IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 181

Suit 1713/1997

Between

Nasaka Industries (S) Pte Ltd

… *Plaintiff*

And

Aspac Aircargo Services Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Carriage of Goods by Air and Land — Carriage of goods by air; Equity — Estoppel

Nasaka Industries (S) Pte Ltd v Aspac Aircargo Services Pte Ltd

[1999] SGHC 181

Suit 1713/1997
Judith Prakash J
07 July 1999

1 This claim arises in connection with the air carriage of 27 shipments of computer components by the defendant for the plaintiff from Singapore to New Delhi in September and October 1996. The plaintiff`s complaint is that the defendant wrongfully released the goods in New Delhi to someone other than the specified consignee. As a result, in respect of 15 shipments, no payment has been received by the plaintiff who now claims US$283,771.50, being the price of the goods.

2 ***Summary***

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4 The plaintiff company started business in Singapore in August 1995. Its founder, Mr Sandeep Gupta, had been in the computer component supply business in New Delhi and he came to Singapore to set up a similar business to supply components to Indian manufacturers of computers. The business did fairly well. In the 12-month period between April 1996 to March 1997, the

plaintiff had 51 customers, mainly in India. The plaintiff`s major customer was a company known as Altos India Ltd (`Altos`).

5 Altos was a public company listed on the New Delhi Stock Exchange. Its core business was the manufacture of personal computers for the domestic Indian market. The plaintiff was one of some ten foreign companies that supplied computer components to Altos for use in its production line. The plaintiff started doing business with Altos in 1995 and made regular shipments of goods to it thereafter.

6 In about August/September 1996, Altos embarked on a project it called the `Millenium project` (`the project`) to manufacture low cost personal computers. Between 26 September 1996 and 22 October 1996, it placed five purchase orders with the plaintiff for the supply of components for the project. The payment term specified for each order was by sight draft through Altos` bankers, Bank of India, New Delhi. Further, in each purchase order, the plaintiff was instructed to forward the goods to Altos by air and to use the services of the defendant company as the freight forwarder.

7 The defendant is a Singapore company. As its name implies, the defendant sends cargo shipments by air to various parts of the world. The defendant`s business also requires it to act as the consolidator of cargo that it has agreed to transport for various clients. This means that the defendant issues its own house airway bills to its various clients in respect of cargo entrusted to it, then consolidates such cargo and prepares a master airway bill for the airline which actually carries the goods. The defendant does not undertake the physical air transportation of the goods.

8 The defendant became involved in this transaction through its relationship with a New Delhi freight forwarder named Air Link India Ltd (`Air Link`). Air Link was one of several Indian freight forwarders that did a lot of business with Altos. Altos instructed Air Link to arrange for a Singapore freight forwarder to transport the goods purchased from the plaintiff for the project and Air Link then nominated the defendant for the job. Air Link also instructed the defendant to contact the plaintiff and arrange for the shipment of the goods.

9 What happened thereafter was that when each shipment for the project was ready for despatch, the plaintiff contacted the defendant and obtained certain details relating to the shipment. These included the numbers of the house airway bill and the master airway bill to be issued by the defendant in respect of the shipment. The plaintiff then prepared a shipping instruction relating to the shipment that it sent to the defendant. This shipping instruction contained the information obtained from the defendant as well as the number and date of the plaintiff`s invoice, the number of cartons to be forwarded, the names and addresses of the consignor, consignee, and notify party, and also the description of the goods which invariably was `computer parts`.

10 It is important to note that in each shipping instruction, the consignor was named as the plaintiff and the notify party was Altos. As regards the consignee, each shipping instruction read:

> *Consignee:Bank of India.Joyti Building, Nehru Place,New Delhi - 110019.*
>
> *A/CM/S Altos India Ltd,B-64, Okhla Industrial Area,Phase - 1, New Delhi - 1100-20, India*

11 The plaintiff attached a copy of the relevant invoice to each shipping instruction. From this the defendant would have been aware, had it bothered to check, that the goods had been sold on the basis of payment by sight draft.

12 Once the defendant was in receipt of a shipping instruction, it would prepare the necessary house airway bill (`HAWB`). Each such HAWB would name the shipper of the goods as the plaintiff, the consignee of the goods as the Bank of India, New Delhi, and the issuing carrier as the defendant. The HAWB also disclosed the chargeable weight of the consignment forwarded and gave the relevant flight details. A copy of the invoice was also attached to the HAWB.

