

3. The defendant gave MISC authority to contract on its behalf for its protection in terms of its standard trading conditions.

It was not suggested by the defendant that MISC had direct authority. It was conceded by counsel for the defendant that the contract between the plaintiff and ASL, which is evidenced by the ASL bill of lading, does expressly state that ASL acted as the plaintiff's agent in contracting with MISC for the carriage of the cargo from Hong Kong to Durban. It was however contended that such agency is implied from the following:

1. ASL was a non-vessel owning common carrier (NVOCC) also commonly referred to as a freight forwarder, which means that it was never contemplated that it would actually perform the carriage. It did, and was always going to, contract with other parties to perform the carriage.
2. The ASL bill of lading is accordingly a house bill of lading, not an ocean bill of lading. The plaintiff itself had the obligation to arrange for the carriage from Hong Kong and the name of the seller was inserted as shipper merely for convenience and to comply with letter of credit requirements.
3. It follows that the plaintiff contracted with Aprile to arrange for the carriage of the cargo and that the provision in the contract between the plaintiff and Aprile to the effect that Aprile could "sub-contract on any terms the whole or any part of the carriage" must be seen in this light. It was argued by counsel for the defendant that the term "sub-contract" is not used in a technical sense.
4. MISC, in issuing its bill of lading, was entitled to assume that the named shipper had authority from the owner of the goods. It was argued that a person shipping goods (in this case ASL) must be ostensibly authorised by the person owning the goods to enter into the contract of carriage.

It is common cause that the plaintiff became a party to the ASL bill of lading. The factual evidence upon which the defendant relies for the contention that authority was furnished is contained in clause 13 of the defendant's standard trading conditions (which has been quoted earlier in this judgment). The defendant's standard trading conditions, including the provisions

relied upon, are of application as between the defendant and MISC. On the stated case, this occurred when Bridge Shipping (Proprietary) Limited, acting as agent for MISC, contracted with the defendant for the storage of the cargo at the defendant's premises pending collection thereof for haulage to Johannesburg in terms of the contract between the plaintiff and ASL. The authority furnished by the defendant is stated expressly to be furnished to "every container operator for or on whose behalf it deals with goods or containers in any manner." The term "container operator" is defined in the defendant's standard trading conditions. A governing part of the definition is the requirement that the container operator be one (in the context of import goods as in this case) "from whom or at whose instance or instruction CMC receives containerised import goods." It is clear that the phrase referred to governs container operators either as defined in Act 91 of 1964 or carrying on the businesses described in the defendant's standard trading conditions. I agree with counsel for the plaintiff, Mr. Mullins, that clause 13.1 of the defendant's standard trading conditions cannot operate in general, save between the defendant and some party who is in a contractual relationship with the defendant on its standard trading conditions. The authority furnished in clause 13.2 of the defendant's standard trading terms is expressly limited to container operators "for or on whose behalf it deals with goods or containers in any manner." The authority is accordingly one which was furnished to MISC when it "through the agency of Bridge Shipping (Pty) Ltd" concluded the contract for the storage of the containers with the defendant. Clause 13.2.1 of the defendant's standard trading conditions grants authority to act as the defendant's agent "to contract on its behalf with all persons to whom bills of lading, combined transport documents or any other documents evidencing contracts of carriage are issued" and accordingly presupposes a contractual relationship between the relevant container operator and the persons to whom bills of lading are issued. The authority contained in clause 13.2.1 clearly provide authority, by ratification, for the contract concluded between MISC and the shipper under the MISC bill of lading (to whom the bill of lading was issued) to act as agent or trustee for the defendant. Unless the plaintiff was a party to the contract of carriage evidenced by the MISC bill of lading, the authority granted to MISC to conclude a contract on the terms of the Himalaya clause for the benefit of the defendant is irrelevant. The contract was not concluded with the plaintiff and is therefore not binding of the plaintiff. It is clear from the agreed facts that the plaintiff contracted with Italfreight, acting as agent for ASL, to carry the cargo from Hong Kong to Johannesburg on the terms of the ASL bill

of lading. ASL was bound, as carrier, to cause the cargo to be carried from Hong Kong to Johannesburg. It was the carrier and liable as such from the time that the cargo was taken into its charge until the time of delivery at the identified place of delivery, namely, Johannesburg. It is also clear from the agreed facts that ASL was entitled to sub-contract the whole or any part of the carriage and did so sub-contract the carriage from Hong Kong to Durban to MISC, that sub-contract being on the terms of the MISC bill of lading. In my view, the right of ASL to sub-contract for the performance of its obligations as carrier under the ASL bill of lading issued by it did not constitute any authority to ASL to act as agent for the plaintiff and thereby to bind the plaintiff as principal or otherwise as a party to the sub-contract. The plaintiff was accordingly not rendered a party to the contract of carriage evidenced by the MISC bill of lading. The plaintiff was certainly not a person "to whom a bill of lading was issued by MISC" which is the manner in which the authority contained in clause 13.2.1 of the defendant's standard trading conditions identifies the persons with whom MISC was authorised to contract as agent for the defendant. In general, the authority to sub-contract is inconsistent with a relationship of principal and agent. [*Sonicare International Ltd v East Anglia Freight Terminal Ltd and Others and Neptune Orient Lines (Third Party)* [1997] 2 LLR 48 (CLCC (BL).]

