IN THE HIGH COURT OF MALAWI, BLANTYRE

PRINCIPAL REGISTRY

CIVIL CAUSE NO.604 OF 1985

BETWEEN:

ABDUL HAMID PANJWANI AND 4 OTHERS ..... PLAINTIFFS

AND

AMI PRESS (MALAWI) LIMITED ..... DEFENDANTS

CORAM: MBALAME, J.

Ng'ombe, Counsel for the Plaintiffs
Kaliwo, Counsel for the Defendants
Nanvenya, Official Interpreter
Gausi (Mrs), Court Reporter

JUDGMENT

The plaintiffs in this case carry on business in partnership as wholesalers and direct importers of sundry goods in Limbe in the City of Blantyre. They are known as A.G.A. Karim and Sons and their business in Balaka, Machinga, is under the trade name of Balaka Distributors. It is the plaintiffs' case that they on 10th December 1984, trading under the name of Balaka Distributors, ordered from a supplier in Hong Kong five cases containing 200 dozen baby clothing valued at K9,355.00 to be delivered at their warehouse in Limbe through the defendants. They further allege that around the same time they ordered 440 assorted motor vehicle tyres and 109 cartons of motor vehicle tubes from a supplier in the United States of America. These were ordered in the name of A.G.A. Karim and Sons and were to be delivered to their warehouse at Limbe by the defendants. It is their case that both consignments were duly delivered to the defendants by the respective suppliers and that the defendants acknowledged to the plaintiffs in writing receipt of the said goods in full whereby the plaintiffs paid customs duty in order to have the goods released for resale.

It is further their case that the defendants failed to deliver to them all the goods in that the following were missing:

(1)	1 carton of garments destined for Balaka Distributors (inclusive of customs duty paid)	K5,500.00
(2)	10 tyres destined for A.G.A. Karim and Sons costing	K1,545.00
	Total -	K7,045.00

They claim that if the goods had been sold they would have realised a profit at the rate of $33\frac{1}{3}\%$ which they say they have lost because the defendants failed to deliver the goods.

The defendant filed a defence in which it denies being an agent of the plaintiffs. In the alternative it is pleaded that the defendant was not an agent on its own account but expressly an agent for and on behalf of AMI Forwarding (Pty) Limited of South Africa, a fact which it says the plaintiffs well knew. It is again pleaded that if there was any contract between the defendant and plaintiffs at all, then such contract was entered into subject to the Standard Conditions of the Clearing and Forwarding Agents' Association of Malawi. The defendant relies on Conditions 13, 16, 22, 25 and 26 thereof and these are as follows:-

"13. The Company shall not be liable for loss of or damage to goods unless such loss or damage occurs whilst the goods are in the actual custody of the Company and under its actual control and unless such loss or damage is due to the wilful act of the Company or its own servants.

16. In no case shall the liability of the Company exceed the value of the goods or the value declared by the Customer for insurance, customs or carriage purposes or the following respective amounts, whichever figure is the lowest:-

(a) Inward and outward consignments received or to be forwarded by airfreight K50 per consignment.

(b) Inward and outward consignments received or to be forwarded by sea freight or other surface carriage, excluding parcel post K100 per short ton.

(c) Inward and outward parcel post consignments, K25.00 per consignment.

If it is desired that the liability of the Company should not be governed by these limits, written notice thereof must be given to the Company before any goods or documents are entrusted to the Company, together with a statement of the value of the goods. Upon receipt of such notice, the Company may agree to its liability being increased to a maximum amount equivalent to the stated in the notice, in which case it shall be entitled to effect special insurance to cover its maximum liability

and the party giving the notice shall be deemed by so doing to have agreed and undertaken to pay the Company the amount of the premium payable by the Company for such insurance. The Company shall not be responsible for loss of profits in any circumstances.

22. Pending forwarding and delivery, goods may be warehoused or otherwise held at any place or places at the sole discretion of the Company at the customer's risk and expense.