13 The defendant would then ship the goods to New Delhi. Once the goods arrived there, they would be under the control of Air Link. Air Link`s duty was to issue a delivery order to the consignee named in the HAWB to allow the latter to take possession of the goods. Since the named consignee was a bank, though the goods were actually intended for Altos, the procedure to be followed was that Air Link could not issue a delivery order to Altos until Altos furnished it with a document from the bank known as a bank release order or `BRO`. On receipt of this document, Air Link would issue and deliver a delivery order to Altos which would then be able to collect the goods from the airport. The consignee bank would not issue its BRO in respect of any shipment until Altos had paid on the sight draft drawn by the plaintiff.

14 What transpired in this case is that Air Link released the delivery orders for the shipments made by the plaintiff to Altos without obtaining the relevant BROs. Altos took delivery of all 27 shipments but was subsequently unable to pay for 15 of them. It is now under provisional liquidation. The plaintiff seeks to recover the price of these 15 shipments from the defendant on the basis that the goods should not have been released without the BROs.

15 ***The pleadings***

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17 The plaintiff`s claim is based on the breach of the defendant`s duty as an air carrier under the Carriage by Air Act (Cap 32A) (`the Act`) which incorporates the amended Warsaw Convention as a part of Singapore law. The plaintiff has also pleaded alternative causes of action based on breach of contract and/or negligence.

18 The defendant amended its pleading several times. In its re-re-re-amended defence filed on 30 September 1998, the defendant raised inter alia the defences of estoppel and waiver as well as the defences available under the Warsaw Convention, including its right to invoke limitation of liability if found to be responsible for the plaintiff`s claim. In its closing submission, the defendant confirmed that it was no longer relying on most of the defences pleaded in the re-re-re-amended defence. The defendant further agreed that it was no longer in dispute that there had been several contracts of carriage between the plaintiff and the defendant as evidenced by the various HAWBs and that the defendant had delegated the performance of these contracts to its counterpart in New Delhi, Air Link. The defences that it continued to rely on were:

19 (a) the equitable defences of acquiescence, estoppel and waiver;

20 (b) a defence arising under cl 4(a) of the conditions of contract printed on the reverse of each HAWB;

21 (c) the defences and limitation of liability provisions provided by the Warsaw Convention.

22 I think it would be helpful at this stage to set out those paragraphs of the defence which contain the pleas of estoppel and waiver as they summarise the main contentions with which I will have to deal in this judgment. The relevant paragraphs are paras 20, 30 and 31. They read as follows:

> 20 In the alternative, the defendants aver that they are not liable to the plaintiffs as the plaintiffs are estopped and precluded from alleging any breach of agreement and/or breach of duties as bailees, because the said cargo was with the knowledge of the plaintiffs released to M/s Altos India Ltd (M/s Altos) without obtaining Bank Release Orders and the plaintiffs by their silence and/or conduct acquiesced in this practice which was prevailing at the material time. Particulars (a) The plaintiffs have had business transaction with M/s Altos for the last few years. M/s Altos used to be a large public listed company in New Delhi and other Stock Exchanges all over India and was one of the biggest customers of the plaintiffs. (b) Since it takes considerable time to obtain original shipping documents in the air freight consignments to India, M/s Altos in order to save time, avoid delay in their production line, and to avoid payment of demurrage, obtained the delivery order from M/s Air Link India Ltd in accordance with the prevailing practice to get possession of the cargo in the Customs. It is only after taking physical possession of the goods M/s Altos would make the requisite payment to the plaintiffs through its bankers. (c) This practice was carried out with the acquiescence of the plaintiffs and they just stood by and did not protest when the goods were being released to M/s Altos without Bank Release Orders as long as payment was being received in accordance with the said practice. … 30 In the alternative, the defendants aver that the plaintiffs must have been aware of the alleged loss or delivery without Bank Release Order as early as mid October 1996 but did not complain or protest or claim or notify the defendants of any loss or mis-delivery or breach of agreement until 4 November 1996. 31 The defendants aver that the plaintiffs by their silence and their conduct of not stipulating a condition not to release goods for subsequent shipments without Bank Release Order they had waived any breaches of the agreement by the defendants, if any. Particulars
>
> *By 26 October 1996 the plaintiffs knew or had reason to suspect that goods had been released without obtaining Bank Release Order but did not make this (ie Bank Release Order should be obtained before goods could be delivered) a condition in their*

shipping instructions given to the defendants after 26 October 1996.

