintiff to obtain payment for the goods in question from Miami Center Optical (and, indeed, full payment for earlier shipments which had not yet been forthcoming), but without much success. Thereafter the ninth shipment from the plaintiff to the buyer was intercepted post-discharge from the ocean carrier, and was railed across country to other buyers in Los Angeles, wherein this last shipment was sold at a 25 per cent. discount to the invoice price.

15. Further attempts by the plaintiff to secure the outstanding indebtedness due from Miami Center Optical met with little success, the end result being that the buyer had obtained goods to the value of U.S.$672,367.60, but in the period Jan. 8 to Oct. 2, 1998 had paid but a total of U.S.$200,000 in a series of 14 payments spread over that period. At the end of the day, therefore, Miami Center Optical remained indebted to the plaintiff in the sum of U.S.$472,367.60. In the present action, however, the plaintiff seeks to recover only the invoice value of the 596 cartons of optical frames and sunglasses contained in the seventh and eighth shipments, that is the sum of U.S.$301,102.70.

The evidence

16. The plaintiff called viva voce evidence from two witnesses, Mr. Cheung Chi Man, director and sales manager of the plaintiff, and from Mr. Hu Fu Lin, the head of Wenzhou Center Optical, and further relied upon three hearsay statements of Miss Yang Siao, the Wenzhou staff member responsible for the business operations which were effected between the plaintiff and Wenzhou Center Optical.

17. For the defendant evidence was led from two witnesses, Mr. Eduardo Fandino, the president of Pronto Cargo Corporation (whose evidence was taken at the outset of the case), and from Mr. Even Lam Wai Hung, a director and vice president of the defendant.

18. I refer to particular aspects of the evidence later in this judgment. For present purposes suffice to say that in my view there was a significant contrast between the two main witnesses, Mr. Cheung and Mr. Lam.

19. I accept Mr. Cheung Chi Man's evidence as to all material factual matters of which he had

personal knowledge, notwithstanding the patina of suspicion with which the defendant sought to infuse his activities in this case. In my view Mr. Cheung was a sincere witness who plainly made every effort to tell the truth about the events giving rise to this case. Although not sophisticated, and at times sensitive to the commercial difficulties caused to his company by these transactions with the Miami purchaser, he was nevertheless in no doubt about all relevant details, and he dealt with an extensive and at times accusatory cross-examination with the assurance of a person who knew precisely what had happened and why. Notwithstanding the atmosphere of innuendo and suspicion with which he was greeted, I emphasize that I do not regard Mr. Cheung as other than a witness of truth. I take a like view about Mr. Hu Fu Lin, albeit it is quite clear that he had little personal knowledge of the details of this matter, liaison between Hong Kong Center Optical and its Wenzhou counterpart, the manufacturer of the optical goods in question, being handled by Miss Yang Siao, the plaintiff's hearsay deponent.

20. To the contrary, I was signally unimpressed with the evidence of Mr. Lam, who was put forward as the principal witness for the defendant. In real terms, Mr. Lam's evidence was of little, if any, assistance to the Court. In saying this I do not wish to appear unkind, or unduly pejorative. In my view, however, Mr. Lam was placed, or perhaps permitted himself to be placed, in a difficult position. Upon his own admission he possessed no direct personal knowledge whatever about any of the facts of the case. He admitted that his sole knowledge of events came from but one conversation with an employee, Wendy Wong, shortly after the claim was instituted in March, 1999, and also, apparently, from conversations with one Jimmy Lee, a claims manager within the Jardine group, who despite being flagged as a witness in fact was not called, and who himself clearly had possessed nothing but second or third hand information. In addition, not only did Mr. Lam have no personal knowledge as to the facts but also, it seemed to me, he possessed scant faith in the legal position he was constrained to adopt on behalf of his company in disputing the plaintiff's contention that the defendant was contractual carrier under the bills of lading.

21. The deficiencies in Mr. Lam's evidence placed into stark relief the evidence which specifically was *not* called by the defendant. Nothing was heard from employees whom, on the face of the papers at least, clearly possessed actual knowledge relating to the booking of the cargo and the shipping arrangements, namely Tony Zhu Tao, Gloria Cheung and Wendy Wong, which is surprising given the evidence that the latter two ladies remain in the defendant's employ, or at the least within the Jardine group. Nor, it should be noted, was any evidence led by the defendant about the issue and manner of signature of the bills of lading, notwithstanding, as Mr. Lam eventually was constrained to accept, that patently they were house bills (and are referred to as such within the documentation), nor was there any attempt to assist evidentially in terms of the events in Shanghai once JTSC had been instructed; in this latter connection I refer in particular to the precise involvement, at the behest of JTSC, of Shanghai State Union Co. Ltd. (which, inter alia, appears to have issued godown receipts and customs export declarations) and one Shanghai Through International Freight Co. Ltd., referred to throughout by its acronym "STIF", and which itself appears to be an international freight forwarder. In this context I reject Mr. Lam's passing suggestion that the booking for these two claim shipments was placed by STIF, and thus that STIF acted as principal for the carriage from Shanghai to Miami. Mr. Lam was not involved, and the documentary evidence amply demonstrates that Mr. Zhu Tao of the defendant made the relevant bookings.

