Date: 20090716

Docket: T-1340-07

Citation: 2009 FC 727

Vancouver, British Columbia, July 16, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

H. PAULIN & CO. LTD.

Plaintiff

and

A PLUS FREIGHT FORWARDER CO. LTD.
SCANWELL LOGISTICS (TORONTO) INC.
SCANWELL LOGISTICS (TAIWAN) LTD.
and BALTRANS LOGISTICS (CANADA) LTD.

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] In this action Scanwell Logistics (Taiwan) Ltd., who issued "freight prepaid" shipping documents, claims unpaid freight from H. Paulin Co. Ltd., the ultimate receiver, for the carriage of 29 containers of cargo from Taiwan to Vancouver by sea, and from there to Edmonton, Toronto and Montreal by rail. There were three distinct contracts of affreightment covering this multi-model transport. H. Paulin, the purchaser of the cargo, hired A Plus Freight Forwarder Co. Ltd., who hired Scanwell Logistics (Taiwan) Ltd. who in turn hired Orient Overseas Container Line Ltd. (OOCL).

H. Paulin and one of its suppliers paid freight charges to A Plus and Scanwell paid OOCL. No one has paid Scanwell. It is common ground that A Plus is defunct.

[2] Having obtained judgment in Taiwan against A Plus, but being unable to collect, Scanwell now looks to H. Paulin for payment. It asserts a number of reasons why H. Paulin is liable to it, one being that A Plus was its undisclosed agent, and another being that it is not bound by the "freight prepaid" documents it issued. H. Paulin's position is that Scanwell dealt with A Plus as a principal in its own right. I find for H. Paulin and would dismiss the claim with costs. Scanwell is bound by its representation that freight had been paid.

[3] Before analysing the legal principles involved, it is incumbent upon me to describe the relationships among the various parties, make findings in respect thereto and to set out the somewhat complex history of these proceedings.

Background

[4] H. Paulin is a Canadian manufacturer and importer of various fasteners used in domestic and industrial applications. The nuts, bolts and screws on sale at local hardware stores may well have emanated from it, as may flanges and other fasteners which hold parts of an automobile together.

[5] It regularly imports from the United States and Taiwan. Three of its suppliers in Taiwan are Zyh Yin Entreprise Co. Ltd., Super Cheng Industrial Co. Ltd. and Da Yang Entreprise Co. Ltd. Until 2004 it purchased from Zyh Yin on a C.I.F. basis, and from the other two F.O.B. The goods

purchased from Zyh Yin tend to be somewhat dense and heavy. Goods purchased from the other two may already be packaged for retail sale and thus be lighter and more voluminous. Given that all these goods move in containers, which have both volume and weight limitations, H. Paulin realized it could save freight by consolidating a mixture of light and heavy goods in the same container. This is where A Plus comes in.

[6] A Plus was to, among other things, stuff or arrange to stuff the containers. H. Paulin continued to deal with its suppliers on not quite a C.I.F. or F.O.B. basis. Zyh Yin continued to pay the freight, but now it was paid to A Plus. On the F.O.B. shipments, H Paulin paid freight to A Plus. As to the overall relationship between the two, we have to primarily rely upon the bills of lading issued by A Plus. The gentleman at H. Paulin who had dealt with A Plus, Jack Adair, died in June 2007, the month before this cargo arrived in Canada. Although we have some e-mails from the principal at A Plus, Anderson Chen, and although duly served, A Plus has not seen fit to appear in these proceedings.

[7] A Plus issued eight bills of lading covering the 29 containers. Five show Zyh Yin as shipper; two show Super Cheng and one Da Yang. All are consigned to H. Paulin or a division thereof and state that the cargo had been received on board the OOCL Britain or the OOCL Singapore, as the case may be. In the freight charge box all state “ocean freight as arrange” [*sic*]. However, the Zyh Yin bills of lading also bear another notation “freight prepaid”. The Super Cheng and Da Yang bills of lading do not, but I find that both Zyh Yin and H. Paulin paid freight to A Plus before these

proceedings were instituted. The bills of lading also contain another box titled “forwarding agent references”. The name of Baltrans Logistics Canada Limited was inserted.