23 As regards the defence arising under cl 4(a) of the conditions of contract, this clause provided that except as the Convention otherwise required, the defendant would not be liable to the shipper for any loss for whatsoever nature arising out of the carriage of the goods unless such damage had been proved to have been caused by the negligence or wilful default of the defendant and that there had been no contributory negligence of the shipper. The defendant pleaded that the plaintiff had the onus of showing `negligence or wilful default` on the defendant`s part and that the loss to the plaintiff was not caused by such negligence or wilful default since the mis-delivery was not done when the goods were in the defendant`s custody.

24 Since the defendant is no longer denying that it was the party contractually responsible to the plaintiff and since it also accepts that its contractual duty was to deliver the goods to the named consignee, the bank, or to its order pursuant to a duly issued BRO, the main questions which I have to decide on the pleadings now are:

25 (1) whether there was a prevailing practice that enabled Altos to take possession of goods shipped to it without first paying the bank so as to obtain the release of BROs;

26 (2) whether the plaintiff was aware of such practice or, alternatively, knew that the goods were being released to Altos without the production of the BROs;

27 (3) whether the plaintiff is estopped from making a claim for wrongful delivery against the defendant because (i) of its knowledge of what Altos was

doing and its acquiescence in the wrongful release of the goods by its conduct and/or silence; or (ii) it owed a duty to inform the defendant about the New Delhi practice and it did not give the defendant any notice of the same until 4 November 1996;

28 (4) whether the plaintiff had waived breach of the contract of carriage by the defendant by remaining silent and by failing to insert a specific condition in the shipping instructions that the goods should not be released until the BRO had been obtained;

29 (5) whether cl 4(a) of the conditions of contract is of any assistance to the defendant;

30 (6) if the above defences do not succeed, whether the defendant is entitled to limit its liability in accordance with the Warsaw Convention.

31 ***The evidence***

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33 Before going on to discuss the issues, I will give a brief account of the evidence-in-chief as presented by each party. The plaintiff had four witnesses. First was one Mr Umesh Kumar who joined the plaintiff company in June 1996 as a director of sales. He was the only person from the plaintiff company to give evidence since, unfortunately, Mr Sandeep Gupta had died in December 1997.

34 In his first affidavit of evidence-in-chief, Mr Kumar stated that the person who controlled and managed the plaintiff company had been the late Mr Sandeep Gupta. He had been Mr Gupta`s assistant in respect of all sales

transactions. The plaintiff`s business was the purchase of computer parts, peripherals and software from suppliers from Singapore, Malaysia, Taiwan, Hong Kong and elsewhere and the sale of the same to buyers in India who were manufacturers of or dealers in computers and related equipment. The goods that the plaintiff dealt in were expensive and lightweight. Such goods had to be delivered with speed and were invariably carried by air to the various Indian destinations.

35 Mr Kumar confirmed that towards the end of September 1996, Altos had placed orders with the plaintiff for certain computer parts. The terms of purchase were that the price was determined on an ex-factory basis; that the goods were to be sent by airfreight to New Delhi by the defendant company on a freight collection basis; and that payment would be made for them against sight drafts presented through the Bank of India, New Delhi.

36 When each shipment was ready, either Mr Kumar or another employee would telephone the defendant`s office to make a booking and arrange for collection/shipment. The plaintiff would then prepare the shipping instructions using the HAWB number, main airway bill number, flight number and date/time for collection and flight as specified by the defendant. On receipt of the shipping instructions the defendant would go to the plaintiff`s warehouse or its supplier`s warehouse to collect the goods and would also obtain a copy of the invoice. Three copies of the completed HAWB would be given to the plaintiff and the plaintiff would forward these together with two copies of the bill of exchange for the shipment to its bank in Singapore instructing the same to despatch all documents by courier to the Bank of India, New Delhi for collection.

