Evergreen Marine Corp v Aldgate Warehouse (Wholesale) Ltd. [2003] Int.Com.L.R. 03/28

JUDGMENT : Mr Justice Moore-Bick: Commercial Court. 28th March 2003

1. In this action the claimant, Evergreen Marine Corporation ("Evergreen"), seeks to recover from the defendant, Aldgate Warehouse (Wholesale) Ltd ("Aldgate"), freight in respect of the carriage of certain goods from Bangladesh and China to the United Kingdom between September and December 1995 and demurrage in respect of the subsequent detention of containers at Thamesport until the end of October 1999.

2. Evergreen operates containerised liner services around the world including services between various ports in the Far East and Northern Europe. Its agent in the United Kingdom is Evergreen UK Ltd. Aldgate is a wholesale supplier of clothing, much of which it purchases from manufacturers in the Indian sub-continent and the Far East. It sometimes operates through a subsidiary company, Pierre Leon Ltd, and sells goods under three exclusive brand names, *'Pierre Leon', 'Barney Miller'* and *'James Jordan'*. 'Pierre Leon' is registered as a trade mark in this country, France and the Benelux countries.

The agreements

3. Aldgate wished to ensure that its shipping costs on imported goods were kept to a minimum. Evergreen offered competitive rates and so from about 1991 Aldgate began importing increasing quantities of goods by Evergreen vessels. Its practice was to include in its purchase contracts a requirement that the goods be shipped on Evergreen's vessels and in due course to obtain the bills of lading under which it took delivery at the port of discharge. In recognition of the increasing volume of trade between them Evergreen was prepared to allow Aldgate more generous terms in relation to container demurrage than were provided for in its standard tariff. In April 1994 the rates were fixed at £8 per day for a 20 foot container and £16 per day for a 40 foot container, in each case after a period of 21 days free time.

4. Soon afterwards Aldgate was able to negotiate concessionary freight rates with Evergreen. That was beneficial to both parties: it reduced Aldgate's shipping costs and provided an additional incentive for it to ensure that its imports were carried on Evergreen's vessels, thereby producing a steady volume of traffic. The first special freight agreement was made in November 1994, but it was quickly superseded by an agreement recorded in a telex from Evergreen to Aldgate sent on 21st March 1995 under which all the containers the subject of this action were shipped.

5. The special freight agreement was expressed to apply in respect of shipments made during the period from 15th March to 31st December 1995. It listed a number of ports in the Indian sub-continent and the Far East, including Chittagong and Qingdao, giving rates of freight for the carriage of both 20 and 40 foot containers from the relevant port of loading to a range of northern European ports including Thamesport. It included the following clause:

   "Your special rate reference is E610064. Please quote this for our reference if you have any enquiries regarding rates. To ensure your shipments are rated as per this quotation please ask your supplier to quote this number to our agent at the port of loading when the booking is made."

6. Neither this agreement nor its predecessor made any provision for demurrage, but it was accepted that the rates set out in the agreement of April 1994 continued to apply.

The contracts for the purchase of goods from Bangladesh

7. In February 1995 Aldgate entered into a contract with a Mr. Rahman Mahmud carrying on business under the name of Apparelworks for the purchase of a large quantity of clothing f.o.b. Bangladesh. Payment was to be made by letter of credit. Although both parties regarded Aldgate as the buyer, they appear to have agreed that the contract should be performed in the name of Pierre Leon Ltd rather than Aldgate itself. Apparelworks was not itself the manufacturer of the goods but had arranged to buy them from various suppliers in Dhaka.

8. The goods were originally due to be shipped by 30th April 1995, but the shipment date was subsequently extended and it was not until 12th May 1995 that Fibi Bank (UK), London opened a letter of credit in respect of the price of the goods. The letter of credit was opened in transferable form to enable it to be advised to, and operated by, the original suppliers. In relation to each consignment it called for the presentation of, among other things, a copy certificate of origin, copy export licence and a full set of original clean on board Evergreen bills of lading. The bills of lading were to be made out to the order of the negotiating bank in Bangladesh and indorsed to the order of Fibi Bank marked 'freight collect' and were to name Pierre Leon Ltd as the notify party.

9. At about the same time Aldgate entered into a contract for the purchase of another quantity of clothing with a Bangladeshi company by the name of AMJH Ltd. The terms of the contract were substantially the same as those of the contract with Apparelworks and it was performed in substantially the same manner. It was common ground, therefore, that the same principles apply and that it does not call for separate consideration.

