SUPREME COURT OF QUEENSLAND

CITATION:	*Topaloglu v UPS SCS (Australia) Pty Ltd* [2011] QSC 217
PARTIES:	**MITHAT TOPALOGLU** (plaintiff) **v** **UPS SCS (AUSTRALIA) PTY LTD** (defendant)
FILE NO:	11997 of 2003
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 August 2011
DELIVERED AT:	Brisbane
HEARING DATES:	31 May, 1 and 2 June 2011
JUDGE:	Applegarth J
ORDERS:	**Judgment for the defendant.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – OFFER AND ACCEPTANCE – ACCEPTANCE – GENERALLY – where plaintiff engaged defendant freight forwarding company to arrange for a container of goods to be shipped to Izmir, Turkey – where plaintiff alleged an oral contract for "door-to-door" delivery – where defendant alleged that the contract was on written terms contained in a series of faxes sent to the plaintiff – where written terms referred to delivery only to Izmir Port – where plaintiff received, packed and sent the required container – where container delivered by a carrier to Izmir Port – where container remained in that port and was allegedly "nationalised" by Turkish authorities – whether plaintiff had accepted the written terms offered by the defendant – whether defendant liable for loss of plaintiff's goods *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 cited *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523 followed *Hobbs v Petersham Transport Co Pty Ltd* (1971) 124 CLR 220; [1971] HCA 26 cited *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd* [2001] NSWCA 313 discussed *Perre v Apand Pty Ltd* (1999) 198 CLR 180; [1999] HCA 36

cited

COUNSEL: N M Cooke QC for the plaintiff
M J Luchich for the defendant

SOLICITORS: Forbes Dowling for the plaintiff
O'Reilly Sever & Co for the defendant

[1] The plaintiff sues the defendant over the loss of goods that were shipped to Turkey in 1998. He claims that he and the defendant entered into a contract by which the defendant agreed to:

(a) transport or cause to be transported a container of "personal effects" from Bundaberg to the address of his brother-in-law in Izmir, Turkey;

(b) arrange and be responsible for the clearance of the goods through customs in Australia and in Turkey;

(c) advise if action was required on the plaintiff's part for any of the above matters to be completed.

[2] The defendant denies that any such contract was made. It carries on business as a freight forwarder, and is not in the business of itself shipping goods from Australia to overseas, or in clearing goods through customs in a foreign country. Its business as a freight forwarder involves making arrangements as agent of the owner of goods with carriers, be they trucking companies, rail carriers, shipping lines or airlines. In this case, the defendant says that it contracted to arrange for the transport of a container that contained the plaintiff's goods from Bundaberg to Izmir Port, and that it performed this contract. Its case is that it agreed to act as the plaintiff's agent in arranging the shipment and discharged its obligation by arranging for the carriage to be carried out by a reputable carrier, P & O Nedlloyd.

[3] The plaintiff sues for breach of contract, in negligence, for breach of bailment and for an alleged contravention of the *Trade Practices Act* 1974 (Cth). Issues of liability turn essentially on disputed questions of fact about the terms agreed between the parties. The plaintiff pleads:

(a) dealings and correspondence between the parties in May 1997;

(b) dealings and correspondence between the parties in January 1998, including letters and facsimiles dated 5, 6 and 7 January 1998; and

(c) the delivery of a container soon afterwards into which the plaintiff loaded his goods, and paid Queensland Rail for its transport by rail from Bundaberg to Sydney

as the basis of the alleged contract. His written submissions are that the relevant contract "is entirely oral", but this is not his pleaded case, and he should not be permitted to depart from his pleaded case.

[4] Resolution of the plaintiff's claim turns largely upon an assessment of the evidence of the plaintiff and his son (who dealt on the plaintiff's behalf with the defendant's

representatives because of the plaintiff's lack of fluency in English), and the evidence of the defendant's witness, Ms Simpson, about what was said in discussions between her and the plaintiff's son. It also involves a consideration of contemporaneous documents.

[5] There are a number of perplexing aspects of the case that bear upon the credibility and reliability of the evidence given by the plaintiff and his son. One is the description given to the defendant of the goods that were to be shipped, namely "personal effects". In fact, the container held a large quantity of farming equipment, including recently purchased new items to be used in a business that the plaintiff proposed to commence in Turkey, and commercial quantities of consumer items.

[6] Another perplexing feature of a case involving the shipment of goods that the plaintiff claims had a total value in excess of $450,000 is the failure of the plaintiff to retain a copy of the list of the things packed into the container, and to supply such a packing list to the defendant.

[7] A further perplexing aspect relates to the circumstances in which the goods were lost. The container was delivered to Izmir Port in early 1998. The carrier of the goods, P & O, warned the plaintiff about the need for them to be cleared through customs and of the risk of their seizure. The plaintiff claims that the goods were seized by Turkish authorities because of the failure to clear customs within six months. However, the plaintiff became embroiled in an affair involving the payment of monies to individuals in Turkey, who are alleged to have defrauded him, and he commenced legal proceedings in Turkey arising out of this conduct.

[8] For reasons to be given, I have great reservations about the credibility and reliability of the evidence given by the plaintiff and his son. I reject their evidence that the defendant agreed to transport the container and its contents "door to door" so that it would be delivered to the plaintiff's brother-in-law's house in Turkey. I do not accept that the defendant agreed to be responsible for the clearance of the goods through customs in Turkey. On the contrary, I find that the contract was one by which the defendant agreed to arrange for a carrier to transport the container to the port at Izmir. I accept the evidence of the defendant's witness, Ms Simpson, concerning the discussions she had with the plaintiff's son.

[9] The contemporaneous documents and the course of conduct also support the conclusion that the defendant contracted as a forwarding agent, and not as a carrier. The evidence indicates that the plaintiff in fact entered into a contract of carriage with P & O Nedlloyd, and in other proceedings sued P & O Nedlloyd on the basis that it was the carrier.

Background

[10] The plaintiff is 68 years of age. He migrated from Turkey to Australia in 1970 when he was 27. From 1989 to 1998 he farmed small crops in the Bundaberg area. He grew vegetables, herbs and the like, and seems to have been a successful producer. In the late 1990s, the plaintiff decided to emigrate to Turkey. He is not fluent in English, so in these proceedings he gave evidence through an interpreter. Because of his language difficulty, his son Ilker (known as, and referred to in these proceedings as, Alex) acted as his agent in dealings with the defendant.

[11] According to the plaintiff, upon deciding to return to Turkey he asked his son to inquire about arranging for the shipment of his belongings. This was in 1997. Mr Alex Topaloglu looked in the Yellow Pages and enquired of a number of companies, including Fritz-Fliway (the defendant's name at the time). Alex Topaloglu says in his witness statement that the defendant's advertisement in the Yellow Pages represented that it specialised in the transportation of containers overseas. Some reliance was placed on this advertisement as it constituted the first step in, it was alleged, a process by which the defendant held itself out as a specialist in that business. In the plaintiff's written and oral submissions, this Yellow Pages advertisement is the primary basis for the contention that the defendant held itself out as a specialist in the transportation of containers overseas.

[12] The advertisement was not tendered. In any event, the defendant submitted that an advertisement in the Yellow Pages which refers to transporting containers overseas does not amount to holding oneself out as a specialist. I do not consider that this is necessarily correct. A Yellow Pages advertisement may convey the sort of representation that the plaintiff alleges here. However, such a representation may be contradicted or qualified by later communications between the parties of the kind that occurred in this case.

[13] The defendant is not a transportation company but a freight forwarding company. It receives enquiries from members of the general public who wish to transport goods. It then liaises with transport companies and provides a quote to the potential customer. If the customer decides to proceed, the defendant then arranges for the collection and transport of the customer's goods by the relevant transport company or companies. It is for this broking role that the defendant charges a fee. It is not a specialist in the transportation of containers overseas. It is a specialist in arranging for that service to be provided by others. Its entry in the Yellow Pages may have stated otherwise; it may have been located in the shipping or transport or cargo section rather than the freight forwarding or transport agent section, and the difference between those locations may have been significant. But there is insufficient evidence to find, on the balance of probabilities, that the defendant held itself out as a specialist in the transportation of containers overseas. All I have is Alex Topaloglu's statement, made some ten years after the event, that he contacted various companies, among them the defendant, "a company here in Brisbane that said in the advertisement that they specialised in the transportation of containers overseas". In the absence of the advertisement I am not prepared to find that such a representation was made. If it was made, it was qualified by dealings between the parties concerning the services the defendant provided. The course of dealings between the parties did not give rise to a representation that it engaged in the business of itself shipping goods and clearing goods through customs overseas.

Dealings in May 1997

[14] The parties first dealt with each other in May 1997. The defendant's file indicates that on 7 May 1997 it received a freight quotation from P & O Nedlloyd, a shipping company. That quote, sent to the defendant's employee, Ms Rose Simpson, who was the Topaloglus' point of contact with the defendant, indicated as follows:

> "Origin: Brisbane
> Load Port: Sydney
> Discharge Port: Piraeus

Final Destination: Izmir".

[15] The next day, 8 May 2011, Ms Simpson sent a fax under Fritz-Fliway letterhead to Alex Topaloglu which read, relevantly:

> "Thank you for your enquiry on shipping a container of personal effects to Izmir, Turkey.
>
> Seafreight Brisbane to Piraeus Australian $1795.00 per 20'
> Rail & Swinglift cartage to Bundaberg/return Aust. $640.00
> Piraeus Port charge Greek Dracmar (sic: Drachma) 22,100
> Seafreight Pireaus [sic: Piraeus] to Izmir (United States $600.00)
> Fritz processing/handling charge Australian $100.00 per shipment.
>
> Any further information required, please contact me."

[16] In his witness statement, Alex Topaloglu indicates that his enquiry was for a 40 foot container. He also indicates that his dealings with Ms Simpson resulted in, among other things, her stating to him that she would fax him paperwork that set out "the relevant information, including the cost of transport, the hire of the container, transportation and insurance". On its face, this quote indicates that the first charge (to Piraeus) would probably have had to be doubled as it was stated as being for a 20 foot shipment. But it is unclear whether the other transport charges—namely cartage to and from Bundaberg, the charges at Piraeus port, and the charge for freight between Piraeus and Izmir—are given for a 40 foot shipment or a 20 foot one. If any or all of those were to be doubled, the difference in price would have been significant. It is evident, then, that the quote sets out the transportation costs only ambiguously and does not include anything bearing on insurance or container hiring charges. It does, however, indicate that "Fritz" was levying a "processing/handling charge". Alex Topaloglu sought no clarification on any of these matters. He says that was because his father told him "he now had an idea of how much it would cost". But this document gave only a general idea of the cost of shipping to Izmir and said nothing of insurance or container charges. Any accurate idea of the total cost would have required further enquiry to be made.