Counsel for the defendant also relied on *Carrington Slipways (Pty) Ltd vs Patrick Operations (Pty) Ltd* (1991) 24 NSWLR 745 (CA) in support of the contentions advanced under this heading. In *Carrington Slipways* a house bill of lading, which on its face was an ocean bill of lading, was issued by the NVOCC (Pacific) to the plaintiff. Pacific then contracted with Simsmetal, the ocean carrier, for the ocean carriage and procured the issue of an ocean bill by Simsmetal. The stevedores employed by Simsmetal at the discharge port were negligent in allowing the cargo to be damaged. The stevedores successfully relied on the Himalaya clause and limitations in the ocean (Simsmetal) bill on the grounds that notwithstanding that the Pacific bill appeared on its face to be an ocean bill (i.e. in terms of which Pacific undertook to carry the cargo rather than to arrange for the carriage of the cargo), Pacific acted within its mandate from the plaintiff in contracting with Simsmetal for the actual carriage and the plaintiff was accordingly a party to the Simsmetal bill and bound by the bill as the undisclosed principal of the freight forwarder. On the strength of this case counsel for the defendant submitted that ASL had acted within its mandate from the plaintiff in contracting with MISC for the actual carriage of the

cargo and the plaintiff was accordingly a party to the MISC bill. It was argued by counsel for the defendant that there is no material difference between the present case and *Carrington Slipways* and that this case accordingly falls to be decided in the same way. In my view, this case is clearly distinguishable from *Carrington Slipways*. In *Carrington Slipways* the freight forwarder was authorised to “arrange freight of (the cargo) aboard” a specifically named vessel and on a specifically identified voyage. The freight forwarder issued a document purporting to be a bill of lading in which the carrier was identified as “Pacific East Asian Container Express Line” but which was not in fact a separate entity but merely a further name used by the freight forwarder itself. In itself concluding a contract of carriage with the owner or operator of the identified vessel (which contract is evidenced by the bill of lading issued by or on behalf of such owner or operator) the freight forwarder was in fact performing its mandate and could therefore be considered as having acted as agent in conformity with its mandate. In the present case, it is common cause that the plaintiff’s freight forwarder concluded the contract of carriage for combined transport with ASL and it was ASL, a separate entity from the freight forwarder, which in turn, and in terms of its authority to sub-contract, concluded the contract with MISC. The contract of carriage undertaken by ASL is one of combined transport and extends beyond the Durban Container Yard to Johannesburg. It is accordingly not a case where two bills of lading are issued for precisely the same voyage and certainly not one in which the freight forwarder had purported to contract with itself.

The plaintiff’s contractual relationship was with ASL and not with ASL’s sub-contractors. There is accordingly no proper basis for the defendant’s contention that the defendant can rely on the MISC bill of lading time-bar and Himalaya clause by virtue of the fact that ASL contracted with MISC on behalf of the plaintiff, and the defendant, in its standard trading conditions, authorised MISC to contract for its (the defendant’s) protection.

Defendant authorised MISC to contract for its protection and ASL was authorised to contract for the protection of MISC (ratification by MISC)

The further contention advanced by counsel for the defendant as to the basis upon which the defendant can rely upon ASL bill of lading Himalaya clause and the time-bar is that the defendant had expressly authorised MISC to contract for its protection and MISC, impliedly, through the MISC bill of lading and by accepting the containers for carriage had authorised ASL to contract for the protection of MISC and its sub-contractors and agents, including the defendant. In the alternative, the defendant also sought to rely on the ASL bill of lading on the basis that the defendant had expressly authorised MISC to contract for its protection and MISC, through the MISC bill of lading and accepting the containers for carriage had ratified ASL's action in expressly contracting with the plaintiff for the protection of all sub-contractors and agents, including the defendant.

Counsel for the defendant contended that the only reasonable interpretation of the contractual relationship between the parties is that on accepting the cargo for shipment and issuing its bill of lading, MISC impliedly authorised ASL to contract for its benefit. In this regard ASL was a freight forwarder. According to this argument, it was the intention of ASL and MISC, as expressed in the MISC bill of lading, that ASL would not be able to make any claims against agents or sub-contractors of MISC. Counsel for the defendant argued that both business efficacy and the officious bystander test demand that it be found that there was an implied term in the MISC bill of lading authorising ASL to contract for the protection of MISC. As regards the alternative argument it was submitted by counsel for the defendant that ASL, in contracting with the plaintiff on the terms of the ASL bill of lading, purported to contract for the benefit of MISC and its agents and sub-contractors and as agent and trustee for such agents and sub-contractors. Armed with this knowledge, ASL thereafter contracted with MISC for the actual carriage. Counsel for the defendant argued that MISC, in issuing its bill of lading and accepting the cargo for shipment, must be taken to have ratified ASL's action in so contracting with the plaintiff. I agree with the submission advanced by counsel for the plaintiff that in order for the defendant to be successful under this heading, the defendant must demonstrate that ASL was authorised by the defendant (whether antecedently or by ratification) to contract as agent or trustee for the