22. As for the evidence of Mr. Fandino, I accept his frank account of the misdelivery by his employee, Mr. Veitia, in terms of the seventh and eighth shipments. Such misdelivery was, Mr. Fandino declared, something that clearly should not have happened, as indeed he had made clear in contemporaneous correspondence, and he proffered no excuses for the negligence of his employee. I further have no reason to doubt his account of the way in which his company operated in conjunction with the various Jardine companies, including the defendant, JTSC, with whom he dealt, and of the general manner in which his company functioned at the Miami end of the transport chain. Acceptance of such purely factual aspects of his evidence does not, however, extend to acceptance of such evidence as was purported to be led from Mr. Fandino concerning his views as to his legal status, which (as no doubt is accepted) are solely matters for the Court.

23. In terms of purely documentary evidence, it is fair to say that that which was available was less than wholly satisfactory. Certain documents apparently had been lost, and whether the discovery was as exacting as it should have been is moot. In so saying, I place blame upon neither party, but merely observe that a complete set of primary documentation (for example, the missing carriers' bills of lading) was unavailable, so that the Court and the litigants essentially had to make the best of the documentation that was to-hand.

The plaintiff's case

24. The plaintiff's case is straightforward. Recovery is sought against the defendant in contract arising from the defendant's acceptance of the plaintiff's instruction to the defendant to ship these optical goods to Miami to the plaintiff's order, naming as notify party Miami Center Optical, such contract being evidenced, or partly evidenced, by the bills of lading issued for the seventh and eighth shipments. The plaintiff also seeks to recover in conversion arising from the wrongful misdelivery of these goods. The sum claimed, as earlier noted, is the invoice value of these goods, namely U.S.$301,102.70.

The defences raised

25. The defendant disputes the plaintiff's claim at almost every level, the points raised in defence to this claim being many and varied. I deal with the arguments under the following broad heads.

(i) *The status of the plaintiff*

26. Several points are here taken, and to some extent they are interrelated. First, Mr. Kat asserts that the plaintiff has no locus to bring suit in this case, absent being party to the relevant contract of carriage — to which, he says, the plaintiff is not. On its face, the suggestion that a named shipper on a bill of lading, and in fact, the current holder of the two DCL bills, does not possess locus to bring suit under these bills seems to me to be both ambitious and wrong. The fact that the plaintiff herein does not fall within the definition of "lawful holder" under the Bills of Lading and Analogous Documents Ordinance, Cap.440, which statute is designed to determine the rights of transferees of bill of lading contracts, is nothing to the point, and certainly does not mean that the plaintiff as holder of these bills is not, as such, entitled to delivery. In addition, as Mr. Stokes pointed out, given that the plaintiff asserts its title as owner of these goods under normal f.o.b. rules, as such owner and as the holder of the bills of lading the plaintiff has an immediate right to possession and an entitlement to sue in tort as well as in contract. So I reject the narrow locus argument.

27. It is further said that the plaintiff is not the shipper, that it is not a party to the contract of carriage (whether represented by the DCL bills or as party to a wider contract), and that the correct entity to bring suit on the contract of carriage is Wenzhou Center Optical. In this regard Mr. Kat strongly relied upon the terms of a "Letter of Authorization" dated June 3, 1998 sent to Mr. Tony Zhu Tao of the defendant by Miss Yang Siao of Wenzhou Center Optical with regard to the shipment of 348 cartons on board *Hanjin New York*. This letter instructed JTSC "to handle and arrange, on behalf of our company, all the customs declaration, transportation and storage booking matter for the export goods" detailed therein. It is, I think, accepted that there had existed a like letter from Wenzhou to JTSC with regard to the *Alligator Wisdom* consignment, but that this now has been lost.

28. As to this aspect, I accept the evidence of Mr. Cheung Chi Man (which I note is corroborated by the hearsay evidence from Miss Yang Siao). Mr. Cheung's evidence to this Court was clear. Mr. Cheung said that on behalf of the plaintiff he had caused JTSC to be instructed through Wenzhou. His company was in Hong Kong, Wenzhou was near Shanghai, and the contract between Wenzhou as manufacturer and his company as buyer was f.o.b., Shanghai, so that it was far more convenient, he said, for him to instruct Wenzhou in Shanghai, who acted upon such instructions on his behalf to send the goods to the entity he referred to as "Shanghai Jardine". In my judgment, this evidence is both consonant with the probabilities and is consistent with such other evidence as is to hand, namely, the instruction of Mr. Cheung to Wenzhou to ensure that the plaintiff was named as shipper on the bills of lading (which bills provide the best evidence, absent clear evidence to the contrary), and in light of Miss Yang Siao's hearsay statements wherein she consistently maintains that in dealing with the defendant she acted for the plaintiff, including her assertion that she copied to JTSC the plaintiff's fax specifying that the plaintiff should be shipper. In the circumstances and in light of the specific evidence on the point, which I accept, I do not place great weight upon the manner in which that letter of instruction is couched, and I have no difficulty in accepting the familiar proposition that, for Chinese customs requirements, a mainland entity such as Wenzhou was required to be named as shipper.