37 According to Mr Kumar, once the goods arrived at New Delhi airport, they would be stored at a bonded warehouse. The procedure for the release of the goods would be as follows:

38 (1) the defendant or Air Link would inform Altos of the arrival of the goods;

39 (2) Altos should then make payment for the goods to the Bank of India;

40 (3) on receipt of payment, the bank would release the original invoice, packing list and HAWB together with the BRO, to Altos;

41 (4) Altos would then surrender the BRO and the HAWB to Air Link and, in exchange, the latter would issue a delivery order authorising Altos to collect the goods from the bonded warehouse;

42 (5) Altos would also need to clear Indian customs by applying for a bill of entry. This document would state the import duties payable, which Altos would then have to deposit with the customs office in order to obtain customs clearance. This clearance together with the delivery order would permit Altos to collect the goods from the bonded warehouse.

43 Mr Kumar went on to state that the plaintiff had learned that the defendant had released goods without receiving the BRO. This meant that the defendant must have issued delivery orders to Altos wrongfully. Mr Gupta verbally warned the defendant about this in late October 1996. The plaintiff then sent warning letters to the defendant dated 5 and 8 November and 3 December 1996. No reply was received. He confirmed that as a result the plaintiff had

totally lost the value of 15 of the shipments made through the defendant. The goods concerned were worth US$283,771.50 and weighed 4,971.5 kg.

44 Mr Kumar made a further affidavit in August 1998 to address paragraphs 29 and 30 of the re-re-re-amended defence. In it he confirmed that, in total, 27 shipments had been made through Altos to the defendant in October 1996 and Altos had paid for 12 of those shipments. In the course of October 1996, Altos was paying slowly. Yet, the plaintiff`s shipments were going ahead vigorously to meet its obligations. Its past experience had been that it took about seven to ten days from shipment to receipt of funds. For the October 1996 shipments, there was a delay in receipt of funds and Mr Gupta would speak to Altos nearly every day regarding expediting of payment.

45 In late October 1996, probably after 26 October 1996, Mr Gupta told Mr Kumar that because of delay in payment and his conversations with Altos personnel, he suspected that Altos might have arranged to take delivery of the goods without obtaining the BROs. The plaintiff had no evidence that this was in fact happening. Mr Kumar recalled Mr Gupta telephoning the defendant`s personnel, telling them about his suspicions and asking them to check. When the defendant did not revert, Mr Gupta told its officers that if the defendant or its agent was releasing goods without the relevant BRO, he would sue them. The plaintiff then sent the defendant a letter that was dated 5 November 1996 but which was actually transmitted to the defendant on 4 November 1997. This read:

> *We have came to know [sic] that your Delhi office has been releasing DO without proper Bank Release Order (BRO).*
>
> *This is a gross breach of trust and misconduct on your Company`s part. Please note that unless we give in writing for specific cases, you are not suppose to release DO without proper documents.*

> *We will hold you responsible for delay/ non receipt of payment in such cases and shall claim all payments, interest and misc charges. Please immediately furnish us a list of HAWB where you have released DO`s in such cases.*
>
> *You are requested to arrange BRO`s for this within 15.11.96. Also no DO should be given strictly with immediate effect (05.11.96). Failing which we will be forced to lodge a complaint against you to the relevant authorities. Please acknowledge receipt of this letter and urgent action to be taken by you.`*

46 Mr Kumar went on to say that the plaintiff had, prior to the shipments in question, made about 170 shipments to Altos. Most of the shipments were on D/P terms (ie payment had to be made on presentation of the plaintiff`s sight draft and other relevant documents). The shipments were made through a multitude of carriers and to a number of bank consignees. All the shipments were executed correctly and plaintiff`s bills had been met. In all these shipments, the shipping instructions were similar to those before the court. The plaintiff had never expressly stipulated in any shipping instruction that the BRO should be obtained before the goods could be delivered. There was no necessity to state such a condition since the airway bill named the bank as consignee. The only party who could receive the goods would be the consignee and the consignee had to give an authorisation to the carrier in order for the goods to be released to a third party. In India, such authorisation is the BRO and the defendant/its Indian agent would have known this.

47 The second witness for the plaintiff was Vijay Kumar Mehta, the deputy general manager of a company called M/s Lee & Muirhead Ltd of New Delhi. That company one of the largest companies engaged in the business of freight forwarding and customs clearance in India. Mr Mehta stated that he had been employed by Lee & Muirhead Ltd for the previous 20 years and was an expert in the field of import freight forwarding and customs clearance in New Delhi.

