Federal Court  Cour fédérale

Date: 20151006

Docket: T-1297-13

Citation: 2015 FC 1141

Ottawa, Ontario, October 6, 2015

PRESENT: The Honourable Mr. Justice Russell

ADMIRALTY ACTION *IN PERSONAM* AGAINST BELAIR FABRICATION LTD

BETWEEN:

UPS ASIA GROUP PTE LTD d.b.a UPS ASIA OCEAN SERVICES, INC

Plaintiff
(Defendant by Counterclaim)

And

BELAIR FABRICATION LTD

Defendant
(Plaintiff by Counterclaim)

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is a motion for summary trial brought by UPS Asia Ocean Services, Inc [UPS] pursuant to Rule 216 of the *Federal Courts Rules*, SOR/98-106 [Rules]. UPS seeks judgment

against Belair Fabrication Ltd [Belair] for CAD$210,105.02. In a counterclaim, Belair seeks judgment against UPS for CAD$173,629.12.

II. BACKGROUND

[2] UPS is a logistics company which provides ocean freight services to clients shipping goods from China to North America.

[3] Belair is a company which manufactures steel components for industrial, commercial and institutional projects.

[4] In late 2012, UPS and Belair discussed arranging a series of shipments from China to Vancouver. The shipment at issue is described as a "break bulk" or non-containerized shipment. It consisted of a number of extremely large crane parts which were manufactured in China.

[5] On May 13, 2013, the parties executed a booking note for the break bulk shipment [Belair-UPS Booking Note]. A booking note is a contract used for large ocean charter contracts. The Belair-UPS Booking Note: provided for an estimated shipping date of May 23, 2013; provided a port of loading as Qinghuangdao, China; and, contained a "dead freight" clause. A "dead freight" clause is a standard clause in booking notes and provides that a charterer will pay the full freight charge if the charterer cancels a booking or reduces the cargo to be shipped after a booking is confirmed. Belair says it executed the Belair-UPS Booking Note on the condition that UPS would confirm with the Chinese manufacturer that the shipment would be ready in time.

[6] On May 14, 2013, the manufacturer advised Belair that the goods would not be ready to ship until June 10, 2013. Belair advised UPS of this date.

[7] On May 15, 2013, UPS advised Belair that it needed to confirm that the cargo was ready to ship, or the space on the ship would be released and Belair would be responsible for any penalties.

[8] On May 16, 2013, UPS again advised Belair that the ship was already booked and that Belair should try to ship as much as they could because they would be responsible for the dead freight charge regardless of whether the space was used. On the same day, UPS entered into a booking note with Eastern Car Liner Ltd [ECL] to ship Belair's break bulk shipment on May 23, 2013 [UPS-ECL Booking Note]. This booking note also contained a dead freight clause.

[9] UPS says that when it became aware that the goods would not be ready to ship, it immediately began working with ECL to see if another vessel could be booked to mitigate Belair's responsibility for the dead freight charge.

[10] On May 26, 2013, the original vessel was released without Belair's goods.

[11] UPS and Belair exchanged a number of offers with different shipping dates and different ports as they worked to find an alternative vessel to ship Belair's goods and mitigate the dead freight charges.

[12] UPS says it offered Belair a vessel on May 24, 2013 which would have been available between June 10-15, 2013 and that ECL would build a reduced dead freight charge into the fee.

[13] Belair says that it confirmed this offer on May 27, 2013.

[14] UPS says that Belair attempted to change the terms of the offer over the following days.

[15] Belair says that it confirmed with the manufacturer on June 6, 2013 that the shipment would be ready for June 8, 2013.

[16] UPS says that on June 6, 2013, Belair advised that the shipment would not be ready until June 10, 2013. UPS advised ECL that it would not be executing a booking note for the June shipping.

[17] Belair ultimately shipped its goods to Vancouver with another carrier. As a result, Belair says that it incurred storage, transportation, labour and other costs.

[18] On June 15, 2013, UPS-SCS Inc paid USD$57,500 to ECL.

[19] On June 27, 2013, UPS sent Belair an invoice for the dead freight charge totalling CAD$210,105.02.

[20] UPS filed its Statement of Claim on July 29, 2013. Belair filed its Statement of Defence and Statement of Counterclaim on August 27, 2013. UPS filed its Statement of Defence to the Counterclaim on September 24, 2013.

III. ISSUES

[21] UPS raises the following issues in this motion:

1. Whether this matter is suitable for determination by way of summary trial;
2. Whether Belair is liable to UPS for the full dead freight amount pursuant to the Belair-UPS Booking Note; and
3. Whether Belair's counterclaim should be dismissed.

IV. STATUTORY PROVISIONS

[22] The following provisions of the Rules are applicable in this proceeding:

Summary Trial	**Procès sommaire**
Dismissal of motion	**Rejet de la requête**
216. (5) The Court shall dismiss the motion if	216. (5) La Cour rejete la requête si, selon le cas :
(a) the issues raised are not suitable for summary trial; or	a) les questions soulevées ne se prêtent pas à la tenue d'un procès sommaire;
(b) a summary trial would not assist in the efficient resolution of the action.	b) un procès sommaire n'est pas susceptible de contribuer efficacement au règlement de l'action.

Judgment generally or on issue	**Jugement sur l'ensemble des questions ou sur une question en particulier**
(6) If the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment either generally or on an issue, unless the Court is of the opinion that it would be unjust to decide the issues on the motion.	(6) Si la Cour est convaincue de la suffisance de la preuve pour trancher l'affaire, indépendamment des sommes en cause, de la complexité des questions en litige et de l'existence d'une preuve contradictoire, elle peut rendre un jugement sur l'ensemble des questions ou sur une question en particulier à moins qu'elle ne soit d'avis qu'il serait injuste de trancher les questions en litige dans le cadre de la requête.

V. ARGUMENT

A. *UPS – Plaintiff/Defendant by Counterclaim*

(1) Suitability for summary trial

[23] Under Rule 216, a judge should give judgment if he or she can find the facts as he or she would upon a trial, regardless of complexity or conflicting evidence, unless to do so would be unjust. The Court should consider the following factors (*Inspiration Management Ltd v McDermind St Lawrence Ltd* (1989), 36 BCLR (2d) 202, [1989] BCJ no 1003 at paras 48, 53-57 [*Inspiration Management*]): the amount involved; the complexity of the matter; its urgency; any prejudice likely to arise by reason of delay; the cost of taking the case forward to a conventional trial in relation to the amount involved; the course of the proceedings; and any other matters that arise for consideration.