[8] All eight bills of lading state that they are not negotiable unless consigned to order, which they were not. They all state that three originals were issued and add “if more than one originals [*sic*] issued, the others stand void when one is accomplished”. This means that delivery would only be effected against surrender of the bill.

[9] A Plus signed the bills of lading “as agent for carrier”. The boiler plate text states that the Master of the ship affirmed the bill of lading and authorized signature. A Master’s bill of lading usually evidences a contract with the shipowner or, if the ship is demised chartered, with the demise charterer. However, that cannot be so in this case. There is no evidence whatsoever that the Masters of the OOCL Britain and OOCL Singapore were even aware of the existence of A Plus. The bills of lading are issued on A Plus’ letterhead and state that the issuer of the bill of lading is the “freight forwarder”. In virtue of clause 2 thereof, A Plus undertook to perform, or in its own name to procure, the performance of the entire transport, and assumed personal liability.

[10] I find that A Plus was acting as a Non Vessel Operating Common Carrier (NVOCC). The bills of lading were straight bills of lading which means that title to the goods did not pass by their consignment or endorsement. It was expressly provided, however, that an original bill had to be surrendered in order to obtain delivery.

[11] The Court only heard evidence with respect to one set of the original bills of lading. There is no evidence that they were ever in the hands of the named shippers. Copies, but not originals, were in the hands of H. Paulin. When this action began, the set of originals was with Baltrans.

[12] A Plus in turn retained the services of Scanwell Logistics (Taiwan) Ltd. who issued "Forwarder's Cargo Receipts". A Plus is identified as the shipper and Baltrans Logistics Canada Ltd. as the consignee. Scanwell signed "as carrier". The receipts state on their face that they are not documents of title, and bear the notation "freight prepaid". Scanwell submits that it is also an NVOCC and that its receipts incorporated the terms and conditions of the next bills of lading issued by OOCL. It is not necessary to decide this issue.

[13] In the third set of contracts, Scanwell retained OOCL. Scanwell Logistics (Taiwan) Ltd. appears as shipper on its bills of lading. The consignees are its Canadian affiliates such as Scanwell Logistics (Toronto) Inc. The bills of lading state that they are not negotiable unless consigned to order which they were not. In addition the word "waybill" was typed in. All bills are marked freight prepaid. Freight had not then been paid, but eventually was paid by Scanwell. They also contain the "when one is accomplished" proviso.

[14] Finally, OOCL retained Canadian Pacific Railway to move the containers from Vancouver to Edmonton, Toronto or Montreal, as the case may be. The contract and financial arrangements between them are not before the Court.

The proceedings

[15] The business between H. Paulin and A Plus was fairly high volume, with as many as 20 containers shipped per month. Come early 2007, Mr. Adair formed the view that A Plus had been double invoicing, overcharging and levying improper charges. He began "setting-off" against invoices which were due. He deducted at least $400,000.00, but had not informed others at H. Paulin of exactly what he was doing.

[16] The figures are a bit murky as the dispute between the two has not proceeded to trial. Mr. Anderson Chen conceded some errors but was still of the mind that A Plus was owed some $400,000.00, when the containers in question were available for delivery in Canada.

[17] Not wanting to run the risk of these 29 containers being held up, H. Paulin paid the freight charges on them in full. The payment matches the specific freight charges to the penny; consequently, this is not a case where the debtor had not allocated a payment against various debts, so that the creditor is then entitled to attribute them as it sees fit (*Mount Royal/Walsh Inc. v. Jensen Star (The)* (1988) 17 F.T.R. 289, varied in appeal [1990] 1 F.C. 199). Furthermore, based on the affidavit of Mr. Chih-Yuan Chen, assistant managing director of Zyh Yin, I am satisfied that it paid A Plus the freight which it owed on the C.I.F. shipments.

[18] Nevertheless, A Plus instructed Baltrans, which was then holding an original set of A Plus bills of lading, not to release them and not to arrange for delivery of the cargo.