48 Mr Mehta confirmed that when goods consigned to a bank were imported into New Delhi, it would be the responsibility of the freight forwarder`s agent in New Delhi to ensure that the goods were released to the proper party, usually the notify party named in the airway bill, only upon receipt of an authorisation from the consignee named in the airway bill. Otherwise the agent could not and must not release the goods to any party. To release the goods the agent must first receive the BRO and once that was in his hands, the agent would issue a delivery order to the party authorised to receive the goods.

49 Mr Mehta was not aware of any prevalent or general practice whereby freight forwarders in New Delhi would release goods or issue delivery orders to a party without first receiving a BRO. He stated that there had been unfortunate instances where certain agents/freight forwarders had released goods or delivery orders without first receiving the BRO. In such instances, the freight forwarder had taken a risk and, in his view, such a situation would be unlawful. The freight forwarder would only be able to do this with the connivance of the party taking the goods/delivery order. He also pointed out that by no means could such exceptional bad or wrongful practice on the part of such parties be taken to be the prevalent practice. Wrongful acts of this nature had been frowned upon by the Aircargo Agents` Association of India of which both his employers and Air Link were members.

50 The next witness, Mr Ashok Kumar Patni, a banker working with the ICICI Banking Corp Ltd at New Delhi, stated that he had been a banker for 22 years out of which he had spent no less than ten years in New Delhi. Mr Patni confirmed that when goods were imported into New Delhi by air on sight/documents against payment basis, it would take about seven to ten days for the documents concerned to reach the bank in New Delhi. On receipt of the same, the bank would issue a notice to the importer requesting him to pay for

the documents/goods and to collect the documents from the bank. The importer would then submit to the bank a statutory document prescribed by the Reserve Bank of India known as Form A1. This form would be submitted together with an authorisation from the importer permitting the bank to debit the importer`s account with the bank for the amount due under the documents. The bank would then issue a BRO and release the original documents to the importer. To the best of Mr Patni`s knowledge, there was no general or prevalent practice of departing from the above procedure.

51 Mr Gopala Krishna Pillai, an employee of Altos, was the final witness for the plaintiff. He had worked for Altos from November 1989 as its `Assistant Manager (Imports)` until it was put into provisional liquidation. According to Mr Pillai, Altos had two divisions:

52 (1) the core business that was manufacturing personal computers for the domestic Indian market, situated at Okhla, New Delhi.

53 (2) the subsidiary business known as Altos EHTP, situated at Gurgaon, Haryana State, that manufactured items on contract for foreign companies.

54 Mr Pillai stated that the procurement of all imported materials required by Altos and/or its associated concerns like Altos EHTP was centralised, controlled and directed by Altos and specifically by himself. He had managed the entire import of material function for Altos. Among his functions were to receive requisitions and schedules from the production planning department in respect of materials which had to be imported, to send enquiries to foreign vendors, to negotiate prices and other terms with the vendors, to prepare and forward purchase orders to the vendors and to ensure that the contracted goods were delivered to New Delhi airport.

55 The functions of documentation, banking, customs and taxes, clearance of goods, payments to vendors and warehousing were undertaken by the commercial department and the accounts department. Although Mr Pillai was not directly involved in these two departments, he had to work closely with people from those departments. He also stated that he was aware of Mr Guru Dutt Bhola who was being called as a witness for the defendant. According to Mr Pillai, Mr Bhola was an employee of Altos EHTP and had nothing to do with, nor had any reason to have any direct or indirect dealings with, the plaintiff. At any rate he came from the commercial department of Altos EHTP and personnel of this department did not deal with foreign vendors. Any import requirement that Altos EHTP had in regard to the plaintiff was routed to and dealt with by Mr Pillai himself.

56 Mr Pillai confirmed that he was the person from Altos who communicated with the plaintiff. Almost all written communications between Altos and the plaintiff were done by Mr Pillai or with his knowledge. He also communicated verbally, either in person or by telephone, with Mr Gupta and other persons from the plaintiff.

57 In 1995, Mr Pillai placed the plaintiff on the list of vendors supplying materials to Altos, and immediately thereafter commenced giving orders to the plaintiff. To the best of his recollection, there were no less than 100 shipments from the plaintiff company to Altos between then and the end of September 1996. Most purchase orders/ shipments were made on the basis of payment by sight draft.