Dealings in early January 1998

[17] Nothing further was done for around six months. At some stage the plaintiff clarified his shipping needs, and asked his son to contact the defendant again. This time, Alex Topaloglu says that he specified that the goods were to be shipped to his uncle's house at Izmir, not simply the port of Izmir, and that the goods to be shipped were "a lot of farming and irrigation equipment but mostly household items" or words to that effect.

[18] This enquiry resulted in another fax, on 5 January 1998, from the defendant to "Alex". The subject of that fax was given as "Container rates to Turkey". The message reads:

> "Thank you for your enquiry regarding shipping your personal effects to Izmir, Turkey.
>
> Shipping Company have quoted the following rates:-

> Rail Brisbane/Bundaberg/Brisbane including delivery to your house in Bundaberg Metro area.
>
> 20' container: AUD 700.00 – delivery by swinglift truck where container is dropped off on the ground in your yard.
>
> *AUD $1062.00*
>
> 40' container: AUD 922.00 0 delivery by standard truck only (no 40' swinglift) You would need to pack container on the back of the truck. They only give you 1 hour to pack before they start charging extra.
>
> Seafreight: Brisbane port to Izmir port:-
>
> 20' container: AUD 1805.20 Brisbane to Piraeus
> Greek Dracmar 22100 for Piraeus wharf charges
> USD 600.00 Piraeus to Izmir
>
> 40' container: AUD 3402 Brisbane to Piraeus
> Greek Dracmar 32400 for Piraeus wharf charges
> USD 1050.00 Piraeus to Izmir
>
> Fritz-Fliway handling charge/Booking fee and documentation is AUD 100.00
>
> A vessel sails from Australia every week to Piraeus with a transit time of 40 days. Transit time from Piraeus to Izmir is 5 days."[1]

[19] Importantly, the quote is specified as being "Seafreight: Brisbane port to Izmir port". A separate entry is made in relation to rail freight from the plaintiff's residence in Bundaberg to Brisbane port. There is no corresponding entry for whatever other transport was required to take the goods from Izmir Port to the residence of Mr Ahmet Demirhan, the plaintiff's brother-in-law and Alex's uncle. Ms Simpson, on behalf of the defendant, refers in the third person to the "Shipping Company" and, in relation to the Bundaberg transportation, to "they". These expressions, as well as the fact that "Fritz-Fliway" was charging a handling charge and booking fee, tend to indicate that the defendant was representing itself as separate from whichever entity was to provide the transportation services.

[20] There are a number of discrepancies between this fax and the account of its genesis given by Alex Topaloglu. He says that Ms Simpson indicated that it was possible for the container to go by rail from Piraeus to Izmir, as well as by boat. He claims that his response to this was: "Obviously transporting the container by rail will be a lot cheaper than shipping?" or words to that effect. He says that Ms Simpson replied by saying "Yes that's right". Obviously the quote I have set out above makes no reference to any rail cartage between Piraeus and Izmir, only sea freight.

[21] Nor does that quote make any reference to insurance. Alex Topaloglu's evidence is that, in family discussions, "the issue of insurance was very important because my

[1] Italicised portion in handwriting in the original.

father was effectively sending all of his personal belongings to Turkey and did not want anything to happen to them." Yet despite this anxiety, no enquiry was made of the defendant as to why it had failed to mention insurance in its quote when Alex Topaloglu had specifically asked for it. He indicates that he had asked for the quote to include "all costs and insurance" and that, when translating and explaining the quote to his father, he conveyed that the quote was inclusive of all costs and insurances. But the quote provides no basis for Alex Topaloglu holding that belief and conveying it to his father. It specifically itemises the separate costs and charges; no insurance charge is itemised, and the quote is not expressed at any point as being inclusive of insurance or, in fact, inclusive of anything other than what it has itemised.

[22] Then there is the question of "personal effects". On Alex Topaloglu's account, Ms Simpson asked what goods his father was intending to send to Turkey:

> "to which I replied 'a lot of farming and irrigation equipment but mostly household items' or words to that effect.
>
> She asked me 'Do you mean personal effects?' to which I replied 'Yes, if that is what you call them' or words to that effect."

[23] Alex Topaloglu does not encounter the same language difficulties as his father. He spoke confidently from the witness box in fluent English. I find it difficult to accept that someone in his position would so readily accede to describing as *personal* effects the types and quantities of goods that were being transported. Even assuming that the enquiry as to "personal effects" was limited to non-farming items, there was nothing personal about the items the plaintiff was shipping. In ordinary language, "personal" means: "Of, pertaining to, concerning or affecting the individual person or self; individual; private; one's own" (*Shorter Oxford English Dictionary*). The goods to be shipped could not be reasonably or honestly described as consisting of "personal effects". They were of far too great a quantity to be personal or individual or private. They were not effects "personal" to his father but were, in fact, a wide range of new items, in large quantities, that his father had no intention of using or keeping to himself. On the plaintiff's account, he intended to give a large quantity of new consumer items to an extensive network of family and friends. Taking this account at face value, Alex's preparedness to have the goods described as "personal effects" is to his discredit. He was prepared for Ms Simpson to be misled about their true nature, and for her innocently to mislead others into believing that the goods were "personal effects".

[24] Alex Topaloglu claims that Ms Simpson then asked him which items, either farming equipment or personal effects, formed the majority of the shipment. He replied by estimating that the shipment was about 70 per cent personal effects and 30 per cent farming equipment.

> "I then asked her 'Why is that?' to which she replied 'because if your father's personal effects are more in quantity than the farming equipment, it would be easier to say on the documents that they are personal effects. That way you won't have to pay tax duties' or words to that effect."

[25] That statement seems to me to amount to an assertion that the defendant, through its employee, was a willing participant in, or even the instigator of, a scheme to avoid customs duties by misrepresenting the contents of the plaintiff's container. On Alex Topaloglu's account he was content to ask Ms Simpson "to look after dealing with all this for us because I don't have any knowledge or experience with these matters".

[26] But he knew that it was not true to describe his father's container as holding "personal effects" and, on the basis of his evidence, knew that a misrepresentation was to be conveyed to governmental authorities. He then asserts that Ms Simpson volunteered to the effect that the defendant would "organise the clearance of your father's goods through Customs in Turkey. Your father's goods will be classified as personal property so there should be no problems getting a Customs clearance as no duty will be imposed upon the goods". This customs clearance was to be attended to by the defendant's "agents" in Turkey. Alex Topaloglu says that Ms Simpson went into further detail as follows: "Basically Alex, as your father's goods are going 'door to door', whilst the container will go to your uncle's house, customs will come out and inspect the container and if it is cleared and verified, your uncle will then collect the goods from the container" or words to that effect. On Alex Topaloglu's account, the upshot of this conversation was the fax of 5 January 1998.

[27] The plaintiff alleges, in effect, that not only did Ms Simpson represent to Alex Topaloglu that the defendant would be the willing party in misleading the Turkish and Australian customs authorities, but that she also represented that the container would be delivered to his uncle's door and, after that, at some unspecified stage, Turkish customs authorities would pay a house call on his uncle to inspect and clear the goods. This is inherently implausible. Even if it was made, and if Alex Topaloglu accepted and believed it, it would have begged the frightening question of what would have happened once the Turkish authorities inspected the container at Mr Demirhan's property and found it to contain not "personal effects" but capital equipment that could be used, and was intended to be used, to operate a farming business, as well as commercial quantities of consumer goods. That presumably would have created serious legal difficulties for Alex Topaloglu's father and uncle. It is unbelievable that the interests of his near relatives did not prompt Alex Topaloglu to enquire of Ms Simpson about the fate to which she may have been condemning his family.

[28] Ms Simpson's evidence on this issue is as follows. In May 1997, when Alex Topaloglu first contacted her, she inquired what goods were to be shipped, and that he replied: "Personal belongings and household stuff." She says that, in accordance with her common practice, she would have advised the client that she could not give a quote immediately as she would need to enquire with the shipping companies about their rates. She says that this approach would have been informed by the fact that she knows, and knew then, that the shipping companies' currency adjustment factors and bunker adjustment factors fluctuate all the time with the value of the US dollar and fuel prices respectively.

[29] She says that, following this, when next she spoke with Alex Topaloglu in January 1998, she said she would have to check again with the shipping companies for a quote. She recalls that the plaintiff now wanted to arrange cartage from Bundaberg to Brisbane. She says that, upon being informed that the goods were ultimately intended for Mr Demirhan's house, she told Alex Topaloglu words to the effect of:

"You will have to arrange clearance and delivery to your Uncle's place." Alex Topaloglu responded by saying: "That's okay. My uncle can do that and pick them up from the port."

[30] She says that at no time did Alex Topaloglu request door-to-door delivery to his uncle's house. She says that, if he had done so, she would simply have made enquiries accordingly and arranged for a freight forwarder in Turkey to effect that final leg of the container's journey. She says that Alex Topaloglu only and repeatedly referred to his father's shipment as personal belongings and household items. This is supported by her contemporaneous handwritten memoranda of phone calls with him. None of those notes refers to a 70-30 split between personal and farming items. She says that it was no part of the defendant's business to arrange for customs clearance in foreign countries. Such a service would have required considerable expertise and effort on the defendant's part to master and keep up with the customs laws and practices of hundreds of countries around the world, or even with a handful of common destinations.

[31] She says that P & O, the shipping company of which she enquired, provided her with only one quote (by sea) for the Piraeus-to-Izmir leg of the shipment. She says she is relatively unfamiliar with Izmir as a destination and does not know whether rail would have been an option. All she knows is that P & O only offered her sea freight and that, in her experience, it would have offered other routes if others existed.

[32] Ms Simpson has worked in the freight forwarding and shipping industries for approximately 25 years, the last 19 as a freight forwarder. She has worked for four freight forwarding companies, including the defendant. She was forthright in answering questions. When given the opportunity, and before embarking on her oral evidence, she volunteered two corrections to dates contained in her witness statements, which indicates her attention to detail and her concern to be clear and honest in her evidence. She has no interest in these proceedings, having left the defendant's employment some years ago. For the past seven years she has been export manager with another freight forwarding firm. She explained that it was her job to liaise with customers who wish to export freight and then to arrange such carriage with the relevant transport service providers.