[19] As a result, in July 2007, H. Paulin issued a statement of claim against the defendants and moved for an order forcing the delivery to it of the 29 containers in question. The action against A Plus has two facets. H. Paulin claims damages estimated at $1,100,000 relating to double invoicing, overcharging and improper charges over the approximately three years they had done business. In addition, as against A Plus and the other defendants it is alleged that A Plus had engaged the services of the Scanwell Corporations or Baltrans to facilitate the movement, that freight had been paid and that all defendants should be enjoined to deliver up the 29 containers, which were not subject to lien.

[20] The Court ordered H. Paulin to post security in favour of the defendants as their possessory lien interests may appear, and they in turn were ordered to release the containers. However, it turns out that none of the containers was in the actual physical possession of the defendants, but rather were with OOCL or C.P.R. The latter two were given leave to intervene and were given priority over a portion of the security which had been posted. Thereafter the containers were released.

[21] Scanwell (by convention the two Scanwell corporations have been treated as one), OOCL and C.P.R. all asserted possessory liens. A Plus, as aforesaid, never appeared. There is an important distinction to be drawn between the claims of Scanwell on the one hand, and the claims of OOCL and C.P.R. on the other. Scanwell was claiming a possessory lien for freight, OOCL and C.P.R. were not. OOCL was claiming a possessory lien for demurrage on its containers and C.P.R. a possessory lien for storage charges at its various container yards since the cargo had not been picked up in a timely manner. As matters transpired it is not necessary to decide if any of them had a

possessory lien. Certainly they all had some control over the release of the cargo. C.P.R. needed OOCL's consent, who needed Scanwell's, who needed Baltrans', who needed A Plus'!

[22] The parties agreed to proceed in stages. The first claims intended to be resolved were those of OOCL and C.P.R. However, they ultimately discontinued their proceedings, and a portion of the security was returned to H. Paulin. Although they appear to have renounced such possessory liens or rights *in rem* they may have had against the cargo, they do not appear to have renounced such personal claims as they may have. They have both sent invoices to Scanwell, which it refuses to pay.

[23] Baltrans, which was holding the original A Plus bills of lading, interpleaded and surrendered the bills into Court. It in turn claimed over against Scanwell. However, during the course of the proceedings, H. Paulin discontinued its action against Baltrans and so the latter's indemnity proceedings likewise fell by the wayside.

[24] Although originally asserting a possessory lien, Scanwell decided not to pursue that route and simply cross-claimed against H. Paulin for unpaid freight. The balance of the security was released.

[25] This leaves us with H. Paulin's claim against A Plus and Scanwell, and Scanwell's against H. Paulin. The claim as against Scanwell is limited to incidental matters required in order to get delivery of the cargo. The parties agreed to leave H. Paulin's claim in abeyance and to first proceed

on Scanwell's counterclaim. Thus, the only issues presently before me are whether H. Paulin is indebted to Scanwell for freight, and whether it should be required to indemnify it if it is successfully pursued by C.P.R. or OOCL.

[26] The parties decided not to call witnesses. The evidence consisted of the affidavits filed at the outset of the proceedings, the transcript of the examinations for discovery, answers to undertakings, agreed documents and notices to admit.

Issues

[27] This case deals with the bill of lading, a venerable document with centuries of use in the transportation of goods. Depending on its language, it either serves as a representation by the carrier that the cargo has been received for shipment or has been actually laden on board a named ship. Secondly, even though usually issued after the contract of affreightment has been made, it often serves as evidence of the terms and conditions thereof (*The "Ardennes*" (1950), 84 Ll. L.R. 340, *Saint John Shipbuilding & Dry Dock Co. v. Kingsland Maritime Corp.* (1981) 126 D.L.R. (3d) 332 (F.C.A.)). However, in this case the bills only partially fulfill that role because the freight owing by H. Paulin had not yet been paid. Finally, they may be negotiable in the sense that title to the cargo identified therein may in certain circumstances be transferred by delivery or endorsement thereof.