10. Between May and October 1995 various consignments of clothing in containers were shipped on board Evergreen vessels at Chittagong pursuant to the contracts with Apparelworks and AMJH Ltd for carriage to Thamesport. In some cases copies of the original bills of lading evidencing these shipments were not in evidence, but Aldgate did not deny that the shipments had been made and both parties were content to determine the dispute by reference to what was accepted to be a typical bill of lading. I approach the matter, therefore, on the basis that in each case a bill of lading was issued by Evergreen naming the manufacturer of the goods as the shipper, Pierre Leon Ltd as the primary notify party and Aldgate as an additional notify party. The goods were consigned to the order of a bank in Bangladesh and each bore the Aldgate reference 'E10064' in a box headed *'Notify code'*. They were all stamped *"Freight collect"* and "*Freight as arranged*". The manufacturers presented the

documents, including the original bills of lading, to their own banks who in turn presented them to Fibi Bank in London under the letter of credit on behalf of the sellers. However, the sellers had failed to meet the contractual shipment date and in each case the documents were rejected by the bank on Aldgate's instructions. When the carrying vessel reached Thamesport the containers were discharged on to the quay where they remained while negotiations went on between Aldgate and the sellers over their disposal.

The contract for the purchase of goods from China

11. During 1995 Aldgate also entered into a contract with a Chinese company, Genning Corporation Ltd, for the purchase of a quantity of clothing of the *'Pierre Leon'* and *'Barney Miller'* brands f.o.b. Qingdao. In this case the price was payable by cash against documents on presentation at Aldgate's bank in London. As in the case of the Bangladeshi goods, the garments were to be manufactured not by Genning Corp. itself but by local manufacturers.

12. On 5th November 1995 4 consignments of clothing were shipped in containers on board two of Evergreen's vessels at Qingdao for carriage to Thamesport. In each case a bill of lading was issued by Evergreen naming the manufacturer of the goods as the shipper and Aldgate as the notify party. The goods were consigned to order. None of the bills bore the Aldgate reference number, but each was stamped "*Ocean Freight Collect*" and "*Freight as arranged*". In due course the bills of lading and other documents were presented on behalf of the sellers at Fibi Bank in London for payment, but were rejected by the bank on Aldgate's instructions because the date of shipment did not comply with the contract. In this case too the containers were discharged onto the quay at Thamesport.

13. The freight due in respect of all these containers remained unpaid and demurrage began to accrue. Eventually Evergreen became so concerned at Aldgate's failure (as it saw it) to release the containers and settle its liability for freight and demurrage that it disposed of the goods acting under the powers contained in the bills of lading.

14. Mr. Croall submitted that Aldgate had incurred liability to Evergreen in respect of the outstanding freight and demurrage either under the terms of the special freight agreement or as the party with whom the contract of carriage in each case had been made. The special agreement forms part of the commercial background against which the arrangements were made for the carriage of the individual containers and it is therefore appropriate to begin by considering its effect.

The effect of the special freight agreement

15. Mr. Croall submitted that the special freight agreement contained an undertaking on the part of Aldgate to pay freight at the appropriate rate on any goods it arranged to have carried on Evergreen's vessels between the designated ports with a view to taking eventual delivery of them itself. That undertaking, he submitted, was collateral to, and quite independent of, any obligation that might arise under the bill of lading. Accordingly, even if Aldgate rejected the shipping documents, as it did in the present case, it was nonetheless liable for freight and demurrage.

16. There is surprisingly little evidence of the commercial background to the special freight agreement. By March 1995 the parties had been doing business together for a number of years and from at least 1992 when the number of containers shipped to Aldgate on Evergreen vessels during the year exceeded 800 there had been frequent meetings and discussions between them. Some of these involved Mr. Tobi Cohen, one of the directors of Aldgate, and Mr. Lee Hellier, then head of the Imports Department at Evergreen UK, but most of the day to day contact was between Mr. John Spencer, the assistant manager of the department, and Mr. Mahesh Raichura, one of Aldgate's senior managers.

