CA on appeal from Central London County Court (HHJ Hallgarten QC) before Ward LJ; Kay LJ; Rix LJ. 5th December 2001.

LORD JUSTICE RIX:

1. This is a case about the success or failure of incorporating terms into a contract by notice. The issue is whether or not a carrier's freight surcharge known as a "*Peak Summer Surcharge*" (the "*surcharge*") was incorporated into contracts evidenced by bills of lading for the carriage of goods from Hong Kong to Felixstowe.

2. The carrier was COSCO Container Lines, a Chinese concern with its head office in Shanghai ("*the line*"). The line had agents in Hong Kong and in England. Its Hong Kong agent was COSCO Container Lines Agencies Ltd ("*Cossalina*") and its UK agent was COSCO (UK) Limited, the defendant below and in this court the appellant ("COSCO UK").

3. The claimant TICC Limited ("TICC"), in this court the respondent, was the English consignee of goods shipped on a variety of the line's vessels between 11 September and 23 October 1998. The goods were shipped under a number of bills of lading which named either Cycle Container Lines Ltd ("Cycle") or IFB International Freightbridge Ltd ("IFB") as shippers, and in each case TICC as consignee. Cycle and IFB were Hong Kong freight forwarders who were acting as TICC's Hong Kong agents in organising such shipments.

4. The bills of lading were marked "*Freight Collect*" and the practice was for COSCO UK to negotiate the applicable freight rates for the line directly with TICC and in due course to collect the freight from TICC in England. The issue which has given rise to this litigation arose in the autumn of 1998 when COSCO UK sought to collect from TICC an additional sum of US$14,500 in respect of the surcharge, over and above the normal freight tariff negotiated and applicable to the shipments. TICC refused to pay other than under the duress of a lien, and claimed to recover the excess on the ground that it had had no notice of the imposition of the surcharge. The claim came before HHJ Hallgarten QC in the business list of the Central London County Court, and he found that TICC was entitled to recover $11,500. The difference of $3000 between the sum claimed and the sum ordered to be repaid reflected the surcharge on the last of the relevant shipments, in respect of which alone he found that TICC had had sufficient notice. In the court below there was an issue as to whether COSCO UK was in any event a party liable to repay the sum in question, but that issue is no longer pursued.

5. The bills of lading contained the following terms:

"1. DEFINITIONS

"Merchant" includes the consignor, the shipper, the receiver, the consignee, the owner of the Goods, the lawful holder or endorsee of this Bill of Lading, or any other person having any present or future interest in the Goods or this Bill of Lading, or anyone authorized to act on behalf of any of the foregoing…

"2. CARRIER'S TARIFF

The terms of the Carrier's applicable Tariff and other requirements regarding charges are incorporated into this Bill of Lading. Particular attention is drawn to the terms contained therein, including but not limited to free storage time, Container and vehicle demurrage, etc. Copies of the relevant provisions of the applicable Tariff are obtainable from the Carrier or his agents upon request. In case of any inconsistency between this Bill of Lading and the applicable Tariff, this Bill of Lading shall prevail.

"13. FREIGHT AND CHARGES

(1) All Freight shall be deemed fully, finally and unconditionally earned on receipt of the Goods by the Carrier and shall be paid and non-returnable in any event whatsoever…

(5) The parties defined as Merchants in clause 1 hereof shall, where applicable, be jointly and severally liable to the Carrier for all Freight, demurrage, General Average and charges…"

6. The judge heard evidence from Mr Simon Mills, the managing director of TICC, and from Mr Barry Dinnadge, the deputy manager of COSCO UK's imports department. The judge made the following findings. TICC had a number of UK customers who acquired goods in the Far East and Hong Kong for whom they procured shipping space through Cycle and IFB. Relations between TICC and COSCO UK went back at least to April 1996. For present purposes the story can be taken up in October 1997, when Mr James Rainbow, Mr Dinnadge's predecessor, faxed Mr Mills to confirm COSCO's rates to Felixstowe valid to the end of the year. He pointed out that the rates might be subject to various surcharges. A discount was subsequently negotiated for volume shipments of at least 13 twenty foot equivalent units ("TEU"); and Mr Rainbow for his part gave a space guarantee of 15 TEU per shipment. On 23 December 1997 Mr Rainbow confirmed that the current rates would be valid until the end of March 1998. On 1 April 1998 he provided a quotation valid to the end of June 1998, but added that special tiered reductions could be offered for volume support on shipments from Hong Kong. Such reductions were negotiated and agreed on the same day. In May 1998 the space guarantee was raised to 25 TEU, and in June 1998 an arrangement was agreed whereby TICC deposited £12,500 with COSCO UK so as to procure release of goods on credit pending clearance of cheques.