29. Accordingly, having accepted this explanation, I reject the submission that Wenzhou Center Optical was the other party to the contract of carriage, and thus ought to have been named as plaintiff, or indeed, as shipper on the bills of lading issued by JTSC.

30. In addition, given Mr. Cheung's explanation of the manner in which he did business with Wenzhou, I also reject Mr. Kat's further submission — which again impacts upon the plaintiff's status in this action — to the effect that "the court is entitled to conclude" that Wenzhou was the true owner of the goods at the time of the loss and, if not, had probably forgiven any "debt" or treated it as a paper loss.

31. It is not easy to grasp why this should be said to be so. I have accepted Mr. Cheung's evidence

that Wenzhou sold to the plaintiff and that in turn the plaintiff sold on to the buyer qua principal and not as agent. The documentation (such as the invoices and correspondence) produced which passed between Wenzhou and the plaintiff, and between the plaintiff and the buyer, all support this contention, and it is clear that the plaintiff made a profit, *not* a commission, upon the sale to Miami Center Optical. It is also evident that, in so far as payment was made for the goods, it was the plaintiff and not Wenzhou that was so paid, in which connection I note the existence of the signed "Statement" issued to the plaintiff by the buyer, duly signed by Mr. Ovadia as president of Miami Center Optical, which confirmed the latter's debt to the plaintiff in the sum of U.S.$472,367.60.

32. I further accept the evidence of Mr. Hu Fu Lin as to the business relationship existing between Wenzhou and the plaintiff, and I decline to hold that the relative paucity of inter-company documentary evidence is sufficient to justify Mr. Kat's bold submission. Nor, for that matter, can I discern anything in the point about the passing of property in these two consignments of goods, Mr. Stokes correctly submitting that property in goods sold under an FOB contract passes on shipment unless the seller retains a right of disposal of those goods, and that in this case Wenzhou had done nothing of the sort. So that in my view there is nothing in this point either, although its taking reflects the atmosphere of suspicion which has pervaded the defendant's conduct of this case.

33. At this stage it may assist to summarize that which I have found to be the position so far as this plaintiff is concerned. I have no difficulty in accepting, and I so find, that the plaintiff contracted with Wenzhou for the purchase of these optical goods for the purpose of onsale by the plaintiff to Miami Center Optical, that the plaintiff is correctly named as shipper in the DCL bills of lading issued by JTSC, that the goods were shipped by Wenzhou from Shanghai through JTSC upon the instructions of the plaintiff, that property in these goods passed to the plaintiff, that the plaintiff remains indebted to Wenzhou as asserted, and that the plaintiff has locus to sue for the loss and damage occasioned by their premature and wrongful release. Whether the plaintiff is successful in its claim depends, of course, upon resolution of the divers other arguments canvassed in opposition, but on the facts of this case I am satisfied that it, and not Wenzhou Center Optical, is the correct plaintiff.

(ii) *The defendant as contracting carrier*

34. A central dispute in this case is the identity of the contracting carrier under the DCL bills of lading issued at Shanghai by JTSC on May 25 and June 9, 1998 respectively.

35. Both bills are in the same form, the differences relating solely to the details of the goods and the dates of signature. The actual signatures on the bills, which at the top thereof bear in bold the distinctive Jardines logo and the words "Dynamic Container Line (a Jardine Pacific business)", take the form of a stamp consisting of the defendant's name in English and Chinese, with the stamped signature of Wendy Wong (the defendant's general manager, who, as earlier noted, has not been called) thereunder. There is no qualification of the stamped signatures as part of the stamp.

36. The bills, in this particular DCL form, appear to have been designed specifically for use by the Jardines Hong Kong office. Adjacent to the place and date of issue, and the stamped signature of the defendant, appear the printed words:

> As Agent for the Carrier
> DYNAMIC CONTAINER LINE
> JARDINE FREIGHT SERVICES (HK) LTD

37. Clause 1 of the reverse side terms defines "Carrier" as "the Company stated on the front of this Bill of Lading as being the Carrier and on whose behalf this Bill of Lading has been signed", while the box headed "Jurisdiction and Law Clause" at the foot of the front of the bills includes the words:

> All transactions are subject to the Company's Standard Trading Conditions (copies available on request from the Company) and which in certain cases exclude or limit the Company's liability.

38. Against this background the lines of demarcation are clear. The defendant disavows the status of the bills in relation to the identity of the shipper, Mr. Kat maintaining that the carrier under these bills is not JTSC but is Dynamic Container Line Ltd., a BVI company, with whom the defendant, JTSC, has an agency agreement. For the plaintiff, Mr. Stokes says that in the circumstances revealed by the evidence plainly this is not the case, and that it is JTSC which is the true contracting party.

39. The evidence is that absent the name "Dynamic Container Line" on the bills the BVI company, Dynamic Container Line Ltd., had nothing to do with the carriage of these shipments of goods from Shanghai to Miami. This was specifically accepted by Mr. Lam. Nor was any evidence called from the company itself.