17. By April 1994 when the first special agreement relating to demurrage was made Evergreen had become familiar with the general nature of Aldgate's business. In particular, it was aware that Aldgate purchased substantial quantities of clothing from suppliers in India and the Far East on f.o.b. terms for which payment was made either by letters of credit or by cash against documents. With isolated exceptions the goods were entered with customs by Aldgate's forwarding agents, Frans Maas, when they reached this country and the agents had paid the freight and any demurrage due. In 1995 the volume of Aldgate's imports was growing. It was obviously in the interests of Evergreen to offer Aldgate special freight rates in order to retain a valuable customer; equally it was in the interests of Aldgate to direct shipment by Evergreen vessels in order to obtain the benefit of those lower rates.

18. Two aspects of the way in which Aldgate conducted its business are of significance for the construction of the special freight and demurrage agreements. The first is that few, if any, of the goods imported by Aldgate were shipped under bills of lading naming Aldgate either as shipper or consignee. Typically bills of lading named the exporter or manufacturer as shipper, the goods being consigned to order of the shipper or a local bank in the country of origin. The bills of lading covering the containers in the present case provide good examples. On the face of it, therefore, Aldgate was not an original party to the contract of carriage and did not obtain control over the goods until the bills of lading were indorsed and delivered to it.

19. The second is that although Aldgate did from time to time give instructions in relation to the handling of its cargoes, there is no evidence that arrangements for any individual shipments were made between Aldgate and Evergreen. Mr. Hellier described the procedure that would be followed if an importer wished to engage Evergreen to carry a parcel of goods from a foreign port to this country. The importer would first contact Evergreen UK to obtain a quote for the carriage. If the quote was acceptable, Evergreen UK would then contact its agent at the port of loading to ensure that it could make the necessary arrangements for receiving and

shipping the goods. A written confirmation note would then be issued to the importer to confirm the contract and Evergreen UK would in its turn receive formal confirmation of the arrangements by fax or telex from its local agent. A copy of that confirmation would usually be sent to the importer. In that way a formal record of the transaction would be brought into existence both as between the importer and Evergreen UK and between Evergreen UK and its local agent. In due course a bill of lading would be issued naming the importer as shipper, thereby reflecting the fact that the goods had been shipped on his instructions.

20. In some cases an initial shipment of that kind would lead over time to the development of a substantial volume of business, often involving regular shipments of similar goods originating from the same supplier or group of suppliers for carriage to the same destinations. Mr. Hellier explained that in such cases it was quite common, once a routine had been established, for the importer simply to provide Evergreen with a list of suppliers from whom it was authorised to accept goods and for the suppliers to deliver the goods to the local agents for shipment without any of the formalities that would be expected in the case of a single shipment. In effect, the shipping arrangements were made automatically in response to the presentation of goods by the exporters. Even in these cases, however, one would expect to find some formal confirmation of the earlier arrangements for shipment between the importer and Evergreen that would provide the contractual framework for the later shipments.

21. Mr. Croall submitted that by the time the parties in the present case entered into the special agreements for freight and demurrage the relationship between Aldgate and Evergreen had already reached the point in relation to shipments from both Bangladesh and China at which shipments were being made without any formalities. That, he submitted, explained the absence of any records relating to arrangements between Aldgate and Evergreen UK for shipments from those countries. The difficulty with that submission, however, is that there is no evidence that the trading relationship between Aldgate and Evergreen developed in the manner described by Mr. Hellier. In particular, there is no evidence that in the early stages of their relationship Aldgate made arrangements with Evergreen UK in its own name for the shipment of clothing from Bangladesh or China, or that it provided a list of approved exporters whose goods were to be accepted for shipment on Aldgate's behalf whenever they were presented. That is perhaps not surprising given the fact that Aldgate appears to have had no direct contact with any of the manufacturers by whom goods were delivered for shipment.

22. Against that background I turn to consider the special freight agreement. Mr. Croall drew my attention to the fact that the telex of 27th April 1994 recording the concessionary demurrage rates refers to "all traffic shipped in the Aldgate Warehouse name". He submitted that those words were intended to reflect an understanding between the parties that Aldgate was, or at least was to be treated as, the shipper of any goods to which the agreement applied. However, to my mind this is to place far more weight on the words than they can properly bear. They do not say that Aldgate is to be treated as the shipper in every case; taken at face value they suggest that the concession is restricted to cases in which goods are shipped under bills of lading naming Aldgate as shipper. However, as both Mr. Spencer and Mr. Hellier were well aware that that was not how Aldgate did business, I do not think that can possibly have been what was intended. Given the established trading background, I think those words were simply intended to convey that the agreement related to the carriage of goods destined for Aldgate in the sense that Aldgate was the notify party in the bill of lading and the intended receiver.