[24] UPS submits that this matter is suitable for disposition by way of a summary trial because (Plaintiff's Memorandum of Fact and Law at para 55):

> a. The contractual dispute is not overly complex and turns on a factual dispute which is sufficiently evidenced in the written record;
>
> b. A determination at a summary trial would be dispositive of both the Plaintiff's claim and the Defendant's counterclaim, and there would be no litigating in slices;
>
> c. A summary trial would allow for the just, most expeditious and least expensive determination of this proceeding on its merits as contemplated by Rule 3 of the *Federal Courts Rules*.

(2) Belair is liable to UPS for the dead freight charge

[25] UPS submits that the general rules of contract apply to the Belair-UPS Booking Note. Under a booking note, the party entitled to use the ship, or the space on a ship, is called the charterer. Belair executed the Belair-UPS Booking Note on May 13, 2013 as merchant and charterer and agreed to be bound by all terms of the Belair-UPS Booking Note.

[26] UPS says that Belair cancelled the Belair-UPS Booking Note when it advised UPS that the cargo would not be available until June 10, 2013. By failing to provide the cargo, Belair breached the Belair-UPS Booking Note and became liable for the dead freight charge.

[27] As a result of Belair's cancellation, UPS released the space booked with ECL and became liable to ECL for the dead freight charge under the UPS-ECL Booking Note.

[28] UPS says that the Court must uphold the contract because it was a bargain struck between two commercial parties with equal bargaining power: *Ship MF Whalen v Pointe Anne Quarries Ltd* (1921), 63 SCR 109 at 125-126; *Atlas Construction Co Ltd v Montreal (City of)*, [1954] 4 DLR 124 at 130 (QCSC).

(3) Counterclaim

[29] UPS asks that the counterclaim be dismissed. UPS says that it did not agree to amend the Belair-UPS Booking Note, nor did it repudiate the Belair-UPS Booking Note. UPS also says that Belair and UPS did not enter into any other booking note. UPS was simply working with ECL to try to secure another vessel to mitigate Belair's liability for payment of the dead freight charge. UPS was unable to offer Belair a new shipping option to meet Belair's needs, and so no new booking note was ever executed.

B. *Belair – Defendant/Plaintiff by Counterclaim*

(1) Suitability for summary trial

[30] Belair submits that this motion should be dismissed because the matter is not suitable for summary trial. Belair agrees with UPS' general statement of the law governing summary trials. However, Belair says that this matter is inappropriate for summary trial because there are significant inconsistencies in the evidence on crucial elements of the proceeding. The inconsistencies relate to whether or not the Belair-UPS Booking Note was modified by UPS' agreement that UPS would confirm with the manufacturer that the cargo would be ready to ship.

(2) Belair is not liable to UPS for the dead freight charge

[31] Belair says that it is not liable to UPS for the dead freight charge for three reasons.

[32] First, Belair says that it is not a charterer as provided for in s 43 of the Belair-UPS Booking Note. A charterer is someone who hires an entire ship from a ship owner for a period of time or who reserves the entire cargo space of a ship: see BBC Chartering, "Chartering Terms," online: <https://bbc-chartering.com/toolbar/tools/chartering-terms.html>. In contrast, Belair only booked space on a ship that was already carrying cargo for multiple shippers. The Belair-UPS Booking Note itself identifies Belair as a merchant, not a charterer. As a result, Belair should not be liable.

[33] Second, Belair says that it only signed the Belair-UPS Booking Note on the condition that UPS would confirm with the manufacturer that the cargo would reach the port on time. It says that it expressed concern about signing the booking note without a fixed shipping date, and UPS agreed to confirm with the manufacturer to obviate the risk of the dead freight charge being imposed. Belair should not be responsible for the dead freight charge because UPS never confirmed with the manufacturer as agreed. UPS' breach of this condition should absolve Belair from any liability under the Belair-UPS Booking Note. Belair says that neither of its witnesses has been cross-examined on their affidavits. As a result, their evidence on this issue should be accepted: *Society of Composers, Authors and Music Publishers of Canada v Maple Leaf Sports & Entertainment*, 2010 FC 731.

[34] Third, Belair says that UPS has suffered no loss. The dead freight charge was not paid by UPS but by UPS-SCS Inc, and UPS has not reimbursed this payment. UPS is seeking a windfall payment. It is unfair for UPS to claim the full CAD$210,105.02 because it has never suffered that loss. A clause which is not reflective of a true estimate of potential damages, or is wholly out of proportion to the potential loss, is unenforceable as it is a penalty rather than a stipulated damages clause: *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*, [1915] AC 79 (HL) [*Dunlop Pneumatic Tyre Co Ltd*]. UPS is not a carrier or a ship owner. If cargo is not delivered, UPS is not necessarily out of pocket for the loss of the freight charge. Here, UPS is only out of pocket because of the dead freight charge in a separate contract with ECL – not for the full dead freight amount in the Belair-UPS Booking Note. If any damages are awarded, they should be limited to the actual loss which shows that UPS-SCS Inc paid a dead freight charge of USD$57,500 to ECL.

(3) Counterclaim

[35] Belair asks that the Court grant its counterclaim. Belair says that it confirmed that the cargo would be delivered to the shipping port by June 8, 2013. UPS failed to confirm this with ECL. As a result, the delay in finding a new ship caused Belair to incur storage, transportation, labour and other costs that would not have been required had the cargo shipped as agreed. Belair says that it has incurred a loss of CAD$173,629.12 because of the cancellation.

VI. ANALYSIS

A. *Suitability for Summary Trial*

[36] There are two issues that need to be decided in this dispute:

a) Whether Belair is liable to pay UPS the sum of CAD$210,105.02 for the amount owing for the dead freight charge under the Belair-UPS Booking Note; and

b) Whether UPS is liable to Belair for damages suffered by Belair as a result of UPS' breach of contract, as set out in Belair's counterclaim.

[37] As Mr. Walek tells the Court in his affidavit for Belair (Affidavit of Mark Walek, sworn December 17, 2014 [Walek Affidavit]):

> 3. I have read the Affidavits of Larry Palmer dated June 25, 2014 ("Palmer #1") and Normal Heath dated July 16, 2014 ("Heath #1") and September 30, 2014 ("Heath #2"). While those Affidavits set out generally the dealings between Belair and the Plaintiff/Defendant by Counterclaim ("UPS"), there are significant discrepancies in how Mr. Palmer and Mr. Heath describe the genesis of the booking note eventually signed by Belair on or about May 13, 2013 and the cancellation of the charter in June, 2013. I have also read the transcript of the Examination for Discovery of Mr. Heath and the responses provided by UPS counsel to requests for further information made at Mr. Heath's Examination for Discovery.

[38] Those "essential differences," although extremely important, are focused upon two fairly narrow assertions that Belair makes:

1. That UPS agreed that Belair would only sign the Belair-UPS Booking Note on the condition that UPS would confirm with the manufacturer in China that the cargo would be delivered to the port in time for the May 23-25 loading; and

2. That UPS agreed to amend the Belair-UPS Booking Note, or contracted with Belair to ship the goods from the port in China to Vancouver with a cargo delivery date of June 10, 2013, and UPS breached this contract.