58 Prior to the end of September 1996, Altos had from time to time delayed payment to vendors including the plaintiff. The unfortunate aspect of Altos` business was that it very often used the airport warehouse as its warehouse. The

usual procedure was that on arrival of a shipment (sold on D/P terms) at New Delhi airport, Mr Pillai would be notified and he would in turn notify the commercial department. The commercial department would then have to take the following steps to obtain delivery of the goods:

59 (1) pay the bank the invoice value of the goods and the bank`s charges and receive in return a BRO;

60 (2) using the BRO, obtain a delivery order from the freight forwarder; and

61 (3) settle the customs duties.

62 When funds were not available to pay the various charges, including the price of the goods, then the goods would remain at the airport warehouse incurring demurrage charges. Unfortunately, according to Mr Pillai, sometimes Altos could not find sufficient funds to clear the goods and they would be left in the airport warehouse until all payments had been settled. When payment of bills was delayed, Mr Gupta would chase Mr Pillai for payment. Ultimately Altos would settle its bills, the plaintiff would be paid and Altos would then take the goods from the airport.

63 From about September 1996, Mr Pillai placed huge orders with foreign suppliers including the plaintiff, for the purpose of the project. The production schedules were very tight and speed of delivery was of the essence. In court, Mr Pillai stated that he had given Mr Gupta an assurance that payment for goods ordered for the project would be made within seven days because the consumers were paying for such computers in advance and also Altos was arranging to take a big bank loan to finance the production.

64 At about the end of October 1996, Mr Gupta telephoned Mr Pillai to chase for payment. He chided Mr Pillai for pressing the plaintiff to ship the goods urgently and yet not collecting them from the airport. Mr Pillai was bewildered. To enable the goods to be collected, Altos should have paid for them. He checked with other departments and discovered that the goods had been taken by Altos and had been used in production but that payment for them had not been made. This applied not only to the plaintiff but also to each and every foreign vendor. He further learned that Altos had been taking delivery of goods from various freight forwarders without documentation or authorisation of the consignee bank or permission or knowledge of the vendors. This was highly irregular. Mr Pillai confronted various people on the subject and was told to tell the vendors that the goods were still at the airport and that payment would be made in time. However, Mr Pillai revealed to Mr Gupta that Altos had collected the goods without first paying for the same.

65 Some time in November or December 1996, Mr Gupta was told by the directors of Altos that it was in the latest stages of obtaining a huge bank loan and that payment for the goods would be made from there. Altos requested Mr Gupta to hold his hand and not take action against his freight forwarders in Singapore pending the outcome of the loan. In 1997, the loan was rejected and thereafter Altos had very severe financial problems that led to its liquidation.

66 According to Mr Pillai, there was no understanding between the plaintiff and Altos to the effect that Altos could take delivery of the goods without first settling its bills. Neither was there any prevalent or general practice for Altos to take goods from freight forwarders without first paying for them. It was only at the end of October 1996 that he had discovered that this abnormal practice had been followed and that it was being applied not only to shipments made by the plaintiff but also across the board to shipments by all vendors from October

1996. Mr Pillai affirmed that to his knowledge no vendor including the plaintiff had known or agreed to or acquiesced in such an abnormal or illegal practice.

67 The defendant had only two witnesses: Mr Tan Ah Tam, its senior airfreight manager and Mr Bhola. According to Mr Tan, after Altos had placed its purchase orders with the plaintiff, it instructed Air Link to arrange for a Singapore freight forwarder to forward the goods from Singapore to New Delhi. Air Link then contacted the defendant to arrange this. Subsequently, the defendant had sent the 15 shipments in question to New Delhi. To this end, the defendant had to prepare the necessary documentation to arrange for the airfreight and to ensure that the goods were put on board the flight to New Delhi.

68 Much of Mr Tan`s affidavit was somewhat at odds with the defences finally relied on by the defendant. He stated that the defendant had issued a master airway bill naming Air Link as the consignee to facilitate the clearance of the goods by Air Link at New Delhi airport. This practice had been accepted by the plaintiff and therefore the defendant`s duty had ended on collection of the goods by Air Link. It was the duty of Air Link to ensure that the goods were cleared and delivered to the buyers in India. The defendant could not be held responsible for any misconduct on the part of Air Link. For the services rendered, the defendant had invoiced Air Link who had then paid the bill. The plaintiff had not made any payment to the defendant.

