

INSIGHT



ISSUE 008: July 2009 **Pauline Barratt**

Trading Terms and Conditions... again

One of the topics that we raise regularly is the need for those in the transport industry to protect themselves through the use of well drafted and up to date trading terms and conditions which have been properly incorporated into contracts with clients. Usually that discussion arises in the context of risk management, but as the following case illustrates, trading terms can be of wider commercial benefit.

In this case, an importer arranged to purchase a consignment of goods on ex works terms from a supplier in Italy with whom it had dealt many times in the past. There was a standing practice, known to the importer's New Zealand freight forwarder, for the seller in Italy to give the carriage instructions to the freight forwarder's Italian agent on behalf of the importer. On this occasion the Italian seller gave instructions for the consignment to be collected and sent to New Zealand by airfreight, that being the method of transport that had been requested by the importer. The freight forwarder acted on those instructions in making the carriage arrangements, and was unable to alter them at short notice when the importer gave a belated instruction to change to seafreight. The importer, disgruntled at this outcome, refused to pay the airfreight cost.

The freight forwarder issued summary judgment proceedings against the importer in the District Court, and succeeded on its claim after a defended hearing. The Court held that the forwarder's trading terms had been correctly incorporated as terms of the contract between the parties. Those terms gave the forwarder the right to proceed with the airfreight arrangements and be paid for the cost of the same, where in the forwarder's reasonable opinion the change of instruction came too late to be effected.

The terms were also held to be complete in themselves and to represent the entire contract between the parties, which meant that the importer's attempt to rely on what it said were implied obligations accepted by the forwarder in relation to cargo management, did not succeed.

The importer appealed to the High Court. The appeal was dismissed, with the High Court Judge describing it as "hopeless" and awarding indemnity costs to the freight forwarder. The ultimate result was therefore that the forwarder's terms and conditions not only protected it from allegations of having breached its obligations to its customer, but also affirmatively established its entitlement to be paid in unusual circumstances.

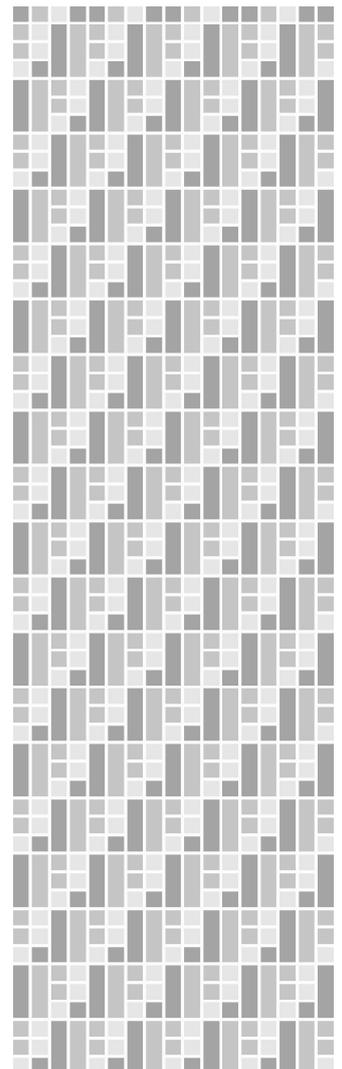
DHL Global Forwarding (New Zealand) Limited v Global Prestige Brands Limited Auckland District Court, 21 February 2008, Gittos DCJ; *Global Prestige Brands Limited v DHL Global Forwarding (New Zealand) Limited* High Court, Auckland, 19 June 2008, Harrison J.

Pauline Barratt represented DHL Global Forwarding (New Zealand) Limited at both hearings. She has worked with DHL over a number of years on regular updates of its trading conditions.

Trading Terms and Conditions...Part II

In these times of difficult economic conditions, the ability to secure payment is particularly important. Most in the transport area will be aware that they may sometimes be able to claim a lien over cargo to enforce payment. However, unless a very broadly worded lien clause is included in trading terms which are then properly incorporated into the contractual relationship with the cargo owner, serious difficulties can arise. This is because non-contractual liens (i.e. those recognised by the common law) are extremely limited in their scope. For example, there is authority for saying that warehouse operators who do not do anything to goods to improve their value are not entitled to a lien at all. That means they may have to release goods even where a debt is owed.

Parties to a contract, though, can agree on virtually whatever terms they wish, and this gives considerable scope for improving the position well beyond what the common law would allow.



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There is also some ability to manage contractual liens in a way that can give protection against receivers and liquidators.

Please feel free to contact us if you think your trading terms may need an overhaul, or if you need advice on how to make sure they are correctly incorporated as terms of the contracts you have with your clients.

Tasman Orient Line CV v New Zealand China Clays Limited & Others (SC)

Those who have been following the progress of the "Tasman Pioneer" litigation will be aware that a decision of the Court of Appeal in favour of cargo interests was delivered on 9 April 2009. The carrier applied for leave to appeal, and on 1 July 2007 the Supreme Court granted leave. The approved grounds of appeal are:

- (a) As the appellant's ground, did the conduct of the Master following the grounding disentitle the appellant to the protection of Article IV, Rule 2(a) of the Hague Visby Rules?
- (b) As the respondents' additional grounds in support of the judgment of the Court of Appeal:
 - (i) Were the decisions of the Master following the grounding made bona fide for the safety of the ship, the crew and the cargo?
 - (ii) Did the conduct of the Master amount of barratry?

"Barratry" can be generally defined as being wilful conduct of the Master or crew which is contrary to the interests of the ship owner.

And Finally...

Those with an interest in matters both maritime and historical may find pleasure in last year's judgment in *Crown Estate Commissioners v Mark Andrew Tudor Roberts*. In that case the English High Court had to consider a claim by Mr Roberts that he was entitled to exercise a

number of royal prerogative rights over the Pembrokeshire foreshore, including rights of wreck de mer, treasure trove, Court leet and estrays. The historical basis for the claim extended back to the Norman conquest, the judge commenting:

1189, the year in which King Henry II died, is generally regarded as the beginning of legal memory. However, the story in this case starts at least half a century earlier, which has made the fact finding exercise unusual, to say the least...

And, what is at least as interesting, is that Mr Roberts was actually found entitled to exercise a number of the claimed rights.

The judgment is available online at <http://www.bailii.org/ew/cases/EWHC/Ch/2008/1302.html>.

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