40. Against this background, Mr. Stokes' submission in relation to the status and signature of these bills of lading is fourfold. First, he says that purely as a matter of construction the defendant, JTSC, is party to or liable under these bills of

lading; second, that in any event the defendant is liable as unnamed principal; third, that in fact JTSC was the real principal thereunder; and fourth, that if and in so far he does not get home under the three earlier heads then there should be rectification of these bills, since it is clear that contracts of carriage for the seventh and eighth shipments were concluded with the defendant prior to the issuance of the bills, and plainly were not subject to any profession of agency.

41. In the circumstances I do not consider it is necessary to consider the remedy of rectification. In my view Mr. Stokes succeeds at the level of his first three arguments. On the construction issue, I accept the submission that the defendant's mode of signature fails to indicate that JTSC is not contracting as carrier and is not simply using the name "Dynamic Container Line" as a trade name. I fail to understand why it is said that such signature as appears necessarily must be construed as having been effected qua agent given the printed words which, while adjacent to the chopped signature, clearly portend signature by a different company, and in circumstances in which the definition of "Carrier" on the reverse of the bill is circular and non-specific, and when, in addition, there is no reference to Dynamic Container Line Ltd. on the face of the bill.

42. This latter point elides with Mr. Stokes' second argument. He says, in my view with good reason, that if the defendant was an agent at all, it was an agent for an unnamed principal, and that non-disclosure of the principal's name leads to the liability of the alleged agent, in this regard citing Bowstead on Agency (17th ed.), at par. 9–014, wherein the editors observed that "unless it is absolutely clear that the person concerned acted as agent only" prima facie liability should accrue together with that of the unnamed principal, an approach which was endorsed by the Court in *Cory Brother's v. Baldan*, [1997] 2 Lloyd's Rep. 58 at pp. 65–66. I agree.

43. I accept also the argument that, notwithstanding the profession of agency status, the defendant is the real principal to this contract of carriage as evidenced by these two bills. In the circumstances of this case I have no hesitation whatever in coming to this conclusion. These bills were accepted in evidence to be "house bills", and I attach little serious credence to the agency agreement prayed in aid in support of the defendant's position, which, inter alia, distinguishes itself by providing (at cl. 6 thereof) that "all profits" from freight forwarding services carried out by JTSC "shall belong to JTSC", the alleged agent under this arrangement, which also, I note, bears the risk of all losses on claims. In his submissions under what I will term the "real principal" argument, Mr. Stokes took the trouble to isolate fully 15 separate factual matters emerging on the evidence, ranging from documentary evidence arising at the outset of events, to the naming of JTSC as principals on the Air Sea and CCL bills of lading, to the defendant's clear agency relationship with Pronto (demonstrating that JTSC made a profit from ocean freight), to subsequent events and correspondence, all of which, he said, were and are consistent with the contention that throughout JTSC acted qua principal in the forwarding of these shipments from Shanghai to Miami.

44. Indeed, in light of all the evidence in my view it is not possible sensibly to argue to the contrary. DCL was no more than the barest cipher for JTSC, in which context one is reminded of the observations of Lord Justice Diplock (as he then was) in *Snook v. London and West Riding Investments Ltd.*, [1967] 2 Q.B. 786, at p. 802, to the effect that if the word "sham" has any legal meaning "it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to the third parties or the court the appearance of creating between the parties' legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create". In all the circumstances it is as plain as a pikestaff that the real principal under the DCL bills, which are forwarder's bills, was the defendant. To claim otherwise, it seems to me, is transparent nonsense.

The position of Pronto

45. For the plaintiff Mr. Stokes says that the defendant, JTSC, was Pronto's principal, and thus is liable for Pronto's admitted act of releasing the seventh and eighth shipments absent production of the bills of lading. To the contrary. Mr. Kat says that Pronto was the *plaintiff's* agent which (as I understand the argument) had been appointed for the plaintiff by the defendant pursuant to the provisions of cl. 6(2) of the bill, which provides, inter alia that the merchant —

> ... constitutes the Carrier as agent to enter into contracts on behalf of the Merchant with others for transport, storage, handling or any other services in respect of the Goods ... subsequent to discharge ....

46. I am unable to take this point seriously. JTSC had an agreement with Pronto dated Oct. 4, 1996 under which co-operation with Pronto Cargo was extended to "our Hong Kong and China Seafreight offices", the terms being the same as for Taiwan, including in particular profit sharing on ocean freight on a 50/50 basis, insurance premia for shipments ex Far East to Miami to be deducted prior to such profit sharing, and for "all bills and

accounts to be settled monthly". Reconciliation accounts between JTSC/Pronto are in evidence, and in fact profits for JTSC after insurance for the two shipments in question (which were two part-containerized loads) were U.S.$159.76 and U.S.$208.49 respectively.