25. The Company shall have no obligation to take any action in respect of any goods which may be recognisable as belonging to its customer unless it has received suitable instructions relating to such goods together with all necessary documents. In particular, the Company shall not be obliged to notify its customers of the existence or whereabouts of the goods or to examine them or to take any other steps for their identification, protection or preservation or for the preservation of any claim by their customer or any other party against the carrier, insurer or any third party.

26. Where it is necessary for an examination to be held or other action to be taken by the Company in respect of goods being cleared by it which are landed from any vessel in a discrepant condition, no responsibility shall attach to the Company for any failure to hold such examination or take such other action unless the Company has been advised by the landing agents in sufficient time that such goods have been landed discrepant."

The only witness called by the plaintiffs was Abdul Majid Panjwani, one of the partners in the business. He said between 1984 end and early 1985 the plaintiffs ordered the goods in question from BF Goodrich in the United States of America and from a dealer in Hong Kong. They eventually received various documents through the bank. The first was a bill of lading from BF Goodrich, Ohio, U.S.A., for 109 cartons of tyre tubes and 440 pieces of pneumatic tyres. Exhibit P1 refers. They also received with Exhibit P1 a certificate of insurance in respect of the said goods, Ex.P2. At about the same time they also received an invoice from Chatams Investment & Trading Corporation Ltd. of Hong Kong in respect of the 200 dozen baby clothing; Exhibit P3, and with this was a certificate of insurance in respect thereof, Exhibit P4. They then handed all these documents to the defendants to clear the goods on their behalf. In due course

the defendants sent them advice notes in respect of both consignments; Exhibit 5 and 6. Exhibit 5 was in respect of the baby clothing and the number of packages there was 5. On the other hand Exhibit P6 read 109 cartons of tubes and 440 pieces of tyres.

He went on to say that they then contacted A.S.M. Suria, a Customs Clearing Agent, for him to clear both consignments. For that purpose Bills of Entry Exhibits P7, P8 and P9 were prepared. Some of the tubes and tyres were cleard immediately while some were warehoused in a bonded warehouse. So far the quantities of the goods on the invoices, advice notes and the bills of entry tallied.

On 15th February, 1985 they sent a vehicle to collect the goods from the defendants. 109 cartons of tubes were delivered on Exhibit P10, a delivery note. Regarding the tyres only a total number of 430 were delivered on Exhibits 11, 12 and 13. There were 10 short. Thereafter there was an exchange of letters between the parties. The plaintiff was claiming for the landed value plus customs duty in respect of the missing tyres. This claim could not be met by the defendants. They denied liability on the ground that they were mere agents and not brokers. Further the defendants relied on the exemption clauses contained in Exhibit D11. In respect of the five cases from Hong Kong only four correct ones were delivered by the defendants to the plaintiffs. Although the delivery note showed 5 cases one of the five was labelled and destined for Zaire. This then meant that one of the plaintiff's cases was missing. It was this witness's evidence that the five cases were of equal value. Like in the case of the missing tyres the defendants similarly denied liability. In cross-examination the witness said the plaintiffs had been dealing with the defendants since 1983 but were never aware of the exemption clauses.

The defendants called two witnesses. DW1, the defendant's Export Supervisor and DW2, a Controller of Customs. I thought DW2's evidence was of very little assistance, if at all, to the defendant's case. In his evidence DW1 said the defendants were instructed to clear on behalf of the plaintiff's 440 tyres and 109 cartons of tubes some time in 1984. He said these arrived by road transport from South Africa and that the defendants only off-loaded 430 tyres and 109 cartons of tubes into their warehouse. There were 10 tyres short. This, he said, was reflected on a tally sheet dated 5th February, 1985 Exhibit D3. He then issued an advice note to their client, the plaintiffs, dated 6th February, 1985, Exhibit P6, which reflected 109 cartons of tubes and 440 tyres. He said the figure 440 was not correct and that this was an oversight on the defendants' part. He said the plaintiffs then launched a claim against them in respect of the missing 10 tyres and that the defendants in turn wrote a claim letter to AMI Johannesburg. It was his contention that it was not the defendants who lost the tyres. Turning to the missing case

of clothings the witness said the defendants did not receive 5 cases belonging to the plaintiffs although it was indicated 5 on the advice note. This, he said, was again an oversight. He thought the fifth case might have gone astray in Johannesburg. In cross-examination this witness conceded that the defendants were engaged as agents of the plaintiffs. He conceded that the defendants' invoices always came after the agency agreement with their client.