[28] Bills of lading are often modified by such words as "negotiable, non-negotiable, order and straight". They were the subject of considerable discussion in the House of Lords' decision in *J.I. MacWilliam Company Inc. v. The Mediterranean Shipping Company S.A. (The "Rafaela S")* [2005]

UKHL 11, [2005] 1 Lloyd's L.R. 347, and very recently by Mr. Justice Blanchard of this Court in *Cami Automotive, Inc. et al v. Westwood Shipping Lines Inc. (The "WSL Anette")* 2009 FC 664. The issues in those cases were quite different from the case at bar. In the *Rafaela S*, the issue was whether the Hague-Visby rules were compulsorily applicable to sea carriage covered by a straight bill of lading. In the *WSL Anette* the issue was whether the covering document was a bill of lading or a waybill. Nevertheless, these cases, as well as the cases and authors cited therein, serve as excellent background to the issues in this case.

[29] The first issue is the meaning of the term "freight prepaid" on bills of lading and similar receipts. Scanwell submits that if, as in this case, the freight has not been paid, the statement at most serves as a renunciation of the right to retain possession of the cargo or to arrest it in an action *in rem*. As regards both the shipper and the consignee, the statement has no bearing on personal liability.

[30] I agree that as between the carrier and shipper the statement does not preclude an action for freight. However, in the circumstances of this case, the statement limits Scanwell's recourse to an *in personam* claim against A Plus. The statement precludes Scanwell from asserting any possessory lien or claim *in rem* against the cargo or *in personam* against the ultimate receiver, H. Paulin.

[31] The next issue to resolve is the relationship among H. Paulin, A Plus and Scanwell. If, unbeknownst to Scanwell, H. Paulin was A Plus' undisclosed principal, then Scanwell indeed has a claim against H. Paulin as shipper. However, I am satisfied that A Plus acted as a principal for its

own account. In the circumstances, A Plus was the only party from whom Scanwell could seek recourse.

[32] In the alternative, Scanwell alleges it is entitled to recover in whole or in part on a *quantum meruit* basis. I hold to the contrary.

[33] Scanwell paid freight to OOCL. In virtue of the Himalaya clause in the OOCL bill of lading and the common law as reflected in such statutes as the (Ontario) *Mercantile Law Amendment Act*, it submits it is entitled to recover from H. Paulin the amount it paid OOCL. However, in my opinion neither the OOCL bill of lading nor the common law aids Scanwell.

[34] Finally, Scanwell asserts an equitable social justice theory. Since the freight was only a relatively small portion of the value of the cargo to H. Paulin, as landed in Canada, but on the other hand represented all, or substantially all, of Scanwell's involvement, even if H. Paulin were an innocent party, which it is not, better that the loss fall upon it. I find this argument singularly without merit, and dismiss it out of hand. Scanwell chose to deal with A Plus on credit. It chose to issue "freight prepaid" documents, all with the hope of profit. That was its decision and its risk. It must live with the consequences.

Discussion

[35] The particulars to be inserted in the A Plus bills of lading were furnished by H. Paulin. H. Paulin was aware that A Plus was not a carrier in its own right. It dealt with and paid A Plus

to the exclusion of all others. Although it was aware that A Plus was going "in its own name to procure the performance of the entire transport", it was not even aware of the existence of Scanwell until this particular dispute arose.

[36] As between the two, as aforesaid, A Plus was an NVOCC, not a freight forwarder or forwarding agent.

[37] The original traditional role of a freight forwarder is well-known. As stated by Mr. Justice Rowlatt in *Jones v. European & General Express Company, Ltd.*, (1920) 25 Com. Cas. 296 at p. 298 and approved by the English Court of Appeal in *Marston Excelsior Ltd. v. Arbuckle, Smith & Co. Ltd.*, [1971] 2 Lloyd's L.R. 306 and *Gillespie Bros. & Co. Ltd. v. Roy Bowles Transport Ltd.*, [1973] 1 Lloyd's L.R. 10:

> It must be clearly understood that a forwarding agent is not a carrier; he does not obtain the possession of the goods; he does not undertake the delivery of them at the other end unless prevented by some excepted cause of loss or something which affords an excuse. All that he does is to act as agent for the owner of the goods to make arrangements with the people who do carry—steamships, railways, and so on—and to make arrangements so far as they are necessary for the intermediate steps between the ship and the rail, the Customs or anything else…