47. The incontrovertible evidence is that Pronto had worked for a considerable period with Jardine companies — in his evidence in cross-examination Mr. Fandino expressly stated that "Pronto acts as agent for Jardine in Miami" and that bills of lading are "consigned to us as agent for Jardine" — and on this matrix of facts I fail to understand how it can be suggested that JTSC entered into a contract with Pronto as an agent for the plaintiff pursuant to cl. 6(2) of the bills (the pleaded formulation) or that "on the bill, Pronto acted for the shipper", the plaintiff, the plaintiff having "knowingly permitted the use of its own name by the buyer" and having "established a pattern of permitting Pronto to release the goods to that buyer without original documents over at least 3 previous occasions in the previous 2 months" (Mr. Kat's closing written formulation).

48. I reject these arguments. On the evidence before me I find that Pronto was at all material times acting as JTSC's agent in Miami and that, as a matter of fact, Pronto was not appointed by JTSC as agent for the plaintiff pursuant to cl. 6(2) of the bill, or at all.

Ambit of liability under the bills of lading

49. This seems to me to be the defendant's most promising point. It is certainly the most interesting. It is put thus. The defendant relies upon the definition of "port to port" shipment in cl. 1 of the bills, cl. 6(2) relating to "port to port" shipment, and cl. 14, relating to delivery, to contend that obligations under the bills ceased on discharge or on storage of the goods after such discharge. The particular clauses in question read as follows:

> 1. . . .
>
> "Port to Port Shipment" arises where the Place of Receipt and the Place of Delivery are not indicated on the front of this Bill of Lading or if both the Place of Receipt and the Place of Delivery indicated are ports and the Bill of Lading does not in the nomination of the Place of Receipt or the Place of Delivery on the front hereof specify any place or spot within the area of the port so nominated.
>
> . . .
>
> 6. . . .
>
> (2) PORT TO PORT SHIPMENT
>
> The responsibility of the Carrier is limited to that part of the Carriage from and during loading onto the vessel up to and during discharge from the vessel and the Carrier shall not be liable for any loss or damage whatsoever in respect of the goods or for any other matter arising during any other part of the Carriage even though Charges for the whole Carriage have been charged by the Carrier. The Merchant constitutes the Carrier as agent to enter into contracts on behalf of the Merchant with others for transport, storage, handling or any other services in respect of the Goods prior to loading and subsequent to discharge of the Goods from the vessel without responsibility for any act or omission whatsoever on the part of the Carrier or others and the Carrier may as such agent enter into contracts with others on any terms whatsoever including terms less favourable than the terms in Bill of Lading.
>
> . . .
>
> 14. DELIVERY OF GOODS
>
> If delivery of the Goods or any part thereof is not taken by the Merchant at the time and place when and where the Carrier is entitled to call upon the Merchant to take delivery thereof, the carrier shall be entitled without notice to remove from a Container the Goods or that part thereof if stuffed in or on a Container and to store the Goods or that part thereof ashore afloat, in the open or under cover at the sole risk and expense of the Merchant. Such storage shall constitute due delivery hereunder, and thereupon the liability of the Carrier in respect of the Goods or that part thereof shall cease.

50. Mr. Stokes argued, in substance, that the obligation of a carrier of the most fundamental import is delivery of the goods *only* against production of an original bill of lading, and that delivery absent such production constitutes so serious a breach of the contract of carriage that anything less than an express exclusion of liability therefor should fail. He points to the Court's unwillingness to excuse an obligation of such fundamental importance, citing in this regard well-known dicta in *Motis v. Dampskibsselskabet*, [2000] 1 Lloyd's Rep. 211 at pp. 214–216 (C.A.), [1999] 1 Lloyd's Rep. 837 at pp. 840–842 (Mr. Justice Rix), and *The Ines*, [1995] 2 Lloyd's Rep. 144 at pp. 152–154 (Mr. Justice Clarke).

51. Mr. Stokes further submitted that the terms of cl. 6(2) of the bills clearly are not sufficiently specific to exclude liability for misdelivery, and while he accepted that provisions such as cl. 14 "have not yet received the same level of judicial attention" as terms in the form of cl. 6(2) — see here Lord Justice Mance in *Motis*, op.cit., at p. 217, who found it unnecessary to express a definite view on this scope of a similar clause, albeit commenting

that its focus "is at least the delivery obligation" — nevertheless he submitted that the same principles and approach should apply.

52. For his part, Mr. Kat maintained that the carrier on the DCL bill does not claim a complete exemption from its duty to deliver (unlike the bill in *Motis*), that the provisions of cl. 6(2) mean that an agent inevitably will be involved unless the consignee himself picks up the goods at the CFS, and that cl. 14 is predicated upon and offers "a more liberal delivery regime": first, the goods must be at a time and place where the carrier is entitled to call for delivery, and second, if delivery is not so taken, the carrier is entitled to unstuff and to store the cargo at the shipper's risk — and that it is only at this point of storage that the bill is accomplished. Mr. Kat further submitted that the essence of *Motis*, op.cit., is that the contract in that case purported to abrogate the carrier's risk without specifically dealing with its allocation, when, by contrast, cll. 6(2) and 14 of the instant bill expressly alerted the shipper to the fact that if the goods are not taken after discharge, storage will be arranged by the agent appointed by the carrier at the shipper's risk.