7. After June 1998 rates in general began to harden, but on 31 July 1998 Mr Dinnadge, who had now succeeded Mr Rainbow, sent a fax confirming that specified rate reductions, including one on the Hong Kong to Felixstowe route, had been sanctioned by the line for TICC. The 25 TEU space guarantee remained, but the tiered volume reductions were discontinued.

8. In August 1998 TICC became concerned about whether it was being charged $50 per TEU more than the agreed rate, but on checking with the line in Shanghai was mollified to be told that the higher rate was being imposed

only on cargo prepaid in Hong Kong and that shipments on a freight collect basis were unaffected. COSCO UK double checked for TICC and confirmed.

9. Later in August 1998 the subject of a possible surcharge surfaced and on 24 August there was an important telephone conversation between Mr Mills and Mr Dinnadge. At the margin the effect of that conversation remained in dispute, but COSCO UK admitted that Mr Dinnadge had told Mr Mills that as at that date the line was not charging a surcharge; that if one was introduced COSCO UK would be informed, and that if and when that happened, it would pass the information to TICC.

10. As it happened, the line was planning to introduce a peak season surcharge, for on 28 August Cossalina sent a fax addressed to "*All Customers*" stating - *"Please be informed that our principal decided to implement a peak season surcharge USD 100/20', USD 200/40' for Europe services effective from Zhen He 0057W ETD HKG 11 September 1998…*"

11. Cycle and IFB received this fax, but they did not pass it or its contents on to TICC. Mr Dinnadge gave evidence that COSCO UK was not informed either, and in any event he did not inform TICC. Neither Cossalina nor the line informed TICC about the imposition of the surcharge. When it was subsequently imposed on the freight charges demanded from TICC by COSCO UK, the dispute at the root of this litigation broke out.

12. Thus on 14 October 1998 TICC wrote to COSCO UK as follows: "*We rely on yourselves, not Hong Kong, to advise of freight rates etc each quarter or as when such rates change…every single shipment booked by IFB in Hong Kong is actually controlled by us and the only reason IFB are booking with COSCO is because we have asked them to do so.*"

13. When Mr Dinnadge was unable to secure a dispensation from the surcharge for TICC, Mr Mills instructed IFB that booking should be transferred to another carrier with immediate effect. On 26 October Mr Dinnadge wrote to Mr Mills that – *"We accept that, as COSCO UK we must honour quotations regarding freight levels but the PSS is a separate issue…*"

14. COSCO UK submitted below that Cycle and IFB were the shippers under the relevant bills of lading, that Cossalina's fax of 28 August had been effective to incorporate the surcharge into the shipping contracts made by them in Hong Kong and evidenced by the bills of lading relevant to this litigation, and that TICC, on becoming holder of those bills or the person to whom delivery under them was made, became liable under section 3 of the Carriage of Goods by Sea Act 1992 to pay the surcharge as if it had been an original party to the contracts.

15. However, the judge rejected that submission, instead preferring TICC's submission that it had always been an original party to the bill of lading contracts as shipper through the agencies of Cycle and IFB. He did so for inter alia the following reasons, which are essentially findings of fact: (a) that the matter of freight rates was one of indifference to Cycle and IFB; (b) that the actual freight rates were at all material times negotiated between TICC and COSCO UK, so that "*what mattered were the rates which are to be deduced from what passed between those parties and not from what may or may not have passed in Hong Kong*"; (c) that this was confirmed by the 25 TEU guarantee which involved aggregating the Cycle and IFB shipments on any one vessel; and (d) that in the context of the trading relationship which had developed and the assurances given to Mr Mills on 24 August 1998 –

"[TICC] were entitled to and did believe that until they heard anything from [COSCO UK], shipment was to be effected free of [the surcharge]. Since as I have held above, all relevant negotiations were conducted between [TICC] and [COSCO UK], it seems to me, that in practical terms, [TICC] could not be held bound by the [surcharge] until informed thereof…"