[39] As regards the agreement that UPS was responsible to confirm delivery times with the manufacturer, Mr. Walek has the following to say in his affidavit:

> 12. On or about Tuesday, May 7, 2013, Mr. Heath telephoned me and told me that he needed the booking note signed. I told Mr. Heath that I would sign the booking note the following day as long as the factory confirmed that the product would be ready. This conversation took place around noon in Canada, meaning it was in the middle of the night in China and that is why I needed to wait until the following day. Nevertheless, Mr. Heath told me that the booking note had to be signed that very day. I told Mr. Heath that I was not even at the office and was physically unable to sign the booking note. Mr. Heath then asked if Belair's office administrator, Carolyn Albin, could sign on Belair's behalf. I told him that Ms. Albin did not have signing authority but Mr. Heath said that it didn't matter because the booking note was only going to be used to get us a firm shipping schedule.
>
> 13. I did not take Mr. Heath's advice at face value. I was still concerned about the dead freight clause. I told Mr. Heath that Belair would sign the booking note only if UPS confirmed with the factory that the cargo would be ready to be delivered to the port on time to meet the ship. Mr. Heath agreed to do so. By way of an email on the morning of Wednesday, May 8, 2013, I gave Mr. Heath contact information for the factory in China. The contact person there was Lisa Liu.
>
> 14. On Thursday evening on May 9, 2013, Mr. Heath sent an email to Lisa Liu at the factory in China to advise her of the proposed loading schedule on May 23-24, 2013. Due to the time difference between Canada and China, that email would have been delivered in China early Friday morning, May 10, 2013. The same day, Ms. Liu emailed Mr. Heath and asked how long the vessel would be in port. Mr. Heath did not respond to this request until Monday, May 13, 2013 (Tuesday, May 14, 2013 in China).
>
> 15. Also on Friday, May 10, 2013, Mr. Heath sent Ms. Ablin a booking note to sign on behalf of Belair. I am informed by Ms. Albin that she spoke to Mr. Heath on the telephone and expressed concern about a number of things including the dead freight charge. Mr. Heath again assured Ms. Albin that the dead freight charge need not be of a concern as the booking note was only being signed to confirm the dates.
>
> 16. I am informed by Ms. Albin that on May 13, 2013, Mr. Heath phoned her and asked her if the booking note had been

> signed. She told him that it had not been signed because I was not in the office and that it would have to wait until I returned because she did not know all the details. About noon on the same day, Mr. Heath phoned me on my cell phone and told me that the booking note needed to be signed immediately otherwise we would lose the potential sailing at the end of May. I told him again that Belair would sign the booking note only on the condition that UPS would confirm with the factory that the cargo would be delivered to the port on time. He agreed. As a result, I called Ms. Albin and asked her to sign and return the booking note to Mr. Heath.
>
> (Walek Affidavit, sworn December 17, 2014, emphasis in original)

[40] When it became clear that the May 23-25, 2013 delivery date could not be met by the manufacturer in China, UPS and Belair began to look for alternative arrangements that would allow the cargo to reach Canada in a timely manner. Belair says this resulted in a contract to ship the cargo on June 8, 2013. Mr. Walek's version of events is as follows:

> 21. UPS immediately began to search for an alternative. W. Heath telephoned me and advised that UPS had found a vessel in port between June 12 to 15, 2013 and that the dead freight obligation from the first booking note would be covered by the payment of an additional $40,000 on this second attempt. While I did not agree Belair should be responsible for the dead freight charge, time was running short, so I made a business decision to pay the extra money to ensure the cargo was delivered to Canada on time.
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> 22. After a few days of negotiating delivery dates, Mr. Heath told me that the cargo had to be at the port no later than June 11, 2013 and I so advised Ms. Liu at the factory. There were also ongoing discussions about which of two different ports would be used and how the cargo would be delivered from the factory to the port. I asked Mr. Heath if UPS could assist with the delivery from the factory to the port. While it remained Belair's responsibility to pay for the goods to be moved to the port, UPS agreed to assist with the logistics. UPS China was used.
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> 23. On about June 5, 2013, the June 11, 2013 delivery date was changed to June 9, 2013 and I confirmed to UPS that the cargo would be at the port and ready on June 9, 2013.

24. The next day, UPS changed the date again to June 8, 2013 as China Customs would be closed June 10 to 12, 2013.

25. On Thursday, June 6, 2013 in the evening, (morning, Friday, June 7, 2013 in China), I contacted the factory to confirm that the cargo would be ready for June 8, 2013. I was informed by Ms. Liu that the cargo would be ready but that I should make sure that UPS will be able to clear the cargo through customs prior to a Chinese Dragon Boat Festival holiday to be held June 10 to 12, 2013.

26. On Friday, June 7, 2013, sometime between 6 and 7 in the morning as I was driving to my office, I called Mr. Heath on my cell phone to confirm that the cargo would be ready to be delivered at the port on June 8, 2013. I mentioned to him that we needed to have the cargo clear customs prior to the Chinese holiday. Mr. Heath seemed to be unaware about the Chinese holiday but said he would confirm later as it was nighttime in China and the UPS office there would be closed.

27. Later on Friday, June 7, 2013, I was at the Belair assembly shop overseeing production when I received a call from Mr. Heath. Mr. Heath informed me that the vessel had been cancelled because the factory was not ready to deliver the cargo. I asked him why he was saying that when I had confirmed directly with the factory that it was in fact ready. I also asked him who gave him permission to cancel the vessel. Mr. Heath said that his office had made the decision. I was very angry. I asked how it was possible that the vessel that was booked for the May shipment could not be cancelled two weeks prior to the proposed loading date but this vessel from the same shipping line could be cancelled only a few days prior to sailing. Mr. Heath could not answer the question.

28. Immediately after this conversation, I went to my office and started looking for a new shipping company and what other options might be available. I obtained contact information for the original shipping company, Eastern Cu Liner, Ltd. ("ECL") and spoke to Bill Christ who, it turned out, had been the individual at ECL that was dealing with UPS on both the shipments. I asked Mr. Christ if it was an option to have the original vessel return to port. Mr. Christ said he would look into it and would advise me the next day. In the end, it turned out that we were a few hours too late to turn the vessel back to pick up the cargo.

29. About the middle of the following week, Mr. Heath contacted me again and said that he would look for another vessel. I told him that he was welcome to do so but I would be looking at

> new options as well. He eventually offered another vessel sailing in late June or the beginning of July but the price was even higher than the original price we had negotiated in February plus the additional $40,000 dead freight charge.
>
> (Walek Affidavit, sworn December 17, 2014)

[41] This evidence is categorically disputed by UPS. As a result of this dispute concerning, admittedly crucial evidence, Belair says this is not a suitable case for summary trial. My review of the record convinces me that this is a suitable case for summary trial and that the Court is in a position to assess the relevant evidence on key points and make a decision on the facts that underlie the claim and the counterclaim. I will come to that evidence in detail later but, at this point, I think it should be pointed out that every other aspect of the dispute supports the case for summary trial.