23. The special freight agreement which governs the present case was the second of its kind, the first having been made in very similar terms only four months earlier. Neither agreement contains any language which suggests that Aldgate was to be treated as shipper in relation to the goods to which it related. On the contrary, each of them expressly contemplated that the booking would be made by the supplier at the port of loading who would need to be given the special reference in order to ensure that the correct freight rate was applied. In that context the absence of any provision making Aldgate responsible for the payment of freight in any event makes it difficult to argue that the parties intended either of these agreements to impose an independent liability of that kind on it.

24. I do not find that surprising. It must have been obvious to both parties that whoever was the original party to the contract of carriage, Aldgate could be expected eventually to become the holder of the bill of lading and thus to become liable for freight and demurrage in accordance with its terms as modified by the special agreements. There is nothing in the agreement itself or in the commercial background to suggest that the parties directed their minds to the possibility that Aldgate might not become the holder of the bill of lading. Disputes had occurred from time to time between Aldgate and its suppliers, but only in rare cases had goods not eventually been accepted by Aldgate, albeit after some negotiation, and the freight and demurrage duly paid.

25. The parties entered into two subsequent agreements relating to the carriage of goods from the Indian sub-continent and the Far East to Europe in January 1996 and February 1998. These were both of a more formal nature and were in broadly similar terms. Rather than being recorded in a simple telex message, each took the form of a written agreement for the transport of textiles between a range of ports at stated rates of freight and demurrage. For the first time Aldgate undertook to tender a minimum number of containers for shipment each quarter and Evergreen undertook to make sufficient space available for them. Mr. Croall submitted that under each of these agreements Aldgate became liable for freight and demurrage due in respect of each container carried pursuant to its terms and that these agreements reflected the true nature of the arrangements that had been in force between the parties since at least November 1994.

26. It is quite true that in cross-examination Mr. Cohen assented to the suggestion that these later agreements formalised the previous arrangements between the parties without altering them in any fundamental way. However, I do not think that his perception of the position carries the matter very far. The fact is that the

agreements made in January 1996 and February 1998 are very different in their form and terms from those that were made in November 1994 and March 1995. The earlier agreements are extremely brief, containing little more than the rates at which Evergreen was willing to carry containers intended for Aldgate. Neither contained any undertaking by Evergreen to make space available nor any undertaking by Aldgate to ship a minimum number of containers. The whole tenor of these early agreements is quite different from that of the two later agreements. I can see an argument for saying that under the agreements of January 1996 and February 1998 Aldgate did assume a liability to Evergreen for freight and demurrage on goods tendered for shipment under them, but whether that is so or not, the fact that throughout the period covered by those agreements the parties continued to conduct their business in much the same way as before does not provide a sound basis for construing the earlier agreements by reference to the later ones. It is clear that as time went by the parties quite deliberately reformulated the terms on which they did business. The agreement made in March 1995 must be construed by reference to its own terms and in its own commercial context and not by reference to the later agreements.

27. In my view the purpose of the two agreements made in November 1994 and March 1995 was simply to establish rates applicable as between Aldgate and Evergreen in relation to the carriage of goods for Aldgate's account and thereby to modify Evergreen's standard tariff. They were not intended to give rise to any independent obligation to pay freight; that obligation was expected to arise under bills of lading indorsed to Aldgate in accordance with the established way in which business had been conducted over the previous years. I therefore reject the first way in which the claim is put.

Was Aldgate a party to the bill of lading contracts?

28. Mr. Croall's alternative submission was that Aldgate was an original party to each of the contracts contained in the bills of lading covering the carriage of the goods.

29. It was common ground that as between the original parties the bill of lading does not itself contain the contract of carriage but is merely evidence of it: see ***Cho Yang Shipping Co. Ltd v Coral (U.K.) Ltd*** [1997] 2 Lloyd's Rep. 641 per Hobhouse L.J. at page 643. In general it can be presumed that the contract of carriage is made with the person named as shipper, but the evidence may show that the nominal shipper contracted as agent for a third party, in which case the contract will be with his principal. Where a third party was responsible for directing shipment by a particular carrier, therefore, it may be necessary to decide whether the shipper made a contract of carriage on behalf of the third party or whether the shipper made the contract of carriage on his own behalf at the request of the third party: see ***Dickenson v Lano*** (1860) 2 F. & F. 191 per Blackburn J.