defendant. The only authority relied upon by the defendant is that set forth in the defendant's standard trading conditions. It is not suggested by the defendant that ASL was ever party to a contract with the defendant governed by the defendant's standard trading conditions or that ASL was a container operator "for or on whose behalf it deals with goods or containers in any manner" or one "from whom or at whose instance or instruction CMC receives containerised import goods." It must also be borne in mind that MISC was at no time a party to the ASL bill of lading. It was merely a sub-contractor of ASL. The provision in clause 13.2.1 of the defendant's standard trading conditions accordingly does not assist. What is clearly envisaged is authority to MISC to contract in its capacity as a carrier with persons to whom bills of lading and other documents are issued in order to obtain for the defendant benefits which accrue to MISC in terms of the agreements evidenced by such bills of lading. Such authority would accordingly have the effect that ASL (a party to the MISC bill of lading through its agents) would be a party to a contract with the defendant, in terms of the Himalaya clause. Clause 13.2.1 of the defendant's standard trading conditions does not purport to provide MISC with authority to in turn authorise ASL to contract on the defendant's behalf with persons to whom bills of lading may be issued by ASL. The contentions advanced by counsel for the defendant under this heading are inconsistent with the terms of the authority granted to MISC and cannot be sustained. There is no evidence whatsoever to suggest that MISC, whatever the terms of the authority furnished to it by the defendant, authorised or ratified ASL's act in purporting to contract as agent or trustee for persons such as MISC and the defendant.

MISC acted as agent for ASL

In the further alternative it was contended by counsel for the defendant that MISC, in contracting with the defendant to store the containers, acted as agent for ASL. Flowing from the agency of MISC, there is privity of contract between ASL and the defendant. It was argued by counsel for the defendant that the defendant's authorisation in terms of clause 13.2.1 of its standard trading conditions is sufficiently wide to include ASL contracting with the plaintiff for the defendant's protection. It was further submitted on behalf of the defendant, that clause 13.2.2 of the defendant's standard trading conditions expressly authorise a party in ASL's position "to act as CMC's agent to accept on its behalf the benefit of all provisions which accrue to the benefit of

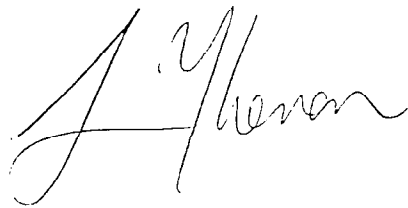
container operators in terms of bills of lading ...” The result being, according to counsel for the defendant, that ASL was authorised by the defendant, through the agency of MISC, to contract for the defendant’s protection. In my view this contention can also not be sustained. Clause 4.1 of the MISC bill of lading provides that “the carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage.” Accordingly MISC, in contracting with the defendant to store the containers, was not acting on anybody’s behalf, but its own.

Stipulatio Alteri

The final ground relied upon by the defendant is that the time-bar and Himalaya clause in the ASL bill of lading constitutes a *stipulatio alteri* in favour of the defendant. Assuming that it is a *stipulatio alteri*,² one of the questions to be answered is whether the defendant accepted the benefit of the *stipulatio*. Such acceptance has to conform with the usual requirements of the acceptance of an offer, in particular that acceptance is communicated to the offeror. [*Jurgens Eiendomsagente v Share* 1990 (4) SA 664 (A)]. It is common cause that there was no express communication of such an acceptance. The defendant relies on the implied acceptance of the benefit by the defendant accepting the containers for storage in terms of its standard trading conditions and the plaintiff becoming aware of that acceptance. This mode of acceptance cannot be relied upon. Counsel for the defendant argued that the plaintiff must have known prior to instituting action against the defendant that the defendant had stored the containers. The argument that such knowledge, however gained, constitutes communication of the implied acceptance of the benefit extended by the ASL bill of lading, is fallacious. The plaintiff may well have acquired such knowledge only after the cargo had been damaged.

I accordingly find that the defendant cannot rely on the Himalaya clause and time-bar contained in either the ASL or the MISC bills of lading in order to avoid liability to the plaintiff. I grant judgment in favour of the plaintiff for:

- (a) payment of the sum of R193 621.09;
- (b) interest thereon at the rate of 15.5% per annum calculated from 3 June 1998 to date of payment; and
- (c) costs of suit.

A handwritten signature in cursive script, appearing to read "A. Y. Moran".

Plaintiff's attorneys: Deneys Reitz
Plaintiff's counsel: S R Mullins

Defendant's attorney: Garlicke & Bousfield Incorporated
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