[42] Rule 216(6) of the Rules provides as follows:

If the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment either generally or on an issue, unless the Court is of the opinion that it would be unjust to decide the issues on the motion.	Si la Cour est convaincue de la suffisance de la preuve pour trancher l'affaire, indépendamment des sommes en cause, de la complexité des questions en litige et de l'existence d'une preuve contradictoire, elle peut rendre un jugement sur l'ensemble des questions ou sur une question en particulier à moins qu'elle ne soit d'avis qu'il serait injuste de trancher les questions en litige dans le cadre de la requête.

[43] It is well-established in the jurisprudence that, in determining whether a summary trial is appropriate, the Court should consider factors such as the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings, and any other matter that arises for consideration. See *Inspiration Management*, above, at para 48.

[44] Federal Court jurisprudence tells us that British Columbia jurisprudence is instructive and persuasive in this context because the Federal Court summary trial rules are modelled on the former Rule 18A of the British Columbia *Supreme Court Civil Rules*, BC Reg 168/2009 (now Rule 9-7). See *Wenzel Downhole Tools Ltd v National-Oilwell Canada Ltd*, 2010 FC 966 at para 34.

[45] In the recent case of *Hryniak v Mauldin*, 2014 SCC 7, the Supreme Court of Canada emphasized the need for proportionality in the judicial process and Karakatsanis J pointed out that summary procedure can be just as fair and is no less legitimate in the judicial process. See para 27.

[46] The only factor in the present case that could render summary trial inappropriate is a conflict in the evidence. Belair acknowledged that conflicts in evidence can be overcome, but objects to summary trial in this case because the conflicting evidence is at the heart of the case. In other words, Belair says that credibility of the witnesses on both sides is a crucial factor and the Belair witnesses have not been cross-examined on their affidavits. However, the British

Columbia Supreme Court concluded that although it is generally inappropriate to decide an application in the face of contradictory affidavit evidence on the main issues, it nevertheless remains within the powers of the Court to decide disputed questions of facts where there is an ability to review the totality of the evidence and give it appropriate weight if the evidence is adequate. See *Canada Wide Magazines Ltd v Columbian Publishers Ltd* (1994), 55 CPR (3d) 142 (BCSC).

[47] I have come to the conclusion that it is possible to deal with this matter summarily. Even though there are conflicting affidavits, there is other admissible evidence before the Court that makes it possible to find the necessary facts. See *Inspiration Management*, above, at para 55. As the British Columbia Supreme Court recently pointed out in *Morin v 0865580 BC Ltd*, 2014 BCSC 2110 at para 22:

> The onus lies with the summary trial application respondent to demonstrate that the matter is not suitable for summary trial. In my view, the issues raised by the applicant defendants in respect of the purported deficiencies in the plaintiffs' claims are discrete and well-suited to disposition in the manner proposed. The actual conflicts in the evidence of Chester on the one hand, and the plaintiffs and Gaukel on the other, are relatively minor and, as will be seen, the differences between the parties amount chiefly to differences in how the evidence is characterized and as to the legal consequences, as opposed to substantive differences as to what was done and said. Furthermore, the Rules do of course permit findings of fact to be made even in the face of conflicting evidence: see *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (B.C. C.A.), at 385 — 86. To the extent there are substantive conflicts in the affidavit evidence of the parties and Gaukel, I have concluded the conflicts can be fairly resolved through weighing that evidence against the affidavit evidence given by non-parties and against the documentary evidence, and by testing the affiants' contentions against common sense.

[48] Proportionality and all of the other factors point to the need for summary disposition in this case. We have a plethora of documentary evidence created at the material time, the UPS evidence has been tested on cross-examination, the evidence of Mr. Walek and Ms. Albin for Belair can be tested against the extensive and detailed documentary evidence dealing with the particulars in this case, common practice and common sense. In my view, this dispute can be fairly adjudicated in a timely, affordable and proportionate manner without the need to resort to a full trial.

B. *Terminology of the Booking Notes*

[49] Focusing upon the terminology of the Belair-UPS Booking Note, Belair asserts that it was not a "charterer" within the legal meaning of that word and so, for this reason, was not subject to the dead freight charge.

[50] In effect, Belair says that a "charterer" is someone who hires an entire ship from the ship owner for a period of time or who reserves the entire cargo space of a ship, and Belair only booked space on a ship that was already carrying cargo.

[51] In my view, this position is a semantic red-herring. UPS has produced authorities to establish that a "charterer" is a signatory to a charter party, which is a contract for the transportation of cargo, whether or not the charterer contracts for the use of the entire space or just a portion of it. I do not have to decide this rather technical issue. The evidence is clear that, however Belair is referred to under the Belair-UPS Booking Note, Belair fully understood that, in signing the Belair-UPS Booking Note, it became liable to pay the dead freight charge. This is

why, in these proceedings, Belair alleges a collateral verbal agreement that UPS would assume the responsibility of dealing with the manufacturer to ensure that the cargo would be delivered to the port in time for loading on May 23, 2013. The Belair-UPS Booking Note, and the contemporaneous documentation that speaks to how the Belair-UPS Booking Note came to be signed, makes perfectly clear what the parties understood as their respective obligations under the Belair-UPS Booking Note. There was a meeting of minds that, as far as the documentation is concerned, Belair would be liable under the dead freight clause if the booking was cancelled or the volume of the cargo was reduced.

[52] Belair is asserting a collateral verbal agreement in order to avoid the consequences of signing the Belair-UPS Booking Note. This is because Belair is fully aware that, whatever terminology is used to identify the parties in the Belair-UPS Booking Note, it signed knowing full well the consequences of cancellation or reduced volume under the dead freight clause.

C. *Parties to the Contract*

[53] Belair also seeks to avoid liability under the dead freight clause of the Belair-UPS Booking Note by questioning the identity of UPS as a contracting party as well as the identity of the corporate entity that paid the liability under the UPS-ECL Booking Note.

[54] The evidence is that UPS Asia Ocean Services, Inc signed the Belair-UPS Booking Note with Belair, while UPS Asia Group PTE Ltd is identified as the merchant on the UPS-ECL Booking Note. The evidence is that UPS Asia Ocean Services, Inc was entered as the operating name for UPS Asia Group PTE Ltd on the Belair-UPS Booking Note in clerical error so it is

clear that the contracting party was UPS Asia Group PTE Ltd for both booking notes, which is an entity organized and existing under the laws of Singapore.