[33] Her evidence of how she went about that job in relation to the Topaloglu shipment was reasonable and convincing. It was supported by the objective fact that, whatever the plaintiff and his son believed, or claimed to believe, the defendant company was a freight forwarding company that had no reason to hold itself out as anything else. The defendant was only authorised to customs clear goods as they either entered or left Australia. The defendant was not registered to customs clear goods in any other countries. I am therefore asked by the plaintiff to find that, despite lacking the authority to do so, the defendant or its rogue employee, Ms Simpson, offered to a customer to clear goods through foreign customs and, having done so, made no mention of this in its documents or file, and did not charge for this service. I find that improbable.

[34] The unchallenged evidence of the defendant is that, if it was engaged to ship goods to the door, it would have cut its own house bill of lading in accordance with customary shipping practice. The defendant would have been named as the shipper and its agent in Turkey as consignee on the cargo carrier's bill of lading (in this case

P & O), in order that the cargo carrier and the handlers at the port of destination would know that it was the Turkish forwarding agent who was to collect the container at the port. In fact, the plaintiff's brother-in-law, Mr Demirhan, is given as the consignee, a circumstance consistent with an agreement that it was he who was to collect the goods from Izmir Port, rather than the defendant delivering them to his door.

[35] If Ms Simpson had been asked to arrange door-to-door delivery, she had no reason not to do that, and to quote and bill the plaintiff accordingly. Not only would that course have been a straightforward task and a simple incident of her employment, it would have been beneficial to the defendant as it would have enabled it to charge more for its own services. It is probable that Ms Simpson would have arranged door-to-door delivery if requested, and documented the same. It is unlikely that she took it upon herself to volunteer advice and make misrepresentations whereby the plaintiff was to avoid customs charges through fraud. Her livelihood would have been ruined if things ever went wrong and word got back to her employer that she had advised customers to declare shipments including capital goods, or mixed commercial and personal goods, as personal effects. Her alleged advice about Turkish customs making a house call to the plaintiff's brother-in-law would have had no basis in reality and she had no cause to invent it. Her unchallenged and corroborated evidence was that she is aware of no place where such a practice prevails, and that such a practice is unlikely to exist anywhere. Certainly the plaintiff could point to nothing that would warrant Ms Simpson volunteering the "advice" alleged.

[36] All that is said by the plaintiff against Ms Simpson is that her recall more than a decade after the fact is liable to be faulty (her statement was filed in 2009). It is submitted that the similarly distant recollections of the Topaloglus should be preferred on the basis that arranging a shipment was a novel and highly significant experience for them, whereas for Ms Simpson the plaintiff was just another customer in her daily working routine. Ms Simpson says that she does recall dealing with the Topaloglus because she had trouble in chasing them up to fill out shipping forms and providing a packing list, and had trouble for months in chasing them up for payment of their bill. I accept that those experiences are likely to make this particular transaction stand out from others. Ms Simpson also had the benefit of refreshing her memory from a number of contemporaneous documents held on the defendant's file, some of them in her own handwriting. This contrasts with the absence of any documentation on the plaintiff's side. For all the significance of this transaction, and being anxious about insuring valuable goods against the perils of their journey, neither the plaintiff nor his son kept any records of what transpired. If they are to be believed, they did not keep a list or any other documentation of all that was packed in the container, or enquire about insurance when none was being offered.

[37] Ms Simpson's evidence is supported by the independent evidence of Mr Wallace. He has 40 years' experience in freight forwarding and customs broking, and served on the national board of directors for the Customs Brokers and Forwarders Council of Australia from 1988 to 2007, including a period as Chairman of that organisation.

[38] Mr Wallace's evidence was that Australian freight forwarders such as the defendant are not authorised to arrange customs clearance in a foreign country unless they are registered as an international forwarder/broker in that country and have an office

located in that country from which they could effect that service. The defendant was not so registered in Turkey, nor did it have such an office. Without such registration, the defendant's practice would have had to be as Ms Simpson recounted it - that is, the defendant would have had to engage a Turkish freight forwarder or customs broker to clear the goods at Izmir and deliver them beyond the port to their final destination. As I have indicated, there is no documentation that a request for such services was ever made to the defendant, or that it agreed to provide such a service.

[39] Mr Wallace has never heard of a practice such as Mr Alex Topaloglu claims to have been promised by the defendant, namely that goods could be passed through customs and delivered to premises where, at a later date, they would be inspected by customs authorities. That strengthens the view that such a practice does not exist, and accordingly heightens the improbability that such an arrangement was struck between Mr Alex Topaloglu and Ms Simpson.

[40] Mr Wallace also corroborated Ms Simpson's evidence as to customary shipping practice in relation to the release of a bill of lading upon payment, and the collection of goods at port upon presentation of that bill of lading. He agreed that if a freight forwarder was acting as a contracting carrier, which is what the plaintiff was effectively alleging, it would have cut its own bill of lading. The absence of any indication that such a step was taken supports a finding that the defendant did not represent that it would itself carry the freight. The lack of any evidence that Turkish forwarders or brokers were contacted by the defendant supports the conclusion that no steps were taken to arrange door-to-door delivery because no such service was ever promised by the defendant.

[41] The plaintiff's evidence was inconsistent in a number of respects. For example, in explaining his desire to re-locate to Turkey, he gave evidence that it was because he wished to retire from farming due to his age. This evidence sits uneasily with his desire at the same time to transport a large amount of farming equipment to Turkey. He explained that this was due to the fact that a lot of the equipment he used in Australia was not in use in Turkey, and so would be of substantial value if he went to the effort to ship it over there. However, that does not explain why so much of the farming equipment he packed into his container was brand new. The list annexed to his son's witness statement listed as "new" such items as: drip irrigation (x 5,000), $25,000; generator pump (x 1), $20,000; Makita drill sets (x 5), $5,000; clamp joins (x 1,000), $12,000; drill bits (x 1,000), $25,000. There were many more. The value attributed to all this new equipment totalled in the hundreds of thousands of dollars.

[42] Under cross-examination, the plaintiff conceded that in fact he was intending to continue his farming business in Turkey. This is inconsistent with his witness statement, which referred only to his wish to "retire" from farming due to his advancing age. I find that he knew that the farming and irrigation equipment that he was shipping was not in use in Turkey and would be of substantial value there.

[43] When asked whether he had any documentation for these new purchases, he said that it was all packed into the containers with the goods themselves. No bank statements were produced which might have documented such large purchases.

[44] The plaintiff's evidence was unbelievable in respect of what the freight documentation referred to as his "personal/household effects". The proceedings took a somewhat comical turn when Ms Luchich of Counsel for the defendant started to take the plaintiff through the various items that he claimed fell under that description: four 120-piece dinner sets ($6,000); 15 dining settings (total value $9,750); 20 tap or basin sets ($4,000); 150 hand towel sets ($4,500); 350 pairs of socks ($3,500); 50 make-up sets ($10,000); 100 pairs of assorted underwear ($500). The plaintiff claimed that all of these items were simply personal or household effects. He said in most cases they were to be given to his relatives and friends in Turkey as gifts (in re-examination he indicated that his family in Turkey consisted of "[m]aybe 50 or 60 people"). The 20 new tap or basin sets were "[b]ecause I was going to build a big house in Turkey".

[45] One could add to the foregoing such other items as: $10,000 worth of Tupperware; 30 sets each of male and female swimwear (total value $2,100); 40 pairs of designer sunglasses ($2,000); $2,000 worth of perfume sets; and 60 leather belts ($1,500 in total). The plaintiff also itemised $1,300 worth of 22 carat "Turkish Bangles" (20 items) and 18 carat "Turkish Chains" (three items), all listed as "New", which he was to bring from Australia to his Turkish friends and relatives. Of the large quantities of consumer goods that were packed in his shipping container, he claimed that most of them were presents, and the rest were for him to keep and use personally. His son, Alex, reiterated this claim.

[46] I found this evidence to be incredible, even if the plaintiff did have a family of 50 or 60 people. The plaintiff's son represented to the defendant that these goods were personal or household effects, knowing that that description would be passed to the authorities. Alex Topaloglu's statement refers to a conversation he had with Ms Simpson in which she indicated to him that the description used for the shipment would also be the description for customs purposes. Ms Simpson denies that the conversation took place as described, but for present purposes it suffices to observe that, on the account of the plaintiff and his son, they were content for the shipment to be represented to the authorities as being personal or household effects. Alex Topaloglu claims that Ms Simpson told him that that description would attract more favourable treatment from the authorities than would the inclusion of "farming equipment" or some such descriptor, as the latter would probably require the payment of duties.

[47] The plaintiff was thus prepared to represent to the defendant, to the authorities and to this Court that what he was sending to Turkey was a container of personal or household effects. Leaving aside the farming equipment, when pressed in cross-examination he made no concessions and continued to claim that the other items mentioned above were purely for his own use or were gifts for friends and relatives. The items were in commercial quantities, and I conclude that the plaintiff was, in fact, shipping those goods to Turkey for a commercial purpose. The assertions to the contrary by the plaintiff and his son were unconvincing.

[48] Another matter going to credibility relates to the packing list, particularly the manner of its compilation. On the plaintiff's account, his son compiled a contemporaneous list of everything that was packed into the container. It is claimed that he then placed that list inside the container, without a copy of it being made and without the existence of any other record of what had been placed in the container. A fax from the defendant requested a packing list, and Ms Simpson testified that she

requested the same by telephone on numerous occasions. The container was then sent from Bundaberg to Sydney, where it was shipped on board a vessel on 17 February 1998. The list upon which the plaintiff bases his claim, and which was tendered in these proceedings, was compiled by Alex Topaloglu in September or October 1998, some eight or nine months after the container was packed in late January 1998. Apparently without any record of the purchase of any of the multitude of brand new items, the plaintiff and/or his son were able to recall not just the used items and their quantity—such as 1,000 used stakes and 150 irrigation pipes of 2.5 and 3 inches (and their total value of $18,000)—but also over 100 separate items of recently-purchased new goods and their precise quantities ranging from the single digits (two chain wrenches, five rolls of nylon rope, four wine glass sets), through many items in quantities of tens and hundreds, and all the way up to 2,000 "Nails/Screws/All sorts", 1,000 drill bit pieces and 5,000 items under the heading "Drip Irrigation". The total number of entries specified and quantified in this way was in excess of 150. I have reservations as to whether this list was compiled without reference to documents. If it was, then I doubt its reliability.