[38] However, there are no fixed rules setting out the respective rights and obligations of the shipper and the freight forwarder. In *Morlines Maritime Agency Ltd. v. IKO Industries Ltd.*, [1999] 180 F.T.R. 12, Mr. Justice Lutfy, as he then was, referred to the third edition of *Marine Cargo Claims* in which Professor Tetley pointed out that nowadays many the freight forwarder also:

> … has acted as principal contractor arranging the carriage in his own name. His fee payable by the shipper is a straight freight charge. He then arranges to pay lower freight rates to the carrier and obtains his profit from the difference between the two. Very often the freight forwarder consolidates the cargoes of a number of clients into a single container, resulting in savings which benefit the freight forwarder and the clients. On these occasions the freight forwarder's responsibility to the shipper is often that of a carrier.

[39] That is exactly the relationship between the H. Paulin and A Plus in this case.

[40] It now becomes necessary to analyse the relationship between A Plus on the one hand and Scanwell on the other. During the more than two years they did business together, Scanwell never made enquiries as to who might be behind A Plus. It only dealt with A Plus, not with A Plus' customers. It billed A Plus, and to the extent it was paid, was only paid by A Plus. It showed A Plus as the shipper on its cargo receipts. It did not show Zyh Yin Entreprise Co. Ltd., Super Cheng Industrial Co. Ltd., Da Yang Entreprise Co. Ltd. or H. Paulin as shipper; and never had any dealings with them.

[41] Although the documents issued by Scanwell were entitled "forwarder's cargo receipt" it goes on to provide that "the Carriage by the carrier—shall be subject to the—regular form Bill of Lading—used at the time by such carrier—". Yet, Scanwell signed "as carrier". Whether an NVOCC or forwarder, it in fact had control of the cargo.

[42] As with the case of a bailee being unable to question the title of the bailor, Scanwell could not look behind A Plus. It dealt with A Plus as a principal. It knew perfectly well by choosing to

issue a freight prepaid bill of lading it chose to look to A Plus, as opposed to the cargo, or the consignee, for payment. (Admitted in the discovery of Scanwell).

[43] By the same token, not that it matters, Scanwell dealt with OOCL as principal. If by no other means, Scanwell's consent was necessary before delivery of the containers could be effected to H. Paulin, as it was both shipper and consignee on the OOCL bills.

Meaning of "freight prepaid"

[44] There have been a number of decisions of this Court, and provincial courts, as to the meaning of this term. Cases in this Court have been limited to carriage by sea. Care should be taken in analysing judgments from other courts as considerable reference has been made to customary practices, particularly in the trucking industry.

[45] In *Chastine Maersk (The) v. Trans-Mar Trading Co. Ltd.*, [1974] F.C.J. No. 1003 (QL), Mr. Justice Mahoney, as he then was, held:

> The notation "Freight Prepaid" means only that the carrier must look to the shipper and not to the consignee for payment of the freight and is obliged, in the absence of other considerations, to deliver up the cargo to the consignee without regard to whether, in fact, it has been paid the freight."

[46] The case most widely cited is *C.P. Ships v. Les Industries Lyon Corduroys Ltée*, [1983] 1 FC 736. In that case the defendant was identified on the bill of lading as shipper. The bill of lading which was issued bore the notation "freight prepaid". The defendant had hired Ketra

Overseas Transport Canada Ltd. to arrange shipment and apparently was under the belief that it was an agent of C.P. Ships for the purposes of receiving payment of freight. Ketra billed the defendant, was paid, but then went into bankruptcy without paying C.P. Ships. C.P. Ships was entitled to recover. Mr. Justice Addy stated:

> Where a debtor, instead of paying his creditor, chooses to pay a third party, he does so at his peril. Where the money is not turned over to the creditor, the onus is then on the debtor to establish either:
>
> (1) that the creditor actually authorized the third party to receive the money on his behalf, or
> (2) that the creditor held the third party out as being so authorized, or
> (3) that the creditor by his conduct or otherwise induced the debtor to come to that conclusion, or
> (4) that a custom of the trade exists to the effect that in that particular trade and in those particular circumstances, both the creditor and the debtor normally would expect the payment to be made to the third party.