[55] The evidence as to who settled the dead freight obligation under the UPS-ECL Booking Note is that UPS-SCS Toronto provided a wire transfer to ECL in the amount of USD $57,500.00 on June 25, 2013. UPS-SCS Toronto is, apparently, UPS SCS, Inc, an Ontario corporation that carries on business as UPS Global Freight Forwarding in Canada.

[56] Belair is attempting to avoid payment of the dead freight charge in the Belair-UPS Booking Note by questioning whether UPS Asia Group PTE Ltd even reimbursed UPS-SCS Toronto for the dead freight payment under the UPS-ECL Booking Note. The Court has no evidence as to how and why UPS has accounted for the payment within its group of companies. However, it is clear that payment has been made.

[57] The issue before me is whether Belair is obliged to pay the dead freight charge calculated under the Belair-UPS Booking Note. Part of the reason for that dead freight charge was the liability that UPS incurred to ECL under the UPS-ECL Booking Note. But there is nothing in the Belair-UPS Booking Note that makes payment by UPS Asia Group PTE Ltd, a condition precedent to Belair's obligation to pay the dead freight charge under the Belair-UPS Booking Note. That payment is triggered by cancellation of the booking and/or decrease in the cargo volume. Belair's liability to pay the dead freight charge is not dependent upon which entity of the UPS corporate structure forwards the payment to ECL. Once again, I regard this point as irrelevant.

D. *Amount of Belair's Liability*

[58] Belair argues that the amount it is obliged to pay under the Belair-UPS Booking Note – assuming the alleged collateral arrangements with UPS do not relieve it of liability altogether – should be either nothing at all because the dead freight charge is a penalty clause, or no more than UPS has paid to ECL in accordance with the dead freight clause in the UPS-ECL Booking Note, which amounted to USD $57,500.00.

[59] I have no cases before me from either side which characterize the kind of dead freight charge at issue here as either a penalty or a liquidated damages clause. The legal distinction is well known in that a liquidated damages clause is enforceable because it is a genuine attempt at a pre-estimate of damages that will occur, while a penalty clause is not enforceable because it is not a pre-estimate of damages and is an "*in terrorem*" clause, the purpose of which is to compel the performance of contractual obligations. The following principles set out by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd*, above, have been widely accepted by Canadian Courts (at 86):

> i) Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.
>
> ii) The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage…
>
> iii) The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as the time of the making of the contract, not as at the time of the breach…

> iv) To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
> (a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach…
>
> (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid…
>
> (c) There is a presumption (but no more) that it is a penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage"…
>
> On the other hand:
>
> (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties…
>
> [Footnotes omitted]

See *Canadian General Electric Co v Canadian Rubber Co* (1915), 52 SCR 349; *Lozcal Holdings Ltd v Brassos Development Ltd* (1980), 111 DLR (3d) 598; 22 AR 131 (ABCA); *Place Concord East Ltd Partnership v Shelter Corp of Canada Ltd* (2006), 270 DLR (4th) 181 (ONCA).

[60] In the present case, it seems to me that, when the Belair-UPS Booking Note was entered into, the dead freight clause was a reasonable attempt to estimate the damages UPS would suffer

in the event that the booking had to be cancelled because Belair could not deliver the cargo to the vessel by the stipulated loading time. We can see this from the explanations given in the written exchanges between the parties. UPS itself had to sign a booking note with ECL that contained the same clause, and it seems obvious that it is intended to cover the loss that occurs when a vessel is booked to come to a particular port to pick up a particular cargo and space is reserved for that cargo which is then not used.

[61] UPS made it clear to Belair that it would have to assume contractual responsibility for this loss (assumed by UPS through the UPS-ECL Booking Note). It is also clear that UPS put a significant amount of work into finding a vessel and booking it for Belair under conditions where timing was extremely important to Belair. No charge was made for this intense and extensive work and any damages would be difficult to calculate with precision. Hence, a dead freight charge makes sense in the circumstances and it seems clear from the record that the parties did not intend this as a penalty but as an attempt to reasonably account for the loss that would occur if the booking had to be cancelled for Belair's failure to deliver.

[62] Cancellation of the May 2013 break bulk shipment meant that UPS became liable to ECL under the s 43 dead freight clause in the UPS-ECL Booking Note. UPS' total liability was USD $163,864.10 which was made up of base ocean freight of USD $143,395.20, plus BAF of USD $20,413.90 (USD $20.50 w/m), and B/L fee of USD $55.00. In June 2013, ECL demanded payment for this amount. However, UPS was able to negotiate a discount with ECL so that, in the end, UPS paid USD $57,500.00 to ECL. UPS has not passed this discount on to Belair.

[63] Belair does not take issue with the calculations set out above but says that if it is obliged to pay anything under the dead freight clause in the Belair-UPS Booking Note it can only be the USD $57,500.00 that UPS has paid to ECL, otherwise this will result in a windfall to UPS.

[64] While there is some discrepancy in the authorities and among academic commentators, the prevailing view appears to be that an enforceable liquidated damages clause is assessed at the time the contract containing it was entered into (May 13, 2013, in this case) and not at the time when the damages occur. See *Mortgage Makers Inc v McKeen*, 2009 NBCA 61 at para 20 [*Mortgage Makers*]. The fact that actual damages may later turn out to be either more or less than the estimate is not an indication that the original estimate was unreasonable. The dead freight clause in this case does not say that the charge will be reduced to reflect the amount that UPS eventually pays to ECL. If Belair's liability is only for actual damages calculated at the time of breach, then the purpose of the dead freight clause - an agreed estimate of damages and the certainty that comes from knowing in advance what the liability will be in the event of cancellation - would be meaningless. The amount remains a genuine attempt to estimate damages and liabilities in advance so that both sides know what they are facing even if actual damages turn out to be more or less. See *Mortgage Makers*, above, at para 19. As Angela Swan points out in *Canadian Contract Law*, 3rd ed (LexisNexis Canada, 2012) at 951

> The fact that a stipulated damages clause may provide for more compensation than a court would have awarded as damages cannot matter because, *ex hypothesis*, the agreement being fair, why would a court focus on that issue to control the parties' power to make such an arrangement as they see fit rather than say, on the parties' definitions of events of default and the remedies for those or any other terms of the deal?

[65] Also, in *869163 Ontario Ltd v Torrey Springs II Associates Ltd Partnership*, [2005] OJ No 2749 (ONCA) at para 34, the Ontario Court of Appeal had the following to say on point:

> … Judicial enthusiasm for the refusal to enforce penalty clauses has waned in the face of a rising recognition of the advantages of allowing parties to define for themselves the consequences of breach. As I have already noted, in *Elsley*, *supra*, Dickson J. labeled the penalty clause doctrine as "a blatant interference with freedom of contract,"…

[66] Although UPS and Belair both knew that the dead freight charge in the Belair-UPS Booking Note was intended to cover losses to UPS under the UPS-ECL Booking Note, there was no agreement that the amount payable would be reduced if UPS managed to reduce its liability to ECL through negotiations. At the time of the Belair-UPS Booking Note, UPS was fully liable to ECL for USD $181.237.70 if the booking was cancelled. UPS assumed this risk and exposure provided Belair agreed to pay UPS the full amount. In effect, that amount was the cost to ECL of UPS assuming that risk, and it is the cost that Belair agreed to pay at that time for the service.