[49] Given my reservations about the credibility and reliability of the evidence of the plaintiff and his son, and the favourable view I have of Ms Simpson's evidence, I prefer the evidence of Ms Simpson where it conflicts with the evidence of the plaintiff's son about the content of their discussions.

The facsimile of 6 January 1998

[50] After a further enquiry from Alex Topaloglu, this time dealing with the extra charges for loading the container at Bundaberg, Ms Simpson sent another fax on 6 January. It told Alex Topaloglu that:

> "Trucking Company have advised the following:-
>
> With the 40' container on the back of the truck they allow 1 hour for you to load for the charge of AUD 922.00, which includes the rail charges from Brisbane/Bundaberg/Brisbane.
>
> Any additional time taken to load is charged at AUD 55.00 per hour."

[51] Again, the defendant made reference in the third person to the entity that was to transport the goods, in this case a trucking company. I also note the ongoing lack of any mention of insurance. Alex Topaloglu's statement refers to his and his family's interest in obtaining insurance. Ms Simpson denies that any discussion about insurance ever took place. She says that, if it had been discussed, she would have made the usual enquiries and it would have been itemised in a quote. In particular she states that it is her usual practice to request insurance cover in writing, especially when the goods to be insured are personal effects as there are particular restrictions that apply to that sort of cover. She also points out that the insurer's box in the Shipper's Letter of Instruction that she faxed on 7 January 1998 was scribbled out. She says that that indicates, in accordance with the defendant's normal practice, that there had been no request for insurance by the client (the plaintiff).

[52] I accept Ms Simpson's evidence. I find that there was no discussion about insurance between the parties, and insurance formed no part of the contract between

the parties. There is no evidence for it in the defendant's file, either in the form of communications between Ms Simpson and insurers in obtaining a quote, or in the form of handwritten notes she made in response to Alex Topaloglu's enquiries. It is improbable that Ms Simpson simply ignored Alex Topaloglu's requests for insurance. It is also improbable that, if they were anxious to protect a lifetime's accumulation of possessions, the Topaloglus would not seek clarification or reiterate their requests for insurance when insurance never appeared on the quotes they received.

[53] Of course, effecting insurance would have required the plaintiff and his son to list the items being shipped and their value, and to provide such a list to an insurer or the defendant if it was to effect insurance on the plaintiff's behalf. No such "packing list" was ever given to the defendant for insurance or any other purposes. The failure of the plaintiff and his son to pursue the issue of insurance with the defendant is consistent with their not wishing to disclose to the defendant or the authorities the true nature of the goods that they intended to ship to Turkey.

The facsimile of 7 January 1998

[54] The fax of 7 January 1998 was apparently sent after an indication from the plaintiff, through his son, that he wished to proceed with the quoted arrangement. Ms Simpson says that this fax was sent in order to set in motion arrangements for the collection and transport of the plaintiff's goods by the relevant transport companies. It was sent by Ms Simpson's colleague, Ms Taylor, as Ms Simpson was absent from the office that day. It reads:

> "Dear Alex,
>
> Further to your recent correspondence with Rose Simpson from our office, we have been in contact with the shipping company in relation to having an empty container delivered to your premises on Sunday.
>
> They have advised that if you wish for this to be done, then the charge would increase from AUD $922.00 to AUD $1062.00. They can deliver the trailer there on a Friday and collect it on a Monday. This will give you a weekend to pack the container.
>
> If you wish for us to ship this cargo for you, we will need your assistance with the following 2 items.
>
> Following is our company shippers letter of Instruction. We will need you to complete and sign this form, and fax it back to us along with a copy of your packing list with values for customs purposes.
>
> Also following is an ANZ bank deposit slip. Prior to shipping, the funds for the shipping will need to be deposited into our Bank account, and a copy of the stamped deposit slip faxed back to us as receipt of funds. We will confirm for you the total amount payable when the shipping arrangements have been confirmed.

> Could you please confirm if you would like a container delivered to you, and if you are willing to accept slight increase to have the container delivered for weekend.
>
> Rose is away from the office until Monday, but please feel free to contact me if you have any problems or queries."

[55] Again, this communication draws a distinction drawn between "we" (the defendant) and "they" ("the shipping company"). There is the passage about wishing "for us to ship this cargo for you", but in the context of the letter as a whole this was a reference to "us" *arranging* to ship the cargo, as elsewhere it is made clear that there is a shipping company that has been engaged to do the shipping. Contrary to the assertions of Alex Topaloglu about the defendant taking the lead in labelling the goods as personal or household effects, this fax informs the plaintiff that he has to compile a packing list which will be used for customs purposes. The fax left to the plaintiff the responsibility to disclose and describe the nature of his cargo to the plaintiff.

[56] The seventh of January 1998 was a Wednesday. Ms Simpson's evidence was that the shipment could not be booked formally with the shipping line until the Shipper's Letter of Instruction (sent with the fax of 7 January) or an Interim Receipt had been completed. For some reason, perhaps because there was a delay in receiving the necessary forms back from the plaintiff, the container delivery was not booked for the following weekend. An entry in the defendant's file indicates that, rather, on Monday, 12 January 1998, it arranged for a "change" to the container arrangements. There are undated handwritten notes in the defendant's file that seem to refer to the arrangements for container delivery. "17/1/98" is written, and beneath it is written "Prefer 18/1/98 – Sunday". The latter entry is circled. Underneath that, among other writing, is: "drop off Friday pick up Monday". In any event, the container was booked to be delivered to Bundaberg on Friday, 23 January, and apparently to be collected on Monday, 26 January. The re-booking of the container delivery is consistent with the defendant's account that there was some delay in having the plaintiff fill out and return the Shipper's Letter of Instruction that was faxed to him on 7 January.

[57] There are two handwritten notes in the company file relating to matters at this time. The first contains the plaintiff's name and address and the annotation "Send docs". The second contains Mr Demirhan's name, address and telephone number, and the annotation "Household". Ms Simpson says that this was written as a result of her seeking confirmation in the absence of a packing list that, in accordance with previous discussions between herself and Alex Topaloglu, the goods to be shipped were still household goods belonging to the plaintiff. Her evidence is that Alex Topaloglu said "yes" to that enquiry.

[58] Ms Simpson says that these notes were taken down by her during a telephone conversation with Alex Topaloglu. She telephoned him at some stage after 7 January to enquire as to why he had not completed and faxed back the documents that were requested on that date. Her recollection is that, having not received those documents, she phoned in order to take down the information necessary to book formally the shipment and enable the shipping company to prepare its bill of lading. Accordingly, she took down the aforementioned information by hand. This is corroborated by an Interim Receipt which reflects the handwritten notes. The

plaintiff's name and address appear in the space marked "Shipper", and Mr Demirhan's name and address appears under "Consignee". Beneath the latter entry is another space marked "Notify Party", and in it is typed "As Above" with Mr Demirhan's phone number. In the space for "Number and kind of packages" and "Description of goods" is typed: "1 x 40' container holding: personal/household effects".

[59] Ms Simpson also testified that she disclosed to Mr Alex Topaloglu in her phone call, in accordance with her usual practice, why she was seeking the information. She says that she emphasised that the defendant needed to be paid for the freight so that it was not out-of-pocket in paying the shipping company. The information she obtained was important in order for the bill of lading to be prepared. The bill of lading was important because it would be needed at the destination by whoever was collecting the goods for the plaintiff. Payment was important because, without receiving it, the shipping company would not release the bill of lading. Ms Simpson says that she told Alex Topaloglu these things. She says she told him that she would send him a bill for the freight; that he should follow the instructions she had faxed him on 7 January about making the bank deposit payment; that, when he had paid, she would obtain the shipping company's bill of lading ("which is your contract with them") and forward it to him; that his uncle, Mr Demirhan, would need the bill of lading in order to collect the goods from the port of Izmir; and that she would also return to him, Alex Topaloglu, a copy of the packing list he would send her, but that he must get that to her immediately. She asked if his father's address was where she should send these documents. On receiving Alex Topaloglu's confirmation, she wrote the entry ("Send docs") underneath the plaintiff's name and address.

[60] I find that by that stage, at the latest, a contract was concluded between the parties. Commitments were made to arrange transportation of the goods. The defendant, on behalf of the plaintiff, sent the Interim Receipt to the shipping company as a formal request to prepare a bill of lading. It is unclear as to whether this phone call was preceded by the despatch of the container to the plaintiff and his filling of it with goods, or whether it was the phone call that precipitated those steps. Those steps also constituted conduct indicating an acceptance of the defendant's terms.

The conflicting evidence of the plaintiff about the contents of the facsimile of 7 January 1998

[61] In his witness statement filed in September 2007, Alex Topaloglu says that, upon receiving the fax of 7 January 1998, he assisted his father "in completing all the documents that accompanied the facsimile", and that in doing so he inserted his uncle's name as the recipient of the container, along with the details of his uncle's residence.

[62] The first defence pleadings that appear on the Court file (which for some reason are styled as an "Amended Defence") advert to the faxes of 5, 6 and 7 January 1998. They also rely, in paragraph 25, on an exclusion clause that was contained in the "General Trading Conditions" of the defendant and that, the defendant alleges, was included in the fax transmission of 7 January. That pleading is particularised with reference to "Clause 10 of the Defendant's General Trading Conditions."

[63] That pleading was filed on 10 December 2004 and remained in the defendant's pleading. It is therefore significant that the evidence put on by the plaintiff in September 2007, in particular the witness statement of Alex Topaloglu, refers to receiving the fax, and to Alex assisting his father "in completing all the documents that accompanied the facsimile". That stood as Alex Topaloglu's account until the morning of the trial, when a Reply was filed. Paragraph 29 of that Reply raised for the first time an allegation that the "General Trading Terms" were never received by the plaintiff. It conceded that "some shipping documents" were sent to the Topaloglus, but claimed that the "General Trading Terms" formed no part of the contract between the parties either because that document was not sent *or was illegible*. Alex Topaloglu filed a second supplementary statement at the same time, i.e. the first morning of the trial, which retracted his account as it had stood since September 2007, by stating that "I do not recall having completed any documents as referred to in paragraph 43 of my original statement". He elaborated by stating that he had searched the folder in which his family kept all their documents from the defendant, and that he found no Shipper's Letter of Instruction document in it.