The first pertinent question to be decided is whether the defendants were in the circumstances agents of the plaintiffs in the two transactions. I think they were. Indeed to start with DW1 said they were. Further it is to be noted that other than the defendants the only other group of people the plaintiffs knew in both transactions were the suppliers in the USA and Hong Kong. There was, in my judgment, no contract between the plaintiffs and AMI Johannesburg and the two parties never corresponded directly. It was the defendants who dealt with AMI Johannesburg as their agents. In my judgment the defendants must be liable for the negligence or wrongful acts of their agents. Consequently, it is immaterial whether the goods missed whilst in the custody of the defendants or those of their agents in Johannesburg.

This is however not the end of the matter. What then is the effect of the exemption clauses being relied upon by the defendants? It is not disputed that the parties had dealings prior to these transactions. It is from these transactions that the defendants ask this court to hold that the plaintiffs had notice of the clauses being relied on. Exhibit D4 is an invoice dated 1st March 1985, from the defendants to the plaintiffs, in respect of 5 cases of garments. This is said to be the standard form of the defendants' invoice and that in the past the defendants had sent similar invoices in respect of preceding transactions between the parties. The notice is at the bottom of the front page of the invoice and is in the following terms:

"TERMS STRICTLY 30 DAYS

> An interest of 1½% per month will be made on all outstanding invoices over 30 days.
>
> All goods handled subject to the standard conditions of business of the Clearing and Forwarding Agents' Association of Malawi, a copy of which is available for inspection in our offices throughout Malawi."

This document was issued after the contract had already been made between the parties. Being an invoice it was sent to the plaintiffs for them to pay the defendants for the services rendered so far. If this were the first time the parties transacted I would have easily held that the notice thereon did not form the terms of the contract the subject of these proceedings. It is however in evidence that similar invoices

had been sent to the plaintiffs before. The case of Spurling vs. Bradshaw (1956) 2 All ER 121 is I think in point here and I would quote it as authority to some extent. Put in brief the facts of the case were that the defendant had dealt with warehousemen for many years. On one occasion he delivered to them for storage some barrels of orange juice. These were a few days later acknowledged by the warehousemen by a document referring on its face to clauses printed on its back, one of which exempted the warehousemen from any loss or damage occasioned by their or their servants' negligence, wrongful act or default. When the defendant came to collect the barrels, they were empty. He refused to pay for the storage charges and the warehousemen sued him. He counter-claimed for negligence. His main argument was that since the document containing the exemption clause was sent to him only after the conclusion of the contract, it was too late to affect his rights. It was however held that he was bound by the clause because he had on previous dealings often received a similar document, though he had never bothered to read it.

For any document to be regarded as an integral part of a contract it must have been signed by the party against whom the excluding or limiting term is pleaded. If it is not signed the reasonable question is, in my judgment, whether reasonable notice of the term has been given. In the instant case there is no evidence that the plaintiffs signed Exh. D4. In the case of Parker vs. South Eastern Rail Co. (1877) 2 CPD 146, Mellish, LJ pronounced the crucial test. In that case the defendants claimed that a passenger was bound by terms stated on a cloak-room ticket of which terms he was ignorant. The Lord Justice asked whether the defendants had done what was sufficient to give notice of the term to the person or class of persons to which the plaintiff belonged. He said the question was one of fact and that the court should examine the circumstances of each case. In this case then, can it be said that the invoice which was sent to the plaintiffs three months after the contracts were entered into formed part of those contracts and thus entitle the defendants to invoke the exemption clauses? In my judgment the time when the notice of the clauses is alleged to have been given is very important. Indeed no excluding or limiting term will avail the party seeking its protection unless it has been brought adequately to the attention of the other party before the contract is made. I do not think a belated notice serves much use to any contract.