E. *Belair's Liability to UPS*

[67] Belair says it is not liable to pay the dead freight charge under the Belair-UPS Booking Note to UPS because UPS assumed the contractual responsibility of dealing with the Chinese manufacturer of the cargo to ensure that the cargo would be at the port and ready for loading by the May 23, 2013 date.

[68] The evidentiary basis for this alleged collateral contractual arrangement, or Belair-UPS Booking Note amendment, are the affidavits sworn for these proceedings by Mr. Walek and Ms. Albin of Belair in December 2014. In effect, the allegation is that, during the course of telephone

conversations between Mr. Walek and Mr. Heath of UPS leading up to the signing of the Belair-UPS Booking Note on May 13, 2013, Mr. Heath agreed that UPS would be responsible for ensuring that the cargo would be delivered to the port for loading at the appointed time so that, in the event this did not occur and the booking was cancelled, Belair would not have to pay the dead freight clause. This is the core of the dispute between the parties and it is here that there is a conflict in the evidence.

[69] In written legal argument, Belair states the issue as follows:

> The Belair Booking Note (as it is so defined in UPS Memorandum) was only signed by Belair on the condition that UPS would confirm with the factory that the cargo would in fact reach the port on time and obviate the risk of the dead freight charge being imposed. No one from any UPS entity confirmed that information with the factory and as a result, Belair ought not to be held responsible for the dead freight charge.
>
> (Belair Memorandum of Fact and Law at para 4)

[70] From my review of the evidence before me, the following general points are clear:

a) There is nothing in the Belair-UPS Booking Note itself to suggest that UPS would confirm with the manufacturer that the cargo would reach port at the appointed time so as to obviate the risk to Belair under the dead freight clause;

b) There is nothing in the extensive correspondence and written evidence relevant to the negotiation and signing of the Belair-UPS Booking Note to suggest that UPS assumed this obligation;

c) There is nothing in the extensive correspondence and written evidence subsequent to the cancellation of the Belair-UPS Booking Note, and the attempt by the parties to find another vessel for the cargo and a delivery date that would meet the needs of Belair, to suggest that the terms of the Belair-UPS Booking Note had been changed in the way suggested by Belair or that Belair did not accept its liability to UPS under the dead freight clause. The only exception is the following assertion by Mr. Walek contained in an e-mail of June 6, 2013 to Mr. Heath when the second shipping had also failed:

> Also, in regards to the first shipping my office signed the documents under the condition that you will confirm with our supplier that the goods will be ready and that payment terms will be reviewed. We hired UPS to provide good service as before, we provided you with all contact information and it was your job to make sure everything will be arranged properly.

This statement is made well after the fact, at a time when, as he makes clear in other correspondence, Mr. Walek is under great pressure and strain and still no vessel has been hired to ship the cargo at the time when he desperately needs it to be shipped. The statement is also general. It does not refer to telephone conversations with Mr. Heath that may have changed the terms of the Belair-UPS Booking Note and, in particular, the dead freight clause. It also does not say that Belair is not bound by the dead freight clause. The timing of this statement is very important, coming as it does when the second shipping in early June had fallen through and Belair was in a difficult situation. This has to be juxtaposed with the fact that on May 24, 2013, soon after the first sailing was missed, UPS immediately began to look for ways of assisting Belair to quickly find a new vessel and negotiated with ECL to build into the shipping cost of the new vessel the May dead freight charge at a reduced amount of approximately USD $54,000.00 to offset Belair's liabilities under the Belair-UPS Booking Note. This involved a sailing offer of June 10, 2013, which the parties worked towards achieving under new arrangements. Belair worked towards this offer with the full knowledge that UPS considered Belair liable to pay the dead freight charge under the aborted Belair-UPS Booking Note. This was why UPS had negotiated with ECL to reduce the shipping cost to offset this liability. Belair did not say at this time that it was not responsible to pay the dead freight charge. It did not take this position until June 6, 2013 when it looked like the second sailing had also fallen through and its exposure was mounting;

d) The allegations of some kind of amendment or collateral contract that the Belair-UPS Booking Note was only signed by Belair on the condition that UPS would confirm with the manufacturer that the cargo would reach the port on time appear, from the record before me, not to have been made until Belair filed its statement of defence in these proceedings on August 27, 2013. And the allegation that the amendment or collateral contract came about as a result of telephone conversations between Mr. Heath and Mr. Walek appears not to have been made until Mr. Walek and Ms. Albin swore their affidavits in this motion for summary trial in December 2014;

e) In a supplemental affidavit, Mr. Heath for UPS concedes that he had telephone conversations with Mr. Walek but opines that he always confirmed important discussions by e-mail and that Mr. Walek did this as well. The record supports this evidence. Mr. Heath also categorically denies any telephone conversation in which UPS assumed any obligation to confirm the shipping date with the manufacturer or that the dead freight clause would not apply:

> a) in paragraphs 8 and 9 Mr. Walek says that in February 2013 UPS was pressing Belair to sign a booking note, but UPS would not provide information about a shipping schedule. This is

untrue. Attached as Exhibit "A" to my affidavit sworn July 16, 2014 is a January 23, 2013 email wherein I told Mr. Walek that once the vessel is ordered and an approximate berthing window is provided the shipper must ensure cargo is delivered and available for loading. Attached as Exhibit "B" to my my [*sic*] affidavit sworn July 16, 2014 is a February 8, 2013 email wherein I told Mr. Walek that

> The Carrier says they will make a vessel available when we want in May. They say once we confirm we want the vessel they will work on the dates in May for loading...They will require you to sign a booking sheet confirming the shipment and they will work on exact dates for you.