[64] Two documents were tendered that were in the possession of the plaintiff. They were the covering page of the defendant's fax of 7 January and the sheet containing the defendant's "General Trading Conditions". The documents indicate that they were received and printed by the plaintiff's fax machine at 11:55 am on 7 January 1998. That printout also indicates that the "General Trading Conditions" document was marked as page two. The covering page, which states that the facsimile transmission constituted five pages in total, was marked as page four. The "General Trading Conditions" are meant to appear with the Shipper's Letter of Instruction. They are to be read in conjunction with that Letter. The Shipper's Letter of Instruction adverts to them, and indicates that the conditions appear on the reverse side of the Letter of Instruction. In the defendant's file, the Conditions appear as a separate page accompanying the Letter. But both of those documents are photocopies, perhaps made for the purpose of faxing. Other original documents in the company file indicate that the Conditions appear on the reverse side of certain documents issued by the defendant.

[65] Given that ordering, and given that the plaintiff was in receipt of the General Trading Conditions document marked as page two of a facsimile transmission, I infer that the Shipper's Letter of Instruction was faxed to the plaintiff at the same time as the Conditions. I infer that the Letter of Instruction would likely have appeared as page one of the printed transmission. The covering letter sent by the defendant, containing its instructions to the plaintiff as to what needed to be done to confirm and finalise the transaction, was of two pages in total, though the second page merely completed the standard company footer that commenced on the first page. As I have indicated, the first page of that letter, which was transmitted to, and received by, the plaintiff, was page four of the facsimile transmission. It is likely that the other pages in the transmission would have been the second page of the covering letter (most likely as page five of the facsimile transmission), and the copy of an ANZ Bank deposit slip which the defendant meant for the plaintiff to use when making payment (most likely as page three of the facsimile transmission).

[66] I find, on the balance of probabilities, that the full five pages of the facsimile transmission of 7 January 1998 were received by the plaintiff. Two pages of it (or at least, copies thereof) were in the plaintiff's possession at the date of the trial. The cover sheet, which was received, indicated that the transmission constituted five

pages. I think it more likely than not, given the importance of that fax (which was plain on the face of the covering letter received by the plaintiff), that if the plaintiff only received two of its purported five pages, Alex Topaloglu would have contacted the defendant to raise his concern and to register his confusion at receiving only pages two and four of a supposedly five-page fax. The cover letter that he undoubtedly received advised that a Shipper's Letter of Instruction was being faxed in the same transmission. It also advised that a bank deposit form was accompanying the fax. If those documents were not received, or if they were illegible, Alex Topologlu would have contacted the defendant to advise of the problem, or would have mentioned the problem when the defendant next contacted him. The cover letter indicated that the plaintiff's "assistance" with the two forms was needed "[i]f you do wish for us to ship this cargo for you". The plaintiff wanted the cargo shipped, and wanted the defendant to arrange it. Accordingly, if his "assistance" with that process was rendered impossible by a defective facsimile transmission, Alex Topaloglu would have conveyed that fact to the defendant.

[67] Between his original statement filed in September 2007 and his second supplementary statement filed at the opening of the trial, Alex Topaloglu filed a supplementary statement on 16 May 2011 (i.e. fifteen days prior to the trial). That supplementary statement said that he could not recall receiving any of the pages except the first page of the covering letter. Of that page, he says that his version differed from the defendant's version. The differences are inconsequential in that they constitute some minor handwritten notes that were clearly added to the page by someone at the defendant's office at some stage after it was faxed.

[68] Somewhat confusedly, in his supplementary statement, Alex Topaloglu also states that "I recall only receiving four (4) pages of the facsimile in total." So he admits receiving four pages, and to retaining copies of two of them. Those were the two pages produced by the plaintiff at the trial. Clearly he is mistaken on this point. His supplementary statement says that the first page of the cover letter was "only the first page of the facsimile transmission that I received", yet it also accepts that that page was marked as page four, "which suggested to me that it was the fourth page faxed to me." I find that all five pages were transmitted to the Topaloglus. Alex Topaloglu's supplementary statement does not contradict that. It only states that he recalls receiving four pages. The fact that it also states that he cannot recall specifically any of the pages other than page one of the covering letter indicates that his memory on this point is unreliable. The supplementary statement also explains that Alex Topaloglu's son was born on 1 January 1998. He states that:

> "At that time I was under severe stress due to the ill health of my new born son who was diagnosed with a heart murmur, and who was also suffering jaundice and reflux. He was admitted to the children's ward at Nambour General Hospital for approximately ten (10) days."

[69] One starts with Alex Topaloglu's original witness statement of September 2007, which recalled simply that the fax of 7 January 1998 was received, and that he assisted his father "in completing all the documents that accompanied the facsimile received from Fritz-Fliway". His second supplementary statement says that he has no recollection of having completed the documents that he said he completed in his original statement. I prefer the evidence of his original statement. It was given four years closer to the events in question. It is consistent with other evidence, none of which indicates that the Topaloglus had any problem with the documents—for

example, no phone calls or other enquiries were directed to the defendant to inform it that the documents were incompletely received, or that the plaintiff disagreed with anything in them, or needed assistance in filling them in correctly.

[70] The original statement was filed in 2007. The defendant's pleading drawing attention in particular to the "General Trading Conditions" contained in the fax of 7 January 1998 had been on the record since late 2004. Alex Topaloglu and the plaintiff's legal advisors had had almost three years to consider their evidence on this point, and the result was a confirmation that the documents had been received and filled out. They had almost a further four years to ponder this evidence before the trial, and they made no change to it, indicating that their version of events continued to be the same. Then, on 16 May 2011, a supplementary statement asserts an incomplete recollection of the receipt of the fax of 7 January 1998, and raises a claim that the "General Trading Conditions" sheet was illegible. This was the first time that the issue of illegibility was raised. Then, finally, on the morning of the trial itself, came the second supplementary statement that reversed the original statement by claiming that Alex Topaloglu had no recollection of completing any documents that were sent on 7 January 1998.

[71] I decline to give any weight to these assertions. His supplementary and second supplementary statements give support to the new and very late allegations raised in the Reply. If the documents were not received or filled out, there was every reason for Alex Topaloglu to have said so in his original statement. The defendant's pleading of 2004 had specifically drawn attention to those documents, and Alex Topaloglu's attention would have been turned to them accordingly. After almost three years of consideration he declared that the documents were received and filled out. For more than three years that remained his story. There was no adequate explanation as to why the story shifted so late in the proceeding.

[72] The document presented by the plaintiff in evidence is hard to read. The text of the "General Trading Conditions" is tiny, distorted and is obscured by a "snowy" effect. The document is, however, as I have already noted, a *copy* of the document that was produced by the Topaloglus' fax machine. Without explanation, the plaintiff did not produce the original, which would have indicated the state of the document that was received. The document tendered may have been illegible because the fax printout was poor, or because the photocopying of that printout was poor. The photocopy produced on behalf of the defendant was legible. I am not persuaded that the document was illegible in the form that it was received by the plaintiff. However, little turns on this.

[73] The title "General Trading Conditions" at the top of the page is in larger font, and every letter is capitalised. It is legible, even in the plaintiff's tendered copy. The plaintiff received the full five pages of this fax transmission. One of those pages was the Shipper's Letter of Instruction. That document stated that the carriage of the goods was "as provided by the STANDARD TRADING CONDITIONS", and required the "Shipper" (that is, the customer) to agree that "he is aware of and accepts the CONDITIONS as shown on the reverse hereof". There is a space for the shipper or its agent to sign underneath this statement. If that form came through legibly then the plaintiff's attention was being specifically directed to the "General Trading Conditions" document that he received, even if only the title of that document was legible in the form it came through to him.

[74] Ultimately it is of little consequence whether I decide the Shipper's Letter of Instruction and its accompanying "General Trading Conditions" were legible or not in the form they were received by the plaintiff. That is because, even on the plaintiff's account, there was enough before him to hold him bound by those documents if he indicated his assent, regardless of whether or not they were legible. The cover letter he received was legible, and it impressed upon him the importance of the accompanying documents. The letter conveyed that the defendant as offeror was conveying those documents to him because those documents constituted the terms of its offer. So much is indicated by the sentence: "If you do wish for us to ship this cargo for you, we will need your assistance with the following 2 items." The defendant as offeror indicated that its "needs" were: (a) for the plaintiff to complete and sign the Shipper's Letter of Instruction, and to fax it back with a packing list; and (b) for the plaintiff, prior to shipping, to deposit into the defendant's bank account the requisite funds.

[75] A further element of the whole arrangement was for the plaintiff to confirm that he wanted a container delivered to him, and that he was willing to pay the higher price for this as indicated in the cover letter.

[76] In those circumstances, the letter made clear that the terms of the offer were accompanying it. Even on the account most favourable to the plaintiff, an accompanying document was transmitted which, whilst illegible, indicated legibly that it constituted the defendant's "General Trading Conditions". Those two circumstances made it incumbent upon the plaintiff to indicate its disagreement with those terms (if it disagreed), or that it could not agree to the terms because they were illegible (if they were illegible). By proceeding with the transaction, even in the face of illegibility, the plaintiff should be taken to have accepted those terms.

The terms of the contract

[77] The terms of a contract are to be determined by reference to the intention of the parties. That intention is not a subjective matter. It is to be gauged objectively by the standards of the reasonable observer.

[78] The critical issue is whether the plaintiff and the defendant contracted for the latter to arrange the shipping of the former's container to Izmir Port. I find that Izmir Port rather than Mr Demirhan's house was the agreed destination. Irrespective of the legibility of the fax of January 7 1998, it made no mention of the destination of the container. This is because Izmir Port is the only destination ever mentioned in the documents earlier sent by the defendant to the plaintiff. The fax of 8 May 1997 lists the final leg of the journey as "Seafreight Pireaus [sic: Piraeus] to Izmir". The fax of 5 January 1998 gave a quote for "Seafreight: Brisbane port to Izmir port". The bill of lading that the defendant arranged with P & O for the carriage of the plaintiff's goods lists the place of delivery as "Izmir CY Turkey". "CY" is a commonly-used abbreviation for "Container Yard". Mr Demirhan was the consignee. The Interim Receipt that Ms Simpson completed on the plaintiff's behalf, included his name and address in the space marked "Consignee". The unchallenged evidence adduced on the defendant's behalf indicated what that meant in the shipping industry, namely that Mr Demirhan was the person authorised to collect the goods from the port upon presentation of the original bill of lading.

[79] I have already addressed the deficiencies in the plaintiff's allegation that the contract was for "door-to-door" delivery. My preference for Ms Simpson's evidence is supported by the Deed of Release and Indemnity entered into between the plaintiff and Maersk Line UK Ltd, which formerly carried on business under the name P & O Nedlloyd, the company that shipped the plaintiff's goods. In the recitals to that deed, the plaintiff acknowledged the following:

> "Pursuant to a contract of carriage, P & O Nedlloyd Limited carried a container said to contain personal household effects ("the goods") from Brisbane Container Facility to Izmir Container Yard…".