16. In this court Mr Christopher Smith, on behalf of COSCO UK, has submitted that the judge was wrong to hold that TICC was the true shipper as principal of Cycle and IFB. The latter parties, as named shippers in the bills of lading, were the original parties to the bill of lading contracts, and as such were bound by the notice of the surcharge given to them by the fax of 28 August. In the circumstances TICC was also bound, although ignorant of the surcharge, since it merely inherited the contracts made by the shippers. Alternatively, if TICC was the true shipper, it was bound by the knowledge of its agents, Cycle and IFB. In any event if the line had known that it would not receive its surcharge, it would not have been willing to take the goods in circumstances where it could fill its shipping space in any event – hence the surcharge. For its part, TICC could not have found cheaper rates anywhere else. It was unreasonable and uncommercial to expect the line to be bound by the assurances given to TICC by COSCO UK. The line could not be expected to contact all clients of its agencies anywhere in the world in order to effect an alteration in its tariff rates. Those clients could not be entitled to expect information about such alterations from the line's local agents, as distinct from notice being given to shippers at the ports of shipment. Although COSCO UK might be bound by the assurances it had given, those did not extend to a promise that TICC could not be informed of the imposition of a surcharge in some other way, and in any event there had been no claim in collateral contract against COSCO UK.

17. I will assume that it may be possible that TICC is to be regarded as the Hong Kong shippers' principal and thus as the true original party to the bill of lading contracts. It has to be said, however, that that is an unusual situation. The normal rule is that a party who procures a shipment for the ultimate benefit of a consignee does not thereby contract with the carrier as agent for the consignee. Thus a cif seller is not an agent for his buyer in procuring a contract of carriage. Moreover, it is difficult to think that Cycle and IFB are not themselves liable as principals on the bill of lading contracts and entitled to enforce rights under them, for, despite the direct contact between TICC and COSCO UK, there is nothing to suggest that Cycle and IFB have contracted only as agents without personal responsibility: see ***Perishable Transport Company Ltd v. N Spyropoulos (London) Ltd*** [1964] 2 Ll Law Rep 379. TICC

furthermore is named as the consignee and not as the shipper. I am therefore prepared to assume (I need not decide) that the Hong Kong shippers are principal parties under those contracts and that TICC, even though in other respects it may be their principal, is to be treated for the purpose of such contracts as a consignee and not as a shipper.

18. Nevertheless, the question remains as to the terms of the bill of lading contracts. The surcharge is not itself an express part of those contracts. If it is incorporated, it can only be incorporated by notice, by reason of clause 2 of the bills' printed conditions. There is no evidence that the surcharge formed any part of the line's "*Tariff*": if it formed any part of the applicable "*other requirements regarding charges*", then, as the matter was presented to the judge, it did so solely on the basis of the fax of 28 August. The question therefore resolves itself into this: whether, in the light of the arrangements entered into directly between TICC and COSCO UK in England, the fax of 28 August is a sufficient basis for the incorporation of the surcharge.

19. In my judgment it is not. The general rule is that for conditions to be incorporated by notice, the party relying on the notice must have done what is reasonably necessary to bring the information to the other party's attention. Whether he has succeeded in doing so is a question of fact dependent on all the circumstances of the case. See *CHITTY on Contracts*, 28th ed, 1999, Vol I, at para 12-013/4 citing (inter alia) ***Parker v. South Eastern Railway Co*** (1877) 2 CPD 416, ***Hood v. Anchor Line (Henderson Brothers) Limited*** [1918] AC 837 at 844, 846/7 and ***Thornton v. Shoe Lane Parking Ltd*** [1971] 2 QB 163 at 171/3.

20. In the present case, it seems to me that, even if Cycle and IFB were the shippers and principals under the bill of lading contracts, it still remains the case that the freight and other charges applicable to those contracts were, in the circumstances, negotiated in England directly between TICC and COSCO UK. The judge's findings fully support that conclusion. Moreover in circumstances where the question of a possible surcharge was directly discussed between the same parties and TICC was assured that if a surcharge were to be introduced it would be told and told by COSCO UK, it would be wrong to distinguish for these purposes between the negotiated tariff rates and the matter of the surcharge. Nevertheless, that was exactly the distinction sought to be drawn by COSCO UK, in Mr Dinnadge's fax to Mr Mills on 26 October (see para 13 above). There, Mr Dinnadge accepted that "*we must honour quotations regarding freight levels*", but he sought to argue that the surcharge, which of course directly affected freight levels, was a *"separate issue*".