It is standard practice for UPS to provide a range of dates for the loading date early in the process. In general, UPS can not provide a pin point loading date because the vessel owner can not accurately estimate the loading date until the vessel is fully booked.

b) In paragraph 11 Mr. Walek says that much of our communication took place over the telephone. I agree with him, but we also frequently confirmed our telephone conversations by email. All firm details of our arrangements wereconfirmed in writing by email and are attached to my affidavit sworn July 16, 2014.

c) In paragraph 12 Mr. Walek recounts a conversation which did not take place. I did not have a conversation with Mr. Walek wherein I told him that a "booking note was only going to be used to get us a firm shipping schedule". UPS requires the customer to sign a booking note to protect UPS in the event the customer fails to deliver the cargo. Finally, at no time did Mr. Walek tell me that Ms. Albin did not have signing authority.

d) In paragraph 13 Mr. Walek recounts a conversation which did not take place. Mr. Walek never mentioned a concern about the dead freight clause prior to signing the Belair Booking Note. He never suggested that he would only sign the Belair Booking Note if I ensured the factory could have the goods ready for shipping. Mr. Walek also never asked me or UPS to confirm with the Chinese factory that the goods would be ready to ship. I would never agree to this kind of an arrangement because I would not have any control or understanding over when the goods would be ready. Delivery of goods to port is always the customer's or merchant/charterer responsibility unless the booking note specifies otherwise.

> e) In paragraph 15 Mr. Walek recounts a conversation he had with Ms. Albin about what I told Ms. Albin. As I state above in this my affidavit, Ms. Albin never mentioned the dead freight clause prior to signing the Belair Booking Note and I never gave her any assurance that the "dead freight charge need not be of concern".
>
> f) In paragraph 16 Mr. Walek recounts a conversation which did not take place. I did not agree to Belair signing the Belair Booking Note on the condition that UPS would confirm with the Chinese factory that the cargo would be delivered to the port on time. I would never agree to this kind of arrangement. The Belair Booking Note clearly states that the agreement is "hook to hook". At all times it was Belair's responsibility to get the cargo to the port in time for the shipping date.
>
> g) In response to paragraphs 19 and 21 of Mr. Walek's affidavit, when I advised Mr. Walek on or about May 24, 2013 that UPS had found another vessel which could take Belair's load in early June and which would incorporate the dead freight charge from the previous Belair Booking Note, Mr. Walek did not dispute that Belair was responsible for payment of the dead freight charge. Mr. Walek accepted the price which included the dead freight charge from the previous booking note. The email exchange which confirms this is attached as Exhibit V to my affidavit sworn July 16, 2014.
>
> (Affidavit of Norman Heath, sworn January 20, 2015)

f) In his own affidavit, Mr. Walek says he was very concerned about the dead freight clause "which required the party seeking to have the cargo shipped (in this case, Belair) to pay full price if the ship arrived at the port but the cargo was not ready to be loaded." By his own evidence then, Mr. Walek confirms that he knew Belair was liable for the full amount under the dead freight clause. Mr. Walek says these were matters of great concern which is why he phoned Mr. Heath. He opines that

> I told him that Belair would sign the booking note only on the condition that UPS would confirm with the factory that the cargo would be delivered to the port on time. He agreed. As a result, I called Ms. Albin and asked her to sign and return the booking note to Mr. Heath.

This is the crucial factor in Belair's case. Yet it was never recorded and confirmed in writing by either party in a context where they were exchanging correspondence on the terms of their agreement and their respective obligations throughout. Nor was it raised by Belair when the first sailing fell though and UPS made it clear that Belair was liable to pay the dead freight clause and negotiated with ECL to have it built into the shipping cost

of a new contract. It was not even mentioned in the June 6, 2013 e-mail when the June sailing also fell through and Mr. Walek began to blame UPS. Given the close and intense working relationship that Mr. Heath and Mr. Walek had at the material time (they were on first-name terms and exchanged numerous correspondence), Mr. Walek never said "Norm, what about our telephone conversation on May 13, 2013 when you agreed to confirm with the factory that the cargo would be delivered to the port in time?";

g) Mr. Heath has been cross-examined on his affidavit and the transcript, in my view, contains nothing to suggest he is mistaken on this crucial point;

h) Ms. Albin's affidavit is equally unpersuasive on this point. It reads in relevant part as follows:

> 7. At the beginning of May, 2013, I remember Mr. Heath calling almost daily to try to get the booking note signed by Belair. I told Mr. Heath on numerous occasions that I was not able to make those decisions and that he would have to deal with Mr. Walek. Mr. Walek and I discussed that Belair did not want to sign the booking note until it knew that the factory could deliver the goods to the port in time to meet the ship. The booking note contained a "dead freight" clause which required the party shipping the goods to pay the full cost of the freight even if the cargo did not reach the port in time to meet the ship. Although Mr. Walek was dealing with Mr. Heath, I had occasion to tell Mr. Heath that Belair did not want to sign the booking note because of the dead freight clause and because 100% of the price was required to be paid in advance. In one conversation, Mr. Heath assured me that we should not worry about the dead freight clause as signing the booking note was only to serve the purpose of getting the delivery dates from the shipping company.
>
> 8. On or about May 12 or 13, Mr. Walek was out of the office and telephoned me and told me that Mr. Heath would be sending the booking note to my attention and that I was to sign it on behalf of Belair. When the booking note came in, I reviewed its terms. I exchanged emails and had telephone conversations about a number of terms in the booking note including the fact that 100% of the payment for freight needed to be paid upfront and the dead freight charge. Again, Mr. Heath assured me that I should not worry about the dead freight clause and as far as the 100% upfront payment term was concerned, he would speak to his manager. I signed the booking note and sent it to Mr. Heath by email.
>
> 9. On or about May 14, Mr. Walek was informed by the factory in China that it would not be able to deliver the cargo to meet the proposed, shipping schedule. Subsequently, Mr. Heath called me several times urging me to try and push the factory to

> meet the proposed shipping schedule otherwise UPS would be seeking to collect the dead freight charge. This was surprising to me in that I understood from our prior conversations that we should not have to worry about the dead freight charge.
>
> (Affidavit of Carolyn Albin, sworn December 17, 2014)

i) Mr. Heath is equally adamant that he never provided the assurance alleged by Ms. Albin, and the written evidence shows that, although she raised her concerns about the up-front payment in writing, she did not mention the dead freight clause. Nor does she mention how and when the alleged prior conversations took place. And if this surprised her, she would presumably have quickly made her concerns known to Mr. Walek who would have raised what he had told Ms. Albin in telephone conversations.

[71] On the record before me, it seems inconceivable that if Mr. Heath had promised on May 13, 2013 that UPS would be responsible for confirming with the factory in China that the cargo would be delivered in time so that Belair could sign the Belair-UPS Booking Note, this would not have somehow been recorded.

[72] The written record, on the other hand, entirely supports UPS' position that Belair agreed to pay the dead freight clause and fully understood what this meant. Mr. Walek confirms this himself.

[73] As UPS points out:

> 114. Absolutely none of the documents in evidence supports Belair's position. In contrast, the evidence demonstrates that, on an almost daily basis UPS confirmed to Belair that the terms of the Belair Booking Note and in particular the "hook to hook" and the dead freight clause would be enforced:
>
> **Affidavit # 1 of N. Heath**
>
> - **Exhibit A January 23, 2013 email forwarded to M. Walek**: "the fee is from ship hook to ship hook so in other word [sic] shipper is responsible for delivering the cargo to the port and having it available to load onto the vessel... Once

the vessel is ordered and a approximate berthing window is provided, the shipper must ensure cargo is delivered and available for loading Vessel cannot wait or be delayed otherwise additional charges will be incurred. UPS must sign a guarantee with the vessel owner to guarantee positioning and we will in turn require the consignee to do the same with UPS."