The plaintiff thereby admitted that: (a) the contract of carriage was with P & O Nedlloyd, the shipping company, rather than with the defendant; and (b) that the terms of that contract required delivery only to the Izmir Container Yard, not door-to-door delivery. In a letter of demand dated 11 October 2001 the plaintiff's former solicitors had advised P & O Nedlloyd that "[w]ith the assistance of Fritz-Flyway Pty Ltd, our client contracted with you to (sic) the delivery of goods to Izmir in Turkey" and referred to the Bill of Lading.

[80] I find that the plaintiff contracted with P & O Nedlloyd to have the goods delivered from his house at Bundaberg to the port of Izmir, and that the defendant arranged such a contract in accordance with the plaintiff's request. The defendant acted as the plaintiff's agent in arranging this contract of carriage between the plaintiff and P & O Nedlloyd.

Acceptance of the defendant's terms

[81] The plaintiff relies on the fact that he did not "comply" with the offer in the manner set out in the defendant's fax of 7 January 1998. That he did not so comply was said to indicate that he was not at all bound by the written terms proffered by the defendant but was instead bound by a completely different set of terms as allegedly contained in Mr Alex's Topaloglu's phone calls to the defendant.

[82] I have set out elsewhere in these reasons the "assistance" that the defendant said it needed if it was to proceed to arrange the plaintiff's shipping. As submitted by the plaintiff, three steps can be identified. The first was that the Shipper's Letter of Instruction had to be completed, signed and faxed back to the defendant. The second was that a packing list had to be compiled and faxed to the defendant. The third was that the plaintiff, prior to shipping, had to deposit into the defendant's bank account the amount payable and to fax a stamped deposit slip to the defendant as proof of payment. The plaintiff submits that, if all three steps were not taken, the offer was not accepted.

[83] The plaintiff invites me to find that his failure to follow these "terms" of the offer indicated non-acceptance. He also invites me to hold that the defendant's act of sending a quote for shipment to "Izmir port" indicated acceptance of the plaintiff's putative oral term that delivery was to be to the door of Mr Demirhan.

[84] Acceptance is a question of fact to be determined in all the circumstances. It can be express or implied. The necessary implication can be drawn from the conduct of the offeree. In this case, acceptance or otherwise is to be gauged objectively by reference to the standards of a reasonable person having regard to the parties' conduct and to the faxes sent from the defendant to the plaintiff. There were no

faxes sent from the plaintiff to the defendant. The faxes sent from the defendant made plain the terms upon which the defendant was prepared to proceed, and might be characterised as an offer.

[85] On his own account, Alex Topaloglu's response to those offers was not to submit the oral terms for which he contends. Counsel for the defendant took Alex Topaloglu through the various documents issued by the defendant, none of which referred to transporting the goods to his uncle's house. All of them, rather, listed Izmir Port as the destination. He maintained, however, that Ms Simpson had earlier represented orally that the container would be delivered to the door of his uncle and, furthermore, that it was once it had been delivered there that the Turkish customs authorities would inspect it. When confronted with the discrepancies between the oral terms he claimed and the written terms of the defendant's documents, he conceded that the lack of any reference to delivery to the door of his uncle was "quite weird". Despite that apparent weirdness, as Ms Luchich of Counsel pointed out, he took no steps to clarify the matter or to insist that the documentation reflect a door-to-door arrangement. The matter is not explained away by his claim in the witness box that he might only have received a copy of the relevant document some days, even a week or two after his parents did. That claim is false in light of the fact that his own witness statement attests that he immediately followed up the fax of 5 January with further enquiries about loading the container at Bundaberg, and that he received another fax in response on 6 January.

[86] A reasonable observer, noting the lack of any mention of door-to-door delivery after 5 January 1998, would take the plaintiff to have been accepted that Izmir Port was to be the destination. Given the absence of insurance from the quote, and no mention of it from the plaintiff's side, insurance was not part of the agreement.

[87] The "General Trading Conditions" were included in the fax transmission of 7 January 1998. The plaintiff raised no objection to the terms conveyed with it, and did not mention to the defendant that the terms had failed to come through legibly.

[88] The plaintiff did not fax any completed forms to the defendant, nor did he fax a packing list, nor did he make a deposit into the defendant's bank account. The plaintiff's evidence is largely silent on what happened next. Ms Simpson's evidence is that, these things not having been done, she telephoned Alex Topaloglu. She had to hand the fax of 7 January 1998. She says that she reminded him about that fax and the instructions contained it. Alex apologised for not having sent the forms. She then said that she would need to take down the necessary information over the phone there and then so that the bill of lading could be prepared and the shipment finalised with P & O. Alex Topaloglu indicated his assent to this course by saying "Okay". She then requested, and Alex Topaloglu provided, information about his father's address and his uncle's name, address and telephone. Alex Topaloglu's evidence is that he cannot recollect this discussion, but that he does recall being asked by the defendant to provide, and himself providing, the addresses of his father and uncle. I accept the evidence of Ms Simpson that this discussion took place, and I find that it was on this occasion that Alex Topaloglu provided the relevant names and addresses of his father and uncle, and also his uncle's phone number. Ms Simpson took down these details by hand.

[89] She confirmed with Alex Topaloglu that the goods to be shipped were the plaintiff's personal or household goods. She wrote "Household" on one of the pieces of

notepaper. Ms Simpson says she then explained that the plaintiff needed to pay for the freight; that if payment was not made the shipping company would not release the original bill of lading; and that without the bill of lading Mr Demirhan would not be allowed to collect the goods at the port. She told Alex Topaloglu that he needed to send the defendant a packing list immediately. He responded by saying "Okay Rose." She told Alex Topaloglu that she would be sending the bill for the final amount shortly. Alex Topaloglu confirmed that the defendant's bill for services, as well as the original bill of lading (eventually), should be sent to the plaintiff's address. Ms Simpson's handwritten notes indicate that she wrote "Send docs" under the plaintiff's address.

[90] Ms Simpson's testimony, corroborated by handwritten notes and documents on the defendant's file, indicates that, after her phone call with Alex Topaloglu, she prepared an Interim Receipt, which was the other document (along with a Shipper's Letter of Instruction) that a shipping company could use in order to prepare a bill of lading. She contacted a "Tony" at P & O to arrange an Export Receival Advice, which she subsequently received. The latter gives 3 February 1998 as the "Date Packed". In the meantime, a container had been delivered to the plaintiff's property at Bundaberg, he had packed it full of goods, and he had sent it to Sydney via Brisbane to be loaded onto a ship.

[91] The only reasonable interpretation of this sequence of events is that the plaintiff had accepted the defendant's terms as contained in its faxes of 5-7 January. He had failed to send a completed Shipper's Letter of Instruction and packing list. But when Ms Simpson followed him up on the matter, he provided the information necessary to enable the arrangements to proceed. Nothing was said in that phone call that derogated from the terms sent in the defendant's faxes. That phone call, and the plaintiff's conduct in receiving, packing and despatching the container that was sent to him by the defendant, plainly indicate an agreement to proceed on the defendant's terms.

[92] In *Brogden v Metropolitan Railway Co*, Lord Hatherley said that a "binding and firm agreement between the parties" could arise

> "if it should be found that, although there has been no formal recognition of the agreement in terms by the one side, yet the course of dealing and conduct of the party to whom the agreement was propounded has been such as legitimately to lead to the inference that those with whom they dealt were made aware by that course of dealing, that the contract which they had propounded had been in fact accepted by the persons who so dealt with them."[2]

That is the case here. The plaintiff did not derogate in any way from the terms contained in faxes sent to him over three consecutive days. An objective bystander would conclude that he accepted the terms which were put to him by the defendant. As McHugh JA (as he then was) stated in *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd*: "The ultimate issue is whether a reasonable bystander would regard the conduct of the offeree, including his silence, as signalling to the offeror

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2 (1877) 2 App Cas 666 at 682.

that his offer has been accepted."[3] I find that a reasonable bystander would conclude that the defendant's offer had been accepted.

[93] The plaintiff had ample opportunity to reject the offer constituted by the defendant's faxes of 5-7 January 1998. Not only did he not reject that offer, he proceeded to take the benefit of it by accepting, packing, and forwarding the container that the defendant arranged to be delivered to him. He also, through his son and agent, gave the information necessary for completing an Interim Receipt, which conduct constituted effectively an instruction to proceed to arrange the shipment.

[94] The plaintiff points to the non-compliance with the three "steps" for acceptance required by the fax of 7 January 1998. But this did not amount to a rejection of the defendant's terms, only to the manner of acknowledging them.[4] He did not take two of the three steps, and he was very dilatory in making payment. But he did not hesitate in accepting the benefit of the offer in full knowledge of the terms on which it was offered. Moreover, though he required repeated reminders and a much longer time than the offeror wanted him to take, he paid the full amount billed to him for the services provided on those terms, without any objection to them.

[95] The same conclusion would be reached even if I had found that the "General Trading Conditions" sent by the defendant with the fax of 7 January 1998 were not received by the plaintiff, or were not received in a legible form. In *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd*,[5] an engineer carried out the construction of a pavement area at certain premises. The construction was faulty because the engineer was never properly informed by the architect of the necessary specifications to which the pavement was to be built. The architect and engineer were found liable in negligence. The engineer appealed in reliance on an exclusion clause. The clause was contained in certain standard engineer's Conditions of Engagement which were adverted to in a letter from the engineer to the architect (who was acting as agent of the land owner). The architect replied requesting a copy of the Conditions of Engagement "for [the owner's] information and approval". The owner, being copied in to all correspondence, thus knew that the Conditions of Engagement were being proffered as the engineer's terms. But the terms were never forwarded to him or to the architect or to anyone else. As Meagher JA observed, if things had stopped there, there would have been no contract.[6] The owner's response to the offer was a conditional acceptance (i.e. a counter-offer) dependent upon the owner's approval of the Conditions of Engagement.

[96] But things did not stop there. The engineer proceeded to perform its works. In those circumstances, the owner having proceeded to obtain the benefit of the engineer's offer even though it had not received a copy of the Conditions of Engagement which it knew were part of that offer, it was bound by the exclusion clause and other terms which it had never seen. The Court applied the principles contained in *Empirnall Holdings*.[7]

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3 (1988) 14 NSWLR 523 at 535.
4 cf *Empirnall Holdings*, ibid at 536.
5 [2001] NSWCA 313.
6 Ibid at [16].
7 Ibid at [16] per Meagher JA, and at [79]-[80] per Giles JA.