53. Mr. Kat acknowledged the significance of the English cases relied upon by Mr. Stokes, albeit he suggested that these cases were "part of the old general cargo approach". He relied upon the different approach represented by the decisions of Australian Courts, and two decisions in particular. In *Collern & Co. v. China Ocean Shipping Co.*, (1999) (unreported), the New South Wales Supreme Court decided that where the carrier regularly had released goods without production of the bill of lading, he was still entitled to rely upon the limitations of liability in the bill of lading, the reason being that, on the true construction of the wording of the bill, provision had been made for limitation of liability in the event of the carrier's negligence. Heavy reliance was also placed on *The Antwerpen*, [1994] 1 Lloyd's Rep. 213, wherein the Court of Appeal of the New South Wales Supreme Court is said to have countenanced an approach similar to that now pressed by JTSC in upholding the decision of the trial Judge who had held that the contract of carriage in that case was for port to port shipment and that cl. 4 of the particular bill of lading was in sufficiently wide terms to exempt the carrier from liability for the wrongful acts of the terminal operator's employers, and the consequent theft of two containers of whisky.

54. I do not find *The Antwerpen*, op.cit., an easy case, and in any event I do not think it goes as far as Mr. Kat suggested, given that on the facts the carrier apparently did not call upon the consignee to take delivery at any time prior to the theft of the goods, that is, it did not insist on its contractual right to have delivery taken immediately the goods were unloaded or storage treated as due delivery — which was why the terminal operator was entitled to avail itself of the exemption clauses in the bill. And although the claim by the consignee against the carrier failed on the basis of the exemption clauses, the basis of this decision seems to have been founded, in part at least, on the discarded notion of fundamental breach.

55. Notwithstanding Mr. Kat's persuasive and forceful arguments, I am disinclined to depart from the established English jurisprudence in this area, the emphatic approach therein being to protect the integrity of the bill of lading as "the key to the floating warehouse". It is perhaps unfortunate that in *Motis*, op.cit., cl. 22(3) of those bills — similar to our cl. 14 — was not canvassed, and I do not read Lord Justice Mance as suggesting that, if it had been, necessarily he would have upheld owner's argument in terms of protection against misdelivery, but simply that the argument better would have got off the ground. At bottom, I decline to hold that the plain wording of cl. 14 is sufficiently clear to impinge upon the cardinal principle requiring delivery by the owner or his agent *only* against production of an original bill of lading, although I accept that this particular clause purportedly is drawn in terms of cesser of responsibility. As the authors of Gaskell, Bills of Lading: Law and Contracts (2000) observe, at p. 449:

> Many of the clauses [as to due delivery] put obligations on receivers to be ready to take delivery of goods and such receivers would be in breach, e.g. if they are not ready to take delivery as soon as the vessel is ready to discharge. Still, it would seem that a court is unlikely to hold that this breach was a cause of the loss where the carrier puts the cargo into storage and later delivers without production of a bill.

56. At the end of the day, the point at issue is clear, the conclusion perhaps less so. Although Mr. Kat says that the evidence is that Pronto notified of the arrival of the goods (although by the same token he says Pronto is the plaintiff's agent, not the defendant's), and even were this duly to constitute a call upon the merchant to take delivery within the meaning of this clause (and Mr. Stokes with some justification argues that the notify party does not fall within the contractual definition of "merchant"), I decline to find that the import of cl. 14, when taken either alone or in conjunction with cl. 6(2), is sufficient to empower the carrier intentionally to deliver the goods without notice to anyone he wishes, and without subsequently being called to account for such action — which, in effect, is the defendant's present contention. There is support for this view in Gaskell op.cit., at pp. 14–95, wherein

the authors, in commenting on *The Antwerpen*, note that —

> ... It is debatable whether an English court would hold that such a general clause should excuse a deliberate decision to make delivery without production of a bill ....

It may be, as Lord Justice Mance commented in *Motis*, that a clause can be designed to achieve this aim, but in my judgment cl. 14 does not succeed. After some reflection, I reject, therefore, the defence propounded under this head.

Package limitation

57. In terms of other contractual limitation provisions on these bills of lading, the issue of package limitation is also raised. It is said by the defendant that there is a special definition of packing limit provided by cl. 6(4)(D), and that if the carrier does not stuff the container itself, the container is the packing unit for the U.S.$500 COGSA limit. Clause 6(4)(D) reads, in relevant part, as follows:

> (D) Definition of Package or Shipping Unit
>
> Where a Container is used to consolidate Goods and such Container is stuffed by the Carrier, the number of packages or shipping units stated on the face of this Bill of Lading in the box provided shall be deemed the number of packages or shipping units for the purpose of any limit of liability per package or shipping unit provided in any international convention or national law relating to the carriage of Goods by sea. Except as aforesaid the Container shall be considered the packaging or shipping unit ....