- **Exhibit B February 8, 2013 email to M. Walek:** "They will require you to sign a booking sheet confirming the shipment and they will work on exact dates for you."

- **Exhibit O May 15, 2013 email forwarded to M. Walek:** "Either Belair conform by tomorrow morning cargo will be ready for May 24 as scheduled otherwise we will have no alternative but to release the space back to the carrier. Any penalties will be for the account of Belair."

- **Exhibit P May 17, 2013 email copied to M. Walek and C. Albin:** "Lisa, Belair has contracted a vessel which is scheduled to arrive for loading on May 25th. This vessel has already been paid for by Belair and this Non refundable freight charge is $180,000.00. This will be charged to Belair even if the vessel has to leave port without the freight. For this reason you need to work day and night to finish as much of the order as possible to make ready for loading on May 25th. I need to know what you will be able to load on May 25th.

- **Exhibit Q May 16, 2013 forwarded to M. Walek and C. Albin:** "Per the booking note, we are responsible for dead freight equal to the amount noted on the contract signed by UPS and Belair, ECL are expecting full payment" and "Mark, the vessel owner is expecting full payment for the booking note we made even if you do not use it. We are unable to cancel the booking because it's (sic) too late for them to find other freight. This space is your space whether you use it or not. The best thing to do is load as much as you can on the vessel on the 24th."

- **Exhibit S May 17, 2013 email to M. Walek and C. Albin:** "Hi Mark, do you know if you can load any freight on the 25th?"

- **Exhibit T May 21, 2013 email to M. Walek and C. Albin:** "Hi Mark, I just received an update on the ongoing discussions with the vessel owner over the penalty. They are

> willing to mitigate the penalty if they get the freight on their next vessel."
>
> [Errors in original]

[74] The evidence also demonstrates that Mr. Walek clearly understood that it was Belair's responsibility to get the cargo to port:

> **Affidavit # 1 of L Palmer**
>
> - **Exhibit D May 15, 2013 Email from M. Walek:** "Norm, This is the first time I am hearing about this and this is not the arrangement I have with my supplier. I will have to confirm with my supplier what will go on the break bulk and what will go in containers The legs are supposed to be shipped by containers and I haven't heard about any changes from their end. **I send few emails about the shipping dates but I haven't heard back from anyone."**
>
> **Affidavit # 1 of N. Heath**
>
> - **Exhibit G May 3, 2013 Email from M. Walek:** "Norm, I am shooting for Qinhuangdao. Just waiting for confirmation. They are working on the freight from the factory to the port but they need to know the shipping dates. This is a special type of freight."
> - Exhibit N May 14, 2013 Emails between M. Walek and N. Heath: "Norm, See below email from Lisa about late delivery."
>
> "Mark, this doesn't sound good. We need to know what we are picking up on the 25th. Le me know how the communication goes tonight".
>
> "Norm, I know this doesn't look good. My blood pressure is high because of this shipping. I will keep you posted."
>
> [Errors and emphasis in original]

[75] It would appear that the Chinese factory knew that Mr. Walek was in charge of shipping the cargo from the factory to the port:

- **Exhibit P May 17, 2013 email from Lisa Liu of CRSBG to M. Walek:** Hi Mark...we received the following email from Norman about the shipping date. We want to know if this date can be extended any more. Our products can not be finished by May 25th.

(Plaintiff's Summary Trial Argument)

[76] The evidence is clear that UPS rendered Belair strategic assistance throughout and made every effort to assist its client to have the cargo shipped in a timely manner so that Belair could meet its obligations in Canada, but it is also clear that UPS did not assume the delivery obligation in a "hook to hook" contract or agree, as Mr. Walek asserts in his e-mail of June 6, 2013 that "we provided you with all contact information and it was your job to make sure everything will be arranged properly." As Mr. Heath points out in his return e-mail of June 7, 2013, the real delay problems were caused by the manufacturer.

[77] The record is so overwhelmingly supportive of UPS on this crucial issue that I think that, notwithstanding the contradictory affidavit evidence, the facts are clear that, on a balance of probabilities, Belair agreed to pay the full amount of the dead freight charge in the event that the booking was cancelled and UPS did not assume the contractual responsibility of checking with the manufacturer and confirming that the cargo would be delivered to the port on time.

F. *The Counterclaim*

[78] Belair claims damages from UPS in a counterclaim that alleges:

a) UPS amended the Belair-UPS Booking Note to include space aboard a new ECL ship with a loading date of June 10, 2013;

b) UPS repudiated the amended Belair-UPS Booking Note by releasing the space aboard the new ECL ship; and

c) As a result of the repudiation by UPS, Belair had to make its own shipping arrangements for the cargo which caused Belair to incur additional expenses after the cargo arrived in Vancouver.

[79] The record is clear that there was no amendment to the Belair-UPS Booking Note. After the vessel was released, UPS simply worked with Belair to work out new arrangements that would assist Belair to mitigate its losses and meet its commitments in Canada. UPS located a new "hook to hook" ECL option with a June 10, 2013 loading date. This option, for various reasons, never came to fruition and never resulted in a new booking note contract. There is no evidence before me to support Belair's contention that UPS agreed to amend the Belair-UPS Booking Note signed by Belair on May 13, 2013 to include this new option.

[80] In addition, no new contract or booking note was ever entered into for the June 10, 2013 sailing because the most important terms of any such contract were never confirmed, including the price, port location and delivery date. The key elements just could not be agreed upon in time to load the cargo, so that no booking note was created or executed and Belair decided to look for a further option without the assistance of UPS.

[81] Once again, the evidence discloses that UPS attempted to work closely with Belair to try to put matters in order in a situation where a booking note could be signed but, for a variety of reasons, many of them related to the manufacturer, delays occurred and a contract could not be concluded and a booking note signed.

[82] My conclusions are that, on the evidence before me, no contract was ever concluded between UPS and Belair to ship the cargo to Vancouver after the Belair-UPS Booking Note terminated in accordance with its terms, neither in the form of an amendment to the Belair-UPS Booking Note or a new contract.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The motion for summary trial is granted;
2. The Belair counterclaim is dismissed;
3. Belair will pay UPS CAD $210,105.02 for the full freight amount due and owing, together with pre-judgment interest at Admiralty Prime rates compounded semi-annually; and
4. Belair will pay costs to UPS pursuant to Part II of the *Federal Court Rules*, SOR/98-106.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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