[47] Ever since, Mr. Justice Addy's commentary has been treated as if it were a piece of legislation. The Courts have used it as the cornerstone of the necessary factual analysis. (*Mondel Transport Inc. v. Afram Lines Ltd*., [1990] 3 F.C. 684; *American President Lines, Ltd. v. Pannill Veneer Co.* (1997), 36 B.L.R. (2d) 1 and *Mediterranean Shipping Co. S.A. v. BPB Westroc Inc.*, 2003 FC 942, 238 F.T.R. 135).

[48] While I agree entirely with Mr. Justice Addy's analysis, I do not think he intended that his words be taken *au pied de la lettre*. He was setting out a practical application of the law of agency. During the hearing I equated the movement of freight money to a shuttlecock. Did the movement of

money from H. Paulin to A Plus remain on the cargo side of the badminton net, or was A Plus on the carrier's side? I have found that A Plus was a carrier and so H. Paulin effected payment.

[49] Scanwell would have been in a completely different position had it issued a freight collect document, or at the very least had not noted that freight had been prepaid. H. Paulin knew that A Plus was not a performing carrier, but would, in its own name, contract with others. Even if not personally liable, H. Paulin would not have been entitled to delivery as Scanwell would have been entitled to insist upon payment. Knowing, and agreeing, that A Plus intended to subcontract or sub-bail it would have been bound by a "freight collect" notation on the Scanwell documents (*Morris v. C.W. Martin & Sons Ltd.*, [1966] 1 Q.B. 716, [1965] 2 Lloyd's Rep. 63 and *K.H. Enterprise (The) v. Pioneer Container (The)*, [1994] 2 A.C. 324, [1994] 1 Lloyd's L.R. 593).

[50] Scanwell relies strongly on two decisions of the Quebec Court of Appeal: *2318-1654 Québec inc. c. Swiss Bank Corp. (Canada)*, J.E. 2000-1475 and *SGT 2000 inc. c. Molson Breweries of Canada Ltd.*, 2007 QCCA 1364, J.E. 2007-2013.

[51] In *Swiss Bank*, a Quebec paper manufacturer sold to various American customers. The bills of lading stated that the freight had been prepaid. The trucker had not in fact been paid. The shipper became bankrupt. Swiss Bank was a secured creditor in virtue of an assignment of book debts. It took the position that it was entitled to the full amount of the sales invoices assigned to it, including the unpaid freight. At first instance ([1996] Q.J. No. 3606 (QL)), the trial judge heard expert evidence to the effect that the term prepaid does not mean that the freight has actually been

paid. It simply denotes an undertaking by the shipper to pay the freight, as transport is usually arranged on credit terms.

[52] He went on to hold that the shipments were covered by the federal *Bills of Lading Act*. Section 2 provides:

2. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself.	2. Tout consignataire de marchandises, nommé dans un connaissement, et tout endossataire d'un connaissement qui devient propriétaire de la marchandise y mentionnée par suite ou en vertu de la consignation ou de l'endossement, entrent en possession et sont saisis des mêmes droits d'action et assujettis aux mêmes obligations à l'égard de cette marchandise que si les conventions contenues dans le connaissement avaient été arrêtées avec ce consignataire ou cet endossataire.

[53] He concluded that the consignees were liable, together with the shipper, for the payment of the freight charges and that those charges could have been withheld by the consignees and paid by them directly to the trucking company. He held that those amounts were not a receivable of the bankrupt but rather that it was collecting same on behalf of the transport company.

[54] The Court of Appeal dismissed the appeal, again relying on section 2 of the *Bills of Lading Act*. By taking up the bills of lading the consignees became subject to the same liabilities as the shipper, including the obligation to pay freight.

[55] No mention whatsoever was made of the jurisprudence emanating from this Court.

[56] The Quebec Court of Appeal simply followed itself in *Molson Breweries*, again without mentioning the decisions of this Court.

[57] These cases can be distinguished if for no other reason than H. Paulin did not become owner of the cargo in virtue of the bills of lading which were not negotiable and apparently were never in the shippers' hands. There appears to be a presumption, at least in trucking cases, that the contract is made between the owner of the goods and the carrier. It follows that the consignee is liable for freight (Palmer, *Bailment* (2nd ed) 1991 at pp. 1015, 1016). There is no such presumption in carriage by sea. Moreover, with respect, I am unable to follow them.