30. The bills of lading and the contracts of carriage which they evidence must therefore be considered in the context of the other transactions to which they are closely related. Aldgate had contracted to buy goods from local suppliers on f.o.b. terms, but, as Devlin J. observed in ***Pyrene Co. Ltd v Scindia Navigation Co. Ltd*** [1954] 2 Q.B. 402, 424, the f.o.b. contract has become a flexible instrument and it does not necessarily follow that the buyer is an original party to the contract of carriage. Indeed, where the parties have provided for payment against documents they usually contemplate that the seller will make the contract of carriage on his own behalf and obtain a bill of lading naming himself or his bank as the consignee which he will transfer to the buyer against payment. It is an important feature of the present case, therefore, that each of the purchase contracts provided for payment against shipping documents.

31. The export of manufactured goods from Bangladesh is controlled by law. Only manufacturers holding an appropriate licence may manufacture and sell goods for export and accordingly documents relating to goods sold for export, such as invoices, certificates of origin, export licences and bills of lading, must be issued in the name of the manufacturer. In the present case Aldgate's contracts of sale in respect of the goods originating from Bangladesh were with Apparelworks and AMJH International; it had no contractual relations with the manufacturers nor, as far as one can see, contact with them of any kind. The manufacturers simply sold the goods to Apparelworks and AMJH International to enable them to satisfy their contracts with Aldgate.

32. In order to comply with local regulations the manufacturers appeared as the exporters both in the certificates of origin and the export licences and invoices were issued in their names. In these documents Aldgate was named as the consignee or buyer, as the case may be. In each case the bill of lading named the manufacturer as shipper, a local bank as consignee and Aldgate as one of two notify parties. Mr. Croall submitted that the manufacturer appeared as shipper in the bill of lading only in order to satisfy the local regulations and that Aldgate was in fact the true shipper, but that seems to me to overlook important aspects of the wider transaction. Although Aldgate's contracts were with the sellers alone, the letters of credit had to be transferable, thereby allowing them to be made available to the manufacturers from whom the sellers were to obtain the goods. Moreover, although the letters of credit called for presentation of copy invoices, export licences, packing lists and certificates of origin and inspection, they called for presentation of a full set of original bills of lading made out to the order of the negotiating bank in Bangladesh and indorsed to Aldgate's bank in London. Although Aldgate received the original certificates, it did not receive copies of the bills of lading, let alone the originals.

33. Although the contracts do not state in terms when property in the goods was to pass from the sellers to Aldgate, it is implicit that it was intended to pass on indorsement and delivery of the bills of lading. That, of course, would only occur on presentation and acceptance under the letter of credit. I think it is clear, therefore, that the reason why the bills of lading named the manufacturer as shipper and the local bank as consignee was to ensure that the manufacturer, and in turn the sellers acting through the bank, retained ownership and control of the goods until

the documents had been accepted and paid for in accordance with their respective contracts. Although it would have been possible for the manufacturers to deliver the goods to Evergreen on behalf of Aldgate and to make contracts of carriage as agents for Aldgate, that would not have been consistent with the nature of the contracts of sale and I can see no reason why they should have wished to do so. The existence of the local regulations explains why the manufacturers, rather than the sellers, were named as shippers. It does not follow, however, that in the absence of such regulations the bills of lading would have named Aldgate as shipper; given the terms of the letter of credit it is clear that they would not.

34. Moreover, the evidence, such as it is, of the way in which these shipments were arranged does not support the conclusion that the contracts of carriage were made with Aldgate rather than the manufacturers. According to Mr. Cohen, Aldgate had no direct contact with any of the manufacturers and there is nothing in the rest of the evidence to suggest otherwise. The manufacturers were, of course, aware of Aldgate's interest in the goods, but any information they received, including their instructions for delivery of the goods, can only have come from Apparelworks and AMJH International. However, according to Mr. Rahman Mahmud, the proprietor of Apparelworks, although the manufacturers delivered the goods to the container freight station in Chittagong operated by Evergreen's agents, Baridhi Shipping, neither they nor Apparelworks were involved in making arrangements for shipping with either Baridhi or Evergreen.