[97] The same reasoning applies to this case. The plaintiff knew that the defendant intended that the "General Trading Conditions" be sent, and that the defendant faxed them. Only the plaintiff could have known whether the fax came through legibly or not. Viewed objectively, the plaintiff accepted the benefit of the defendant's services without mentioning the "General Trading Conditions". He should be taken as indicating that he had accepted the offer contained in those conditions, along with the other faxes sent to him. He had notice of the terms, and the defendant had done all it could to give him such notice. The fax of 7 January indicated that it consisted of five pages, and that a Shipper's Letter of Instruction was included. The Shipper's Letter of Instruction indicated on its face that it was subject to the "General Trading Conditions". If those conditions were illegible, the plaintiff had the Shipper's Letter of Instruction to draw his attention to them, and he could have raised the matter with the defendant. If the Shipper's Letter of Instruction was illegible, he had the defendant's cover letter to draw his attention to it. The cover letter was incontestably both legible and received by the plaintiff. Any matters of legibility could only have been known by the plaintiff, and if he wished to rely on them it was incumbent upon him to raise them before proceeding to indicate, by his conduct, his acceptance of the offer and his receipt of the benefit of it.

[98] Alex Topaloglu's statement recounts an alleged discussion with an employee of the defendant "around this time". In the course of that discussion, he was allegedly informed of "the process by which my uncle would receive the goods":

(a) the shipping documents would be issued by the defendants and sent to Mr Demirhan in Turkey;

(b) when the container arrived in Izmir, Mr Demirhan would take those documents to the defendant's agent in Turkey along with ID;

(c) at this point Alex Topaloglu enquired as to where Mr Demirhan was to go with the shipping documents. He was allegedly told that the place to go was "the international port where all the containers were unloaded"; and

(d) the defendant's agents would arrange for the goods to be cleared through customs and then delivered to Mr Demirhan's address.

[99] I decline to find that this conversation took place. I find Alex Topaloglu to be an unreliable witness. In addition, as to (a), there was uncontradicted evidence from the defendant that the practice in the industry is for the shipping company to issue the relevant documents, chiefly a bill of lading. The defendant had no capacity to issue shipping documents as it was not a shipping company but a freight-forwarder. It had no reason to make any representation to the contrary. As to (d), the defendant was not registered to clear goods through foreign customs and had no cause to represent otherwise. I have already rejected the claim that the contract was for delivery to Mr Demirhan's door. I note in passing, too, the contradiction between point (d), which appears in paragraph 45 of Alex Topaloglu's statement, with the contents of paragraph 27 of that same statement, wherein he attests that the process explained to him was that the goods would be delivered to the door of his uncle and then Turkish customs would come out to inspect the goods.

[100] The defendant contacted Alex Topaloglu on numerous occasions to remind him that until payment was rendered, the bill of lading would not be released to him and Mr Demirhan would therefore not be able to collect the goods at the port of Izmir. No evidence records that Alex Topaloglu raised the matter of door-to-door delivery at this time, as he might be expected to if he believed door-to-door delivery to be a term of the contract.

[101] In summary, I find that the plaintiff accepted the terms of the contract as contained in the faxes of the defendant on 5, 6 and 7 January 1998. That acceptance was manifested in the conduct of accepting, packing and forwarding a container delivered by the defendant to his house at Bundaberg. It was also manifested in the conduct of Alex Topaloglu's conversation with Ms Simpson some time after 7 January, which conveyed the plaintiff's wish to proceed with the arrangement contained in the faxes of 5-7 January 1998.

[102] In terms of the three steps necessary for acceptance, as formulated in the plaintiff's submissions:

(1) The first step, filling out a Shipper's Letter of Instruction, was not performed, but the plaintiff was prepared to achieve the same end by providing the information necessary for the defendant to complete an Interim Receipt on his behalf, and the defendant accepted this course in lieu of a letter.

(2) The second step, providing a packing list, was not performed. But the plaintiff confirmed the nature of the goods as household effects and confirmed that he would send a packing list immediately.

(3) The third step, depositing funds into the defendant's account was not performed. But having told the plaintiff, through his son, that the goods would not be able to be collected at Izmir Port until payment had been made (and the bill of lading consequently released), the defendant was willing to proceed on the basis that the retention of the goods at Izmir port would provide sufficient motivation for payment to be made.

[103] A handwritten note in the defendant's file seems to evidence a telephone conversation between Ms Taylor, an employee of the defendant and a colleague of Ms Simpson's, and Alex Topaloglu. It reads:

> "Booked Container with Russell ~~Smith~~ Jones.
>
> Container will be
>
> Alex due back in Bundaberg 16/2. Will fax stamped deposit slip + SLI then."

[104] The latter half of that note indicates that a phone conversation was had in which Alex Topaloglu agreed to follow steps one and three, namely making payment by way of bank deposit and completing the Shipper's Letter of Instruction. This is evidence that strengthens my view that the plaintiff accepted the terms of the defendant's offer, even if that acceptance was not followed by completion of the steps that the defendant initially outlined. Ms Simpson's evidence, which I accept,

is that the transaction proceeded because Alex Topaloglu undertook to deposit the necessary funds and fax a completed deposit slip to the defendant.

[105] As to the first part of that note, it is in the same handwriting and seemingly written by the same pen. It appears as if it may have been written at the same time as the other writing. If it was, it strengthens the finding that the contract was concluded with that phone conversation, as it indicates that upon Alex Topaloglu giving the aforementioned undertakings, the defendant proceeded to arrange with P & O (of whom Mr Russell Jones was an employee) for the delivery of a container to the plaintiff's Bundaberg address. That accords with another entry on the defendant's file, a fax of 12 January 1998, in which Ms Taylor instructs Mr Jones to change the date of delivery of a container to Bundaberg to 23 January.

[106] In short, insofar as the plaintiff did not comply with the terms of acceptance laid out in the fax of 7 January 1998, the subsequent dealings between Ms Simpson and Alex Topaloglu made it clear that the defendant was prepared to proceed without the Shipper's Letter of Instruction or the packing list. The plaintiff's acceptance of the defendant's terms was indicated by his proceeding to receive, load and return to Brisbane the container sent to him at Bundaberg. The defendant's preparedness to proceed without the Shipper's Letter of Instruction or a packing list is indicated by the fact that it proceeded to complete an Interim Receipt and to arrange shipping with P & O.

Summary – findings in relation to the plaintiff's claim in contract

[107] By way of summary, I conclude that the defendant did not tell Alex Topologlu that the goods would be delivered "door to door". I also reject as unreliable and incredible Alex's evidence that Ms Simpson told him that the container would go to his uncle's house and customs officials in Turkey would go to that house and inspect the container. No experienced export manager would suggest that Turkish customs would make such a "house call", and Ms Simpson had no reason to make such an assertion.

[108] The defendant did not agree to arrange, or to be responsible for, the clearance of the goods through customs in Turkey. This was not part of its business. If it had agreed to arrange for such services, then it would have documented the transaction differently, engaged agents and charged for their services.

[109] The plaintiff, and the plaintiff's son as his agent, did not disclose to the defendant the nature of the goods that were to be shipped, but he permitted the defendant to proceed on the basis that the goods being shipped were personal effects, including some equipment that had been used on the plaintiff's farm in Bundaberg. The defendant was not told the true nature of the goods being shipped.

[110] My findings are based, in part, upon my unfavourable view of the credibility and reliability of the plaintiff and his son as witnesses. Their account of their dealings with the defendant is not supported by contemporaneous documents. It is inherently improbable that the defendant promised to arrange for the container to be transported "door to door" and to clear customs in Turkey, but made no record of these arrangements and took no steps for the promised transport to occur. I accept the evidence of Ms Simpson. Her evidence was given in a clear, careful and impressive manner. Her recollection was refreshed by reference to the file. Her dealings with the plaintiff and his son were sufficiently unusual for her to recall

them. I do not accept the plaintiff's submission that I should prefer the recollections of the plaintiff and his son over the evidence of Ms Simpson because, for the plaintiff, "this has been a traumatic event" about which his son would have "a vivid memory", whereas this was only one of many transactions for Ms Simpson. The accounts given by the plaintiff and his son are unreliable and in many respects incredible.

[111] Ms Simpson had reason to recall this transaction. The plaintiff proved to be a "problem client" (a description used by Ms Simpson's manager in a communication with her in April 1998). The plaintiff and his son failed to supply a requested packing list or to make payments when requested. When they eventually paid, Alex attended Ms Simpson's office on 15 June 1998, pulled out "a wad of assorted dollar notes in cash and paid the total amount owed in cash". This was an unusual event for Ms Simpson. Ms Simpson had earlier warned Alex Topaloglu of the consequence of not paying the freight, including storage and other charges and the risk that the goods could be seized. After P & O raised the same topic in August 1998, Ms Simpson again contacted Alex Topologlu and told him that his uncle needed to pick up the goods from the port or they would be seized. This was an unusual and problematic transaction for Ms Simpson and I accept her recollection of it.

[112] In summary, the plaintiff has failed to prove its case as pleaded, or indeed as argued, concerning the terms of the contract. The defendant has satisfied me that its contract with the plaintiff was as alleged by it, namely one in which it contracted to arrange for the transport of a container of the plaintiff's goods from Bundaberg to Izmir Port. It acted as a forwarding agent. The plaintiff contracted with P & O Nedlloyd to act as carrier.

[113] The defendant performed the contract that it made with the plaintiff. The plaintiff's claim for breach of contract fails.

Negligence

[114] The plaintiff's pleading in negligence is dependent upon a number of the facts set out in paragraphs 4 to 9 of his Amended Statement of Claim, including the allegation that the parties entered into "the carriage contract" for which the plaintiff contended, and which I have rejected. On the basis of these matters, the plaintiff in paragraph 10 of the Amended Statement of Claim alleges that the defendant owed the plaintiff "a duty to exercise reasonable care, skill and diligence in relation to its obligations under the carriage contract, its performance and any advice given to the Plaintiff in relation to the transportation of his goods to Turkey, including the clearance of his goods through customs in Turkey."