[58] The entire contract as between the shipper and the carrier was not contained in the bills of lading. The overall contract included an obligation of the shipper to pay freight. Even if property passed in virtue of the bills of lading, the consignees' liability is under the Act "as if the contract contained in the bill of lading had been made with himself" [emphasis added]. That contract clearly stated that freight had been prepaid.

[59] The freight prepaid notation was a representation by the carrier, just as much as is a statement as to the apparent good order and condition of the cargo, or that the cargo has in fact been shipped on board. A deliberate misrepresentation by the issuance of a clean bill of lading when the cargo is obviously damaged is a conspiracy between the shipper and the carrier. It is a fraudulent representation made by the carrier with the intention that it be relied upon.

[60] The freight prepaid notation is not a representation as between the shipper and the carrier, but vis-à-vis others, to use the words of Lord Justice Morris in *Brown, Jenkinson & Co. Ltd. v. Percy Dalton (London), Ltd.*, [1957] 2 Lloyd's Rep.1 at page 7:

> A shipowner clearly intends that the bill of lading he issues should be relied upon. He intends that it should be relied upon by those into whose hands it properly comes: consignees, bankers and indorsees must be within his contemplation.

[61] I turn now to *quantum meruit* serves as a non-contractual basis to value services rendered. It often is advanced as an equitable remedy to provide restitution for unjust enrichment. It has no application in this case. H. Paulin was not unjustly enriched, it paid the freight. Scanwell provided contractual services to A Plus on credit. The risk of non-payment fell upon it, not H. Paulin.

[62] Scanwell takes the position that it was liable with others, including H. Paulin, to pay freight to OOCL. Having paid it is entitled to recover in accordance with Section 2 of the (Ontario) *Mercantile Law Amendment Act*. As I understand it that act is not being cited in its own right but rather as a reflection and codification of the common law which forms part of English Admiralty

Law, and hence Canadian Maritime Law. This argument fails as Scanwell, and Scanwell alone, was personally liable to OOCL. The OOCL bills of lading provide that anyone who becomes a holder of the bill, whether by transfer or endorsement or by presenting same to obtain delivery, becomes a party to a contract of carriage with OOCL. H. Paulin did none of these things.

[63] Scanwell has tried valiantly to escape its own language. Although Humpty Dumpty may say "when I use a word it means just what I choose it to mean – neither more nor less", Scanwell may not. It is bound to H. Paulin for what it said, that freight was prepaid. It is not for me to say whether Scanwell is liable to OOCL and C.P.R. However, I can say for the reasons given that, even if so, it is not entitled to indemnity from H. Paulin.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the counterclaim of Scanwell Logistics (Toronto) Inc. and Scanwell Logistics (Taiwan) Ltd. against the Plaintiff H. Paulin & Co. Ltd. is dismissed with costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1340-07
STYLE OF CAUSE:	H. PAULIN & CO. LTD. v. A PLUS FREIGHT FORWARDER CO. LTD. et al.
PLACE OF HEARING:	Toronto, ON
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APPEARANCES:

Marc Isaacs	FOR THE PLAINTIFF
No one appearing	FOR THE DEFENDANT A PLUS FREIGHT FORWARDER CO. LTD.
Gavin Magrath Sarah O'Connor	FOR THE DEFENDANTS SCANWELL LOGISTICS (TORONTO) INC. SCANWELL LOGISTICS (TAIWAN) LTD.
No one appearing	FOR THE DEFENDANT BALTRANS LOGISTICS (CANADA) LTD.

SOLICITORS OF RECORD:

Isaacs & Co. Toronto, ON	FOR THE PLAINTIFF
No one	FOR THE DEFENDANT A PLUS FREIGHT FORWARDER CO. LTD.
Magrath, O'Connor Toronto, ON	FOR THE DEFENDANTS SCANWELL LOGISTICS (TORONTO) INC. SCANWELL LOGISTICS (TAIWAN) LTD.
William M. Sharpe Toronto, ON	FOR THE DEFENDANT BALTRANS LOGISTICS (CANADA) LTD.