35. Mr. Deb Bhattacharyya, the assistant general manager of Baridhi, confirmed in a written statement that Baridhi received the goods and stuffed the containers at the container freight station before sending them down to the port for shipment. He also confirmed that Baridhi issued bills of lading on behalf of Evergreen, but he said that it had received no request from the manufacturers or from Apparelworks for bills of lading to be issued naming them as shippers. Baridhi was obviously aware that Aldgate had a special freight agreement with Evergreen because it was able to include the special reference number in the bills of lading. Moreover, both Pierre Leon and Aldgate were named in the bills of lading as a notify parties.

36. Neither Mr. Mahmud nor Mr. Bhattacharyya gave evidence in person so neither could be cross-examined with a view to eliciting precisely how the arrangements for shipment were handled in Bangladesh. It was common ground that the manufacturers arranged transport to the container freight station where they delivered the goods to Baridhi for stuffing into containers prior to shipment. The manufacturers would inevitably have required some formal receipt for the goods even if they had not required bills of lading in order to obtain payment under their contracts with the sellers. In the event they were given bills of lading naming them as shippers under what appeared to be a contract of carriage between themselves and Evergreen.

37. Despite the assertions of Mr. Mahmud and Mr. Bhattacharyya that the manufacturers did not make any arrangements for the carriage of the goods, I find it impossible to accept that that reflects the reality of the situation. It was not suggested that Aldgate had made arrangements with Evergreen UK for the shipment of these consignments and, as I have already said, there is no evidence that Aldgate had at any time previously made arrangements with Evergreen UK for specific shipments from any of the countries covered by the special freight agreement. It clearly was Aldgate's practice when buying goods from abroad to specify shipment by Evergreen vessels, but beyond that it appears to have left it to the sellers to make the necessary arrangements. In practice that would have involved little more than delivering the goods to Evergreen's agents at the port of loading and obtaining a bill of lading. In the ordinary way the person tendering the goods for shipment is entitled to demand a bill of lading naming himself as shipper and where, as here, the goods are being supplied under a contract which provides for payment against documents, the person tendering the goods for shipment would normally expect to obtain a bill of lading giving him or his bank control over the goods. By tendering the goods for shipment and requesting a bill of lading in his own name the manufacturer was doing all that was necessary to arrange shipment under a contract between himself and Evergreen.

38. Someone, of course, must have informed Baridhi that Aldgate should be named as a notify party, but it is unclear how that came about. Mr. Bhattacharyya said that it was established procedure for Baridhi to contact Evergreen UK when it became aware that a consignment for Aldgate had arrived at the container freight station, but that was not supported by Mr. Hellier or Mr. Spencer and there is no evidence that that in fact occurred in relation to any of the goods with which this case is concerned. The fact that Aldgate was named as a notify party was sufficient, however, to enable Baridhi to enter Aldgate's reference in the bill of lading and thus to ensure that the consignment was charged at the appropriate concessionary rate.

39. In support of his submission that Aldgate, rather than the manufacturers, was the original party to the contract of carriage Mr. Croall submitted that no one, least of all Aldgate, envisaged that the original shippers should have control over the goods and be free to sell them afloat to a third party. I accept that Aldgate would have been very concerned at any suggestion that the sellers might do that, but in my view that tells one very little about the identity of the original parties to the contract. What is much more significant is the nature of the underlying sale transaction and the obvious importance for the sellers of retaining title to the goods until they received payment. Equally, the fact that from time to time Aldgate gave instructions about the handling of the goods and stuffing of containers simply reflects the fact that as buyer and ultimate receiver it had an interest in ensuring that the consignment was despatched in an appropriate manner. I do not think that it supports the conclusion that Aldgate was the original contracting party.

40. There is no comparable evidence of the way in which shipments were organised at Qingdao, but I can see no reason to think that the position was in substance any different. The fact that the goods were bought on cash

against documents terms means that the sellers had the same interest in retaining control over the goods until they received payment. In this case too it must have been the parties' intention that property in the goods would pass only on indorsement and delivery of the bills of lading.

41. In further support of his submission that Aldgate was the original contracting party Mr. Croall relied on the extent to which it exercised control over goods even after it had purported to reject them. The example to which he drew particular attention was a consignment of goods purchased from LG International that was rejected by Aldgate in the autumn of 1996. LG International had agreed to resell the goods to one of Aldgate's competitors, Ely & Sidney Ltd, but Aldgate had already made customs entries in relation to them and in addition was willing to take legal measures to protect its brand names. As a result it was able to obstruct the disposal of the goods until it was satisfied that its interests were adequately served.