58. Mr. Stokes says that the figure of U.S.$500 is in derogation of the Hague Convention. And in any event, he says, the point is a non-point because it is clearly established that the packages for calculating limit are the number of cartons stated on the face of the bills of lading, and *not* the number of containers: see *The River Gurara*, [1998] 1 Lloyd's Rep. 225 (C.A.), and that, also, that the limit under the Hague Rules is calculated by reference to gold value: see *The Rosa S*, [1988] 2 Lloyd's Rep. 574; [1989] 1 Q.B. 419.

59. Mr. Kat accepted that limitation under the Hague Rules would be *greater* than the value of the claim (under *The Rosa S* the limit being approximately £3000 per package in current monetary terms), and I have little hesitation in following the approach of Lord Justice Phillips (as he then was) in *The River Gurara*, op.cit. While so far as the stuffing of the containers is concerned, I agree with Mr. Stokes' further contention that it is not clear that the containers were not stuffed for and on behalf of the carrier. Mr. Lam certainly could not say what the position was, and the sub-bills of lading of both Air Sea and China Container Line are both CFS/CFS, at which station the stuffing of the containers takes place. Putting to one side the validity of this attempt to contract out of the protection avoided by the Convention, it seems to me that this is a matter which if invoked must be made good by hard evidence, as opposed to inference as to who stuffed the containers on behalf of whom. The defendant pointedly has not called any evidence which might assist in this matter, and I reject the defendant's contention as to package limitation under the bills.

Causation/failure to mitigate loss

60. Mr. Kat argues, as I understand it, that the act of releasing the containers without production of the bill of lading was not causative of the claimed loss. He says that it is "equally probable" that through the plaintiff Mr. Cheung "would have released these two shipments without documents or payment if the plaintiff had been further pressed by the buyer to do so and allow credit". He bases this assertion on the amount of money owed by the Miami buyer at the end of June, 1998, that Mr. Ovadia was continuing to press for the release of yet more goods, and that three weeks after release of the seventh and eighth shipments Mr. Cheung in fact did release the sixth shipment against a promise of payment in August.

61. This line of argument is speculative at best, and I reject it as firmly as I may. There is no doubt that these goods were wrongfully released, and that causes of action accrue to the plaintiff as a consequence. I do not intend further to consider what might have occurred had no such wrongful release taken place. In *Trafigura Beheer B.V. Amsterdam v. China Navigation Co. Ltd.*, HCCL No. 173 of 1998 (unreported), in which a similar causation argument was raised purporting to nullify the effect of an admitted misdelivery in Hong Kong of a cargo of copper cathodes (which, it was said, in any event were going to be transported into China, where they were seized as contraband by the PLA), this Court rejected such argument, noting that it was —

> ... unwilling to accept the defendant's invitation, in effect, to use a crystal ball and to re-run the sequence of events in order to decide what would or would not have occurred if the cargo had not been so misdelivered by the defendant.

In my view those observations are equally applicable to the present case.

62. The other argument of the defendant under this head is one of failure to mitigate. It is said that when Mr. Cheung found a substantial portion of the seventh and eighth shipments still present at Mr. Ovadia's premises in Miami, he failed to take any reasonable steps to secure possession of these goods or to preserve them, as, for example, by

calling JTSC in Shanghai or by retaining lawyers in Miami, and that "all he had done" was to press for payment.

63. I find this argument neither attractive nor persuasive. Mr. Cheung's uncontradicted evidence was that he was in no financial position to retain legal services in Miami, and that in any event he was constantly being promised payment for these goods by the buyer. In my view, the plaintiff was and is entitled to stand upon its cause of action for the admitted misdelivery, and the fact that his efforts to secure redress in terms of obtaining payment from Mr. Ovadia failed so markedly, or that upon becoming aware of this situation he did not embark upon expensive legal action in the United States, in my judgment is nothing to the point. The standard required from a plaintiff in these circumstances is not high, and does not include an obligation to litigate against a third party. Mr. Cheung clearly found himself in a difficult situation, and the fact that he was unable successfully to extricate his company from the predicament it was in does not serve now to avail the defendant, which bears the onus of proving that the claimant ought, as a reasonable man, to have taken certain steps to mitigate his loss. On the facts of this case, the defendant manifestly has failed to discharge this burden.

Proof of loss

64. Mr. Kat further attacks the plaintiff's case in terms of proof of loss. He says that the evidence is deficient, in that the plaintiff has called no documentary evidence to establish a completed purchase of the goods, or of a debt to Wenzhou, or of any special damage. As to these issues, earlier in this judgment I have made it clear that I have rejected the defendant's claim that Wenzhou was the true owner of the goods and, if not, probably has forgiven any debt or treated it as a "paper loss". No evidential basis has been established for these assertions.

65. Nor does the fact that the plaintiff has not paid Wenzhou the price for the goods preclude recovery, or restrict recovery to profit only, as the defendant has also suggested: see, for example, *Total Liban v. Vitol Energy*, [2000] 3 W.L.R. 1142, at pp. 1149–50 (per Deputy High Court Judge Gross, Q.C.).