21. Not only were the applicable rates in fact discussed and negotiated directly between TICC and COSCO UK, but there was every reason why that should have been so. The relevant contracts were, in accordance with the course of the trade which had been developed, all freight collect bills: the party which was interested in and actually paid the relevant freight and other charges was TICC, not the shippers, even though those shippers might remain alternatively liable for them, should TICC have failed to pay. As the judge found, the Hong Kong shippers were "indifferent" to the freight rates. As the bills' terms made clear, both shippers and receivers would, as "merchants", be jointly and severally liable for the freight and other charges. If, therefore, the course of trade was that these rates were agreed in London, that was a perfectly natural arrangement.

22. In these circumstances, there is no reason to give to the fax of 28 August any preponderant influence; to the contrary. In a series of telling e-mails dated 26/27 October 1998 from Cossalina in Hong Kong to Mr Dinnadge in England, Cossalina clearly accepted the fact that the rates for this business were all handled in England. Thus Cossalina wrote on 26 October that –

"Because rate is discussed in UK, trust you will discuss with TICC and work out a win win solution with them…"

and on 27 October that –

"*Yesterday, I discussed with IFB about this matter and she was very upset that IFB was involved in this ocean freight dispute. Since rate is negotiated in UK, she only handles shipping matters in hkg and she insists that there is no point to blame IFB in this dispute…"*

23. Moreover, there was evidence before the judge that the Hong Kong shippers made shipments apart from freight collect shipments to England, under contracts where the freight was prepaid and where, paradoxically as it may seem, the freight rate was higher than in the case of the trade with which this litigation is concerned: in the freight prepaid trade, not being the case before this court, the shippers negotiated directly on the question of freight rates. Furthermore, IFB at any rate made large shipments to Germany on another line (NYK), with which TICC was not concerned. When, therefore, the fax of 28 August, sent generally to "*all customers*" of the line but not to TICC, spoke of the imposition of the surcharge "*for Europe services*", there was no reason for Cycle or IFB to think that such a surcharge applied to the "*freight collect*" rates for Felixstowe negotiated directly with TICC in England as distinct from other services to other European destinations.

24. In the circumstances, COSCO UK cannot prove that by sending the fax of 28 August to the Hong Kong shippers the line had done what was reasonable to bring to the attention of TICC, as the party known to be the only party interested in the negotiation of the relevant freight rates and other charges, notice of the imposition of the surcharge on the freight collect route to Felixstowe. It follows that the surcharge was not incorporated into the relevant contracts of carriage.

25. It would seem therefore that, on the assumption that TICC was not the principal of Cycle and IFB as shippers under the bill of lading contracts, the true analysis is that TICC was not so much in this respect the shippers' principal, but was rather the shippers' agent for the purposes of negotiating and fixing the financial terms on which the relevant shipments would be made.

26. These facts also totally undermine Mr Smith's alternative submission that knowledge of the Hong Kong shippers concerning the surcharge was to be ascribed to TICC.

27. Mr Smith's submission that such a conclusion is unreasonable and uncommercial therefore flies in the face of the facts. In reality there is nothing unreasonable or uncommercial about this outcome. If the line delegated to its UK agent the responsibility for negotiating rates with a customer in England, it was not entitled to assume that a merely general notice sent by its Hong Kong agent to its Hong Kong customers would take effect in respect of the relevant trade. It had, however, plenty of other opportunities to ensure that its surcharge was applied to that trade. It could have seen to it that the application of its surcharge was communicated to its local agents such as COSCO UK, as the latter obviously expected would and should have occurred. Or it could have ensured that the surcharge was specifically and expressly claused upon the bills of lading.

28. It follows that this appeal must be dismissed.

Lord Justice Kay:

29. I agree

Lord Justice Ward:

30. I also agree.

Order: Appeal dismissed with costs to be assessed. (Order not part of approved judgment)

Christopher Smith (instructed by Messrs James Chan & Co for the Appellant)
Samuel Jarman (instructed by Messrs Sanders Witherspoon for the Respondent)