42. I have little doubt that Aldgate was willing to take advantage of its right to reject goods when that suited its commercial interests and that it was careful to protect its position against competitors by any means available to it. Once the goods were on their way to this country the foreign sellers were at a considerable disadvantage and it was often possible for Aldgate, having rejected the goods, to negotiate a generous discount. If necessary, it would make use of its trade mark protection to inhibit a sale to a third party. However, these are merely examples of Aldgate's ability to exercise practical control over the disposal of goods following their rejection. They do not support the conclusion that Aldgate was the original party to the contracts of carriage, either in relation to the shipments that are the subject of this action or any others. If anything, they suggest the contrary.

43. All the containers were discharged onto the quay at Thamesport on their arrival in this country and shortly afterwards were entered with customs by Frans Maas on Aldgate's behalf. Almost as soon as the documents had been rejected Mr. Cohen became involved in negotiations with Apparelworks to purchase some of the goods at a discount. After a few months the parties appeared to have reached agreement, but in the event the negotiations broke down. The bills of lading remained in the control of the sellers' bank and the goods remained on the quay.

44. In September or early October 1996 Mr. Hellier met Mr. Cohen to discuss clearing the 249 containers that Aldgate by then had standing idle at Thamesport. They included the 22 containers the subject of this action. Evergreen's position at the conclusion of those negotiations was set out in a letter dated 8th October. It proposed the removal of all the containers by 25th October, failing which discounts would be withdrawn. Freight and demurrage were to be paid before any container would be released. Aldgate replied on 16th October asking that the deadline for removal of the containers be extended to 10th December and confirming that freight was always paid by its agent, Frans Maas, prior to the collection of the goods.

45. Mr. Croall submitted that this letter and a further exchange of correspondence a few days later contained an unqualified acceptance on the part of Aldgate that it was under a liability to pay freight and demurrage in respect of containers carried by Evergreen and reflected its understanding of the true position under the special freight agreements. In my view, however, that is to read far too much into these exchanges. No doubt Aldgate did recognise that in the ordinary way it was liable for freight and demurrage on containers discharged at Thamesport. That would follow from the fact that it became holder of the relevant bill of lading. Only a relatively small number of the 249 containers then under discussion had been rejected by Aldgate and there is nothing in the correspondence to suggest that either party was directing its mind to the particular problems they posed. Quite apart from that, however, Aldgate's liability has to be determined by reference to the terms of the agreements and the circumstances in which the goods were shipped. Mr. Cohen's subsequent understanding of the position does not assist very much one way or the other. For similar reasons I do not think that any help on this issue is to be obtained from the discussions between the parties that took place in May 1999 following Evergreen's decision to invoke its power of sale under the bills of lading.

46. In all the circumstances I am unable to accept the alternative way in which Evergreen puts its case. In my judgment each of the contracts of carriage with which I am concerned was made between Evergreen and the shipper named in the bill of lading. In the ordinary way Aldgate would have become a party to those contracts of carriage when the bills of lading were indorsed and delivered to it against payment of the price of the goods. However, the bills of lading covering the 22 containers never were transferred to Aldgate and as a result Aldgate did not become a party to the contracts of carriage. Evergreen's claim against Aldgate for freight and demurrage in respect of them must therefore fail.

Quantum

47. Since I have reached the conclusion that this claim must fail, it is unnecessary to consider any of the issues relating to quantum. However, for the sake of completeness I propose to express my views on them shortly.

48. The first concerns the rate of demurrage payable in respect of these containers. I start from the proposition that the amount payable in respect of both freight and demurrage is governed by the terms in force at the time the contract of carriage was made, and indeed by the end of the trial that was largely common ground. The only justification for adopting a different rate would be the existence of a later agreement varying the rates in relation to containers still in the course of carriage or standing on the quay. All the containers with which I am concerned had been discharged at Thamesport before the parties entered into the new service agreement in January 1996. Accordingly, in each case freight is governed by the terms of the special agreement made in March 1995.

49. During the latter months of 1995 demurrage was still governed by the agreement made in April 1994. That agreement did not contain any limitation of time and I am satisfied that it was intended to remain in force until superseded by a new agreement or revoked. Under it demurrage was payable at the rate of £8 per day in respect of a 20 foot container and £16 a day in respect of a 40 foot container, in each case after the expiry of the agreed free time. It was common ground that the free time was 21 days from discharge.