66. In addition, Mr. Kat submitted that the plaintiff had failed to prove the contract to purchase the eighth shipment. This submission had as its origin analysis of Mr. Cheung's witness statement and attachments (in particular reliance upon one word) although the issue — which revolved around the absence of a signed invoice for the eighth shipment, and thus an alleged inability to establish D/P terms — was neither flagged nor canvassed in cross-examination. In my view this was a misjudgment. The point emerged only in final submission, and Mr. Cheung was afforded no opportunity to address or otherwise to clarify the issue. Be that as it may. I am satisfied that this contract was in place from Mr. Cheung's viva voce evidence. I also have in mind the significance of the "Statement" dated Dec. 2, 1998 from Mr. Ovadia on behalf of Miami Center Optical, wherein the indebtedness for this shipment is admitted and confirmed. So in my view there is nothing in this point either.

67. I find that on the balance of probabilities the plaintiff has established its loss as claimed, and I reject the defendant's arguments in this regard.

Other matters

Claim under the "wider contract"

68. Some argument was addressed to the situation prevailing were it to be held by this Court that the defendant was not party to the bills of lading. In light of the finding earlier that it was, no necessity arises to consider this submission in detail. Suffice it to say that if this conclusion be incorrect, I should in any event have held that if the defendant was not party to the bills, liability nevertheless would have accrued to the defendant for delivery of the goods absent production of the bills of lading on the ground that the defendant's contractual arrangements with the plaintiff, as concluded orally prior to issuance of the bills, extended to delivery, and that Pronto was the defendant's agent.

Defendant's standard terms and conditions

69. These terms were referred to in some detail in argument, but in light of findings earlier made I do not consider them of relevance in this case. Reference to these standard terms appears at the foot of the bills of lading, viz.: "All transactions are subject to the Company's Standard Trading Conditions" ("STC"). It is unclear from the bills what is meant by "the Company", particularly in the context of the defendant's assertion that these are *not* its bills, and given the fact that nowhere on the bills is "the Company" identified. In any event, if and in so far as it is suggested that JTSC's standard terms are incorporated into the bills (or, for that matter, into the "wider contract"), in my judgment such a contention fails, and fails signally, on the basis of absence of notice. As Gaskell, op.cit., at 2.34–2.36 observes, while it would be impossible for a commercial party to assert that it had no notice of the existence of terms on the reverse of the bills of lading, "far more difficult is the case where it is said that the bill purports to incorporate terms from another document, where there are particularly

unusual terms in it, or that it is in small print . . . " and that where a bill of lading seeks to incorporate terms from another document, "the courts will apply general contractual principles about notice, e.g. that reasonable notice must be given, particularly of unusual terms". In this context I agree with Mr. Stokes that the terms of the STC upon which reliance now is sought are unusual and onerous, and that there was in any event insufficient notice of those terms. It is not clear on the evidence before the Court how it fairly can be said that, as Mr. Kat put it, even if onerous or unusual (in terms of time bar and package limitation) these STC "were fairly and adequately brought to the plaintiff's attention". They were not. In light of this conclusion, I do not intend to express an opinion upon the consequential issue canvassed, namely the application of the control of exemption clauses ordinance to such standard terms and conditions. Grasping that particular nettle must wait for another day.

Conclusion

70. I emphatically reject the defendant's primary contentions that this is "a true agency case", wherein the plaintiff referred or arranged others to perform the shipments, that "Pronto's error is not JTSC's error", and that the plaintiff's remedy is and always has been in terms of an action against Pronto, either in Hong Kong or Miami. To the contrary. In my judgment in the circumstances of this case the plaintiff's causes of action against the defendant are well-founded, both in contract and tort, and, for the reasons given, I find for the plaintiff and hold that on the balance of probabilities it has successfully made out its claim against the defendant.

Order

71. The plaintiff is to have judgment against the defendant in the sum of U.S.$301,102.90. I make an order nisi that interest is to be payable on such sum at the rate of 2 per cent. over HIBOR from time to time prevailing from the date of the issue of the writ herein to the date of judgment, and thereafter at judgment rate until payment.

72. I further make an order *nisi* that the defendant is to pay the plaintiff the costs of this action, such costs to be taxed if not agreed.

Third party proceedings

73. It should not be overlooked that third party proceedings were commenced in this case, the Court granting an order permitting the defendant leave to serve the third party notice, dated Dec. 5, 2000, out of the jurisdiction upon Pronto. There is in the papers an affidavit of due service of this notice, but Mr. Kat has informed the Court that Pronto has not acknowledged service nor given notice of intention to defend. He has, therefore, asked for judgment in default against the third party in the third party proceedings, should such prove to be necessary.

74. It is odd in the circumstances that the issue of Pronto's contingent liability was not canvassed with Mr. Fandino, the head of Pronto, who was the defendant' first witness and who gave evidence at the outset of this trial. Be that as it may. Given that there has been no response to the third party notice, I can see no reason why judgment should not follow against Pronto consequent upon the decision of this Court to hold the defendant liable to the plaintiff. I will hear the defendant on the form of the order to be made in the third party proceedings, and further upon the issue of costs in these contingent proceedings.