In the case of Olley vs. Marlborough Court Ltd. (1949) 1 KB p.32, a husband and wife arrived at a hotel as guests and paid for a week's board and residence in advance. They went up to the bedroom allocated to them and on one of its walls was a notice that "the proprietors will not hold themselves responsible for articles lost or stolen unless handed over to the manageress for safe custody". The wife then closed the self-locking door of the bedroom, went down stairs and hung the key on the board in the reception office. In her

absence the key was wrongfully taken by a third party who opened the bedroom door and stole her furs. The Court of Appeal held that the contract was completed before the guests went up to their room and that no subsequent notice could affect their rights. The defendants could not therefore incorporate the notice in the contract.

Yet another case in point is probably that of Burnett vs. Westminister Bank Ltd. (1966) 1 QB 42 where the plaintiff had for some years accounts at two of the defendants' branches of a Bank - branch A and branch B. A new cheque book was issued to him by branch A, on the front cover of which was a notice that "the cheques in this book will be applied to the account for which they have been prepared." These cheques were in fact designed for use in a computer system, operated by branch A, and "magnetized ink" was used which the computer could "read". The plaintiff knew that there were words on the cover of the cheque book, but had not read them. He drew a cheque for £2,300 but crossed out branch A and substituted branch B. The computer could not "read" the plaintiff's ink. He later wished to stop the cheque and told branch B. Meanwhile the computer had debited his account at branch A. He sued the defendants for breach of contract, and they pleaded the limiting words on the cover of the cheque book. In that case it was said by Mocatta, J. that the cheque book was not a document which could reasonably be assumed to contain terms of the contract, and that the defendants had not in fact given adequate notice to the restriction of the plaintiff. In the instant case it is to be noted that the plaintiffs began dealing with the defendants in 1983 and that the transactions now in question were in December, 1984. It is not clear and no evidence has been led by the defendants to show how many business transactions they had with the plaintiffs between 1983 and 1984. It could have been one or more, this court does not know. No copy invoices of those previous transactions were exhibited to show that they contained the exemption clauses now being relied on. The defendant alleges that similar ones were sent to the plaintiffs while PW1 said neither he nor any of the plaintiffs ever saw the notice in respect of the exemption clauses before the contracts in respect of this case. It may well be that there never was no such notice on the earlier invoices. In any case, it is not for the plaintiffs to prove that this notice was not there it is on the other hand the duty of the defendants to prove that at the time the two contracts in question were being entered into the plaintiffs were well aware of the exemption clauses being relied upon. It indeed is the rule of evidence that the point in issue is to be proved by the party who asserts the affirmative; hence the maxim: incumbit probatio qui dicit, non qui negat. Exhibit D4 came after the contract and cannot be relied upon.

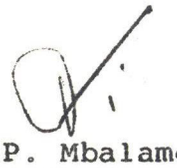
It is in my judgment pertinent that these Courts use the rule enunciated in the case of Spurling vs Bradshaw with caution and care. It is not in my judgment an exception to

any rule regarding the formation of a contract. It is in accordance with the rules of the formation of a contract. What that case actually held is that if in the circumstances a court found on facts before it that two parties had dealt with each other for some time and the other had throughout availed himself of an exclusion or limiting clause then the court may under such circumstances hold that in a subsequent transaction both parties were aware or should have been aware of the fact that that contract was subject to the exclusion clauses being relied on by the other party.

In conclusion it is my considered view that the plaintiffs cannot be said to have been aware of the exclusion clauses contained in the Standard Conditions of Business of the Clearing and Forwarding Agents Association of Malawi. The plaintiffs must succeed with costs.

I award the plaintiffs a sum of K5,500.00 in respect of the 1 carton of garments, K1,545.20 in respect of the 10 tyres and a sum of K2,348.40 being loss of profit as claimed.

PRONOUNCED in open Court this 17th day of February, 1988 at Blantyre.



R.P. Mbalame
JUDGE