50. The service agreement made in January 1996 continued the same rates of demurrage, but in June 1996 those rates were reduced to £5 a day for a 20 foot container and £10 for a 40 foot container, again after 21 days free time. There is nothing in the agreement to indicate that the reduction was intended to apply to containers in transit or standing on the quay at ports of discharge, but both parties proceeded throughout on the basis that the new rates applied in respect of the 22 containers from June 1996 and I do not think that it would be right to depart from that.

51. The second issue concerns the time at which Evergreen exercised its right to sell the goods in order to recover freight and demurrage. Mr. Collins submitted that Aldgate was unable to exercise control over the disposal of the goods once it had rejected the documents and was therefore powerless to prevent demurrage from continuing to accrue indefinitely if the shipper and Evergreen chose to take no action. Accordingly, if Aldgate was liable for freight and demurrage under the special agreement, business efficacy required that a term be implied into that agreement that Evergreen would exercise its right to dispose of the goods within a reasonable time of becoming aware that Aldgate had not, and would not, become the holder of the bill of lading. He submitted that a period of six months was the most that could be allowed for that purpose and that if in the present case Evergreen had exercised its right to sell the goods within six months of being told that Aldgate had rejected them, the proceeds of sale would have been sufficient to cover the whole of the amount outstanding in respect of both freight and demurrage.

52. I am unable to accept this argument. The contract evidenced by the bill of lading is the primary contract under which demurrage becomes payable. Any liability of Aldgate under the special agreement is essentially secondary to that of the holder of the bill of lading who is likely also to be the owner of the goods and, as the present case shows, he may have good reasons for wishing to keep them on the quay for a considerable length of time. I am unable to accept that business efficacy requires that a term be implied into the agreement between Aldgate and Evergreen that would require Evergreen to exercise its rights under the bill of lading in Aldgate's interests regardless of the wishes of the holder of the bill.

53. Having said that, I think that there is force in Mr. Collins's submission that Evergreen did not take steps to dispose of the goods as soon as it was told that Aldgate had finally rejected them. Aldgate's negotiations with the sellers continued until the autumn of 1996 and throughout that period there still remained the possibility that it would take up the documents, albeit it a discount. By September 1996, however, the position had crystallised. Towards the end of that month Mr. Hellier prepared for transmission to Evergreen's head office in Taiwan a written proposal for resolving the dispute in relation to the 249 containers then idle on the quay at Thamesport. In it he noted that Aldgate had ended its dispute with its supplier and had rejected a total of 38 containers of different sizes. Mr. Hellier suggested that the charges for demurrage be reduced in return for the speedy return of all the remaining containers. That led to further negotiations between Aldgate and Evergreen to which I have already referred. These appear to have been inconclusive, but over the following months many of the containers were removed and while some progress was being made no one appears to have directed any attention to the position of the containers that had been rejected.

54. Nothing more appears to have been said about those containers until May 1998 when Evergreen must have written to Aldgate to enquire about various containers that still remained on the quay. In response Aldgate wrote listing the containers which are the subject of these proceedings and referring Evergreen to the suppliers for further information. What steps, if any, Evergreen took in response is unclear, but finally on 26th February 1999 Aldgate confirmed in terms that it had no interest in the containers and shortly afterwards Evergreen gave instructions for the sale of the goods.

55. Although Mr. Hellier did not mention the identification numbers of the containers which Aldgate had rejected in his proposal for settling the dispute in September 1996, it is likely that Aldgate had given him that information. He clearly had been kept informed of the negotiations between Aldgate and its suppliers and of their outcome, and if he was aware of the precise number and sizes of containers that had been rejected, it is more likely than not that Aldgate had given him their identification numbers as well. There was no suggestion during the negotiations that followed that Aldgate had altered its position in relation to any of the 22 containers with which this action is concerned, so if Evergreen was bound to take steps to sell the goods within a reasonable time of becoming aware that Aldgate had rejected them, as Mr. Collins submitted was the case, I think he was right in saying that it ought to have set the process in motion before the end of 1996. However, for the reasons given earlier I am unable to accept that Evergreen was under any such obligation. Finally I should say that I accept the unchallenged evidence of Mr. Cohen that if the goods had been sold in late 1996 or early 1997 they would have realised a sum in excess of the amount then due in respect of freight and demurrage.

Mr. Simon Croall (instructed by Duval Vassiliades) for the claimant
Mr. James Collins (instructed by Edwin Coe) for the defendant