[115] The plaintiff submits that a duty of care arose out of the implied term that the defendant would do all things necessary to enable the plaintiff to have the benefit of the contract. In particular, it submits that the defendant should have: (a) advised the plaintiff to engage a customs agent in Izmir to clear the cargo and deliver the goods to Mr Demirhan's premises, or formally to appoint Mr Demirhan as his agent or proxy so as to have enabled Mr Demirhan to take possession of the goods at Izmir port; and (b) advised the plaintiff of a six-month time limit on the collection of the goods.

[116] I have found that there was no carriage contract, as alleged by the plaintiff. In the circumstances, the pleaded basis for the plaintiff's negligence claim is not established. For completeness, however, I should address the issue of negligence on the assumption that the contract entered into between the defendant and the plaintiff gave rise to a duty of care. This assumption is contentious in the light of the express provisions of the contract. The implication of a term to do all things necessary to enable the other party to have the benefit of the contract does not give rise to the duty of care contended for. The plaintiff cites *Perre v Apand Pty Ltd*[8] in support of the proposition that the requirements for a duty of care are satisfied in this case. However, that authority does not support a duty of care in this case. If the plaintiff wished the defendant to be subject to a duty to exercise reasonable care, skill and diligence in relation to its obligations under the contract, then he should have negotiated such a term, or declined to contract with the defendant if it would not agree to such a term. In this sense, the plaintiff was not vulnerable and an important factor supporting the recognition of a duty of care is not established. If, however, the defendant was under a duty to exercise reasonable care, skill and diligence in relation to its obligations under the contract, notwithstanding the express terms of the contract, then the defendant performed its contractual obligations and no breach of duty is established.

[117] If a duty of care extended to a duty to exercise reasonable care, skill and diligence in providing any advice to the plaintiff in relation to the transportation of his goods to Turkey, then I am not persuaded that there was any breach of this duty. The defendant did not undertake any responsibility to arrange for the plaintiff's goods to be cleared through Turkish customs. It fell to the plaintiff to arrange for the collection of the goods from the port. If the plaintiff wished to clear the goods through Turkish customs, then he did not require the defendant's advice about the possibility of engaging a customs agent in Izmir to do so. The contract of carriage was between the plaintiff and P & O Nedlloyd and, as matters transpired, P & O Nedlloyd advised the plaintiff of the importance of clearing customs. Precisely what the plaintiff did in order to clear customs in Turkey is not adequately explained by him. It was no part of the defendant's duty under its contract, or under the general law, to advise the plaintiff in relation to procedures to clear customs in Turkey. The defendant adequately informed the plaintiff of the importance of giving the original bill of lading to the consignee. It was no part of its duty to advise the plaintiff with respect to customs procedures in Turkey.

[118] As to advising the plaintiff of a six month time limit on the collection of the goods in Turkey, and that they were liable to be nationalised after that time, there is no basis to conclude that it fell within any duty of care, owed by a freight forwarder such as the defendant to a customer such as the plaintiff, to provide advice in relation to Turkish law. The defendant did not hold itself out as a specialist in clearing overseas customs.

[119] Ms Simpson did in fact advise of the danger of the goods being seized, albeit not by reference to a specific Turkish regulation. For reasons best known to the plaintiff, there was a substantial delay in payment of the freight, a step necessary in obtaining the goods, and then in taking steps to have the goods collected and cleared through Turkish customs. By letter dated 5 August 1998 P & O Nedlloyd advised the plaintiff:

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[8] (1999) 198 CLR 180, [1999] HCA 36.

> "We have been advised by our office in Izmir that the above shipment currently in Izmir wharf, is soon to be seized by customs in the near future. To ensure there are no problems, we would recommend that immediate action be taken to take delivery of the container from the wharf, or someone should contact customs and our office in Izmir to advise what you intend to do. Unfortunately we have no control over the seizure of the cargo as it has been there for some period of time."

The plaintiff contended that he did not receive the letter until September. However, I accept the defendant's submission that the plaintiff saw a general practitioner on 12 August 1998 in response to having received it.

[120] The plaintiff gave confusing and inconsistent evidence concerning the steps taken by him to clear the cargo through customs. The plaintiff's statement claims that he arrived in Turkey on 8 October 1998, and later found out "that the goods had already been nationalised by the Turkish government". The Deed of Release and Indemnity between the plaintiff and P & O's successor, however, recites that the goods were nationalised at some date after 17 February 1999. A paragraph in the letter from his solicitors in October 2001 discloses that the plaintiff was required to pay a release fee from "various warehouse officials" in order to obtain access to his container. The letter indicates that he paid this fee with no result, and that he had instituted separate proceedings "in relation to the fraudulent claims by these officials". There is a further document, apparently under the hand of the plaintiff's Turkish solicitor, naming two persons who had allegedly "swindled" the plaintiff. Allegations of fraud are levelled, to the effect that the two named persons required of the plaintiff a supposed "storage expense" at the customs depot at Izmir, but that, when records were checked, the storage expenses were not paid, with the result that the plaintiff's goods continued to be detained in customs.

[121] The plaintiff gave no frank evidence concerning the steps taken by him to clear the cargo through Izmir Port, and I am not satisfied that the goods were seized or "nationalised" as alleged in his pleading because the goods were not claimed and cleared by about 1 October 1998, by which time seizure of the goods pursuant to Turkish customs law was effected. The plaintiff's misleading description of the contents of the container as being personal or household effects strongly suggests that he found himself in a difficult position in having either his brother-in-law or a customs agent clear them through customs. Many of the items in the container were brand new, including farming and irrigation equipment, and the container held commercial quantities of consumer goods. If the goods were in fact seized by Turkish authorities, then they may have been seized because of a failure to declare them properly. In any event, I am not satisfied that any failure to advise the plaintiff to engage a customs agent in Izmir, or to advise specifically about the six month time limit on collection, made a difference.

[122] In summary, if an incident of the contract entered into between the plaintiff and the defendant was a common law duty to exercise reasonable care, skill and diligence in relation to the defendant's obligations under the contract, then the plaintiff has failed to establish a breach of duty. The defendant performed its contract. The advice given by it to the plaintiff in relation to the transportation of the goods has not been shown to have been inaccurate, or given with a lack of reasonable care,

skill and diligence. The plaintiff assumed the responsibility, once the original bill of lading was released to him and sent to his brother-in-law in Turkey, to arrange for the goods to clear the port and to be transported to his brother-in-law's address. It did not fall to the defendant to advise the plaintiff in relation to customs clearances in Turkey, or processes in Turkey by which the goods may be seized if they were not cleared. In any event, the plaintiff was advised of these risks by the carrier, P & O Nedlloyd, and he took inadequate or ineffectual steps in response to that advice to ensure that the goods were cleared through customs. Accordingly, the absence of additional advice from the defendant about customs processes and customs law in Turkey, did not cause the loss of the goods. Finally, the plaintiff has failed to prove that the goods were lost because they were seized by or forfeited to Turkish customs authorities for not having been cleared through customs within six months.

Bailment

[123] Given the findings I have made as to the terms of the contract, and the performance of those terms, the plaintiff's alternative claim in bailment also fails. If the defendant was a bailee of the plaintiff's goods, that bailment was governed by the terms of the contract between the parties and any obligations owed by the bailee were discharged with the performance of those terms.

[124] However, I am not persuaded that the defendant was a bailee of the plaintiff's goods. To constitute a bailment there must be actual or constructive possession of specific chattels. A bailment comes into existence upon a delivery of the goods of one person, the bailor, into the possession of another person, the bailee, upon a promise, express or implied, that they will be re-delivered to the bailor or dealt with in a stipulated way.[9] Possession need not involve immediate physical custody. A party may be characterised as a bailee if it has the right or duty to take possession.

[125] The uncontradicted evidence is that the defendant was never in possession of the container or the goods. The plaintiff has not established that the defendant had the right or duty to take possession of them. He has not established his submission that this is a case of constructive possession. I do not accept the plaintiff's argument that the defendant had constructive possession of the container after it left the Bundaberg farm in the sense that the defendant "controlled its movement". The plaintiff's contract of carriage was with P & O Nedlloyd, and there is no satisfactory evidence that the defendant, as the freight forwarder that had arranged this contract on the plaintiff's behalf, had any entitlement to take possession of the container or its contents. The container's movement was controlled by the contract that the plaintiff entered into with P & O Nedlloyd.

[126] In summary, the claim for breach of bailment fails. The container and the goods in them were not delivered into the possession of the defendant, and the defendant did not have constructive possession of them. In any event, if the contract was one of bailment, then the defendant performed the contract according to its terms.

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9 *Hobbs v Petersham Transport Co Pty Ltd* (1971) 124 CLR 220 at 238, [1971] HCA 26 at [7] per Windeyer J.

Trade Practices Act

[127] The plaintiff's pleading alleges that, essentially by reason of the failure to inform the plaintiff of the matters that are said to constitute negligence, the defendant engaged in conduct that contravened s 52 of the *Trade Practices Act* 1974 (Cth).

[128] I have previously found that the defendant was not required to inform the plaintiff of the matters alleged, and this is sufficient to dispose of the *Trade Practices Act* claim. I note that the *Trade Practices Act* claim was not addressed in the plaintiff's written submissions.

[129] I should add that if the defendant had informed the plaintiff of the matters set out in paragraph 18 of the Amended Statement of Claim, there is no satisfactory evidence that the plaintiff would have acted any differently, and that the goods would not have been lost.

Conclusion on liability

[130] The plaintiff has failed to establish any of his pleaded claims.

Quantum

[131] My conclusion on liability makes it unnecessary to assess quantum. The plaintiff's case on quantum depended on the reliability of the reconstructed list of the goods that were shipped and the accuracy of the descriptions given in that list.

[132] Each party called a valuer to express an opinion on the value of the goods described in the list. Their respective opinions depend on the reliability of their assumptions, and ultimately upon the accuracy of the evidence given by the plaintiff and his son concerning the contents of the container. Remarkably, no receipts or other documentation were disclosed by the plaintiff to prove the acquisition of the items or their value. I am not persuaded that the goods consisted of all of the items listed. I have great reservations concerning the credibility and reliability of the evidence of the plaintiff and his son. In the absence of supporting documentation, I am not satisfied that the goods had the value alleged by them. However, because the plaintiff has failed on liability, it is unnecessary to reach a conclusion concerning the value of the goods that were lost in circumstances that the plaintiff did not properly prove.

Conclusion

[133] The plaintiff's claim fails. There will be judgment for the defendant in the proceeding. I will hear the parties in relation to costs. However, the appropriate order would seem to be that the plaintiff should pay the defendant's costs of and incidental to the proceeding to be assessed on the standard basis.