69 The only other relevant statement made by Mr Tan was that even after the plaintiff had learnt that Air Link had been releasing its goods without the production of the BROs, it had asked the defendant to handle a shipment to India. Exhibited to his affidavit as evidence of this assertion was an invoice issued by the defendant and dated 7 November 1996 in respect of a shipment to Madras for a third party. It should be noted that in cross-examination Mr Tan

stated that when he received the plaintiff`s complaint about the unauthorised release of goods he made a call to Air Link and asked them to check what was happening. It must have been this telephone call that caused Air Link to write to Altos on the same day, 4 November 1996, informing it that of late, the majority of its suppliers, including the plaintiff, had instructed Air Link`s counterparts in Taiwan and Singapore not to release documents to Altos without getting a BRO from Altos. The letter also stated that the plaintiff had threatened to sue the defendant because of the unauthorised release.

70 More relevant to the line of defence eventually adopted was the affidavit of Mr Bhola. He affirmed that he had been working as a Deputy Manager (Commercial) with Altos since January 1993 and his deposition was based on personal knowledge. He also said that he had been authorised by Altos to make the affidavit on its behalf. However the effect of his evidence was largely undermined by his concession, under cross-examination, that much of it was based on information given to him by one Mr Varma, his superior in Altos, and did not come directly from his personal knowledge since he himself had never had any dealings with the plaintiff.

71 According to Mr Bhola, Mr Sandeep Gupta had a very good business relationship with Altos and had developed a personal friendship with its officers. As Altos was a large publicly listed company, suppliers like the plaintiff were happy to do business with it and had confidence that Altos would meet its business commitments. Altos wanted the goods to be released to them immediately even though goods were consigned to the bank as it did not want production work to be delayed. Since Mr Gupta had a good relationship with Altos and never doubted its credit worthiness, there was a clear understanding between Mr Gupta and Altos that all goods shipped by the plaintiff to Altos

could be released to the latter without any BRO even though the consignee was the bank.

72 Mr Bhola stated that over the last ten years, Altos had used various forwarders to import computer parts from foreign vendors and had been able to obtain its delivery orders without supplying any BROs. The vendors always received their payments. This practice had continued with Air Link as well. The practice was for Air Link to give the delivery orders to Altos with the permission of the plaintiff and Altos would get the material after paying customs duties. This was the practice that was followed even though the named consignee was the bank. Thereafter, in due course, Altos` bankers would debit the account of Altos and remit the money to the plaintiff at Singapore after complying with the Indian Foreign Exchange regulations. This same practice was adopted and followed with regard to shipments sent by the plaintiff through the defendant to Altos in the months of September and October 1996.

73 **The issues: (1) preliminary objection**

74 Before I consider whether the defendant has managed to substantiate its defences, I have to deal with a preliminary objection made to them by the plaintiff. The plaintiff`s argument is that defences such as estoppel, acquiescence and waiver, are not available under the scheme of the Warsaw Convention (`the Convention`).

75 The plaintiff`s argument basically is that the Convention provides a complete charter relating to the international carriage of persons, baggage or cargo performed by aircraft for reward. It is the Convention that provides the causes of action available to the cargo owner and it is the Convention that

provides the defences that the carrier can rely on. These defences are contained in arts 20 and 21 and they appear to be formulated in absolute terms. They read:

> Article 20 The carrier is not liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for him and them to take such measures. Article 21 If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

76 The plaintiff`s submission is that because of the all inclusive nature of the Convention, the defendant here cannot rely on equitable defences like estoppel but must, in order to escape liability, bring himself within the four walls of arts 20 and 21. The plaintiff has not cited any direct authority for this submission. It relies, however, by analogy on the principles established in the case of **Seagate Technology International v Changi International Airport Services Pte Ltd** [1997] 3 SLR 1 at pp 8-9 per Karthigesu JA. There, the Court of Appeal, following the English decision of **Sidhu v British Airways plc** [1997] AC 430, stated:

> *... under the regime of the Amended Convention, the carrier`s liability is almost a strict one (subject to the defences in arts 20 and 21) for death or injury to passengers and loss, damage or delay to registered baggage or cargo. Liability arises on the occurrence of facts falling within the scope of arts 17, 18 or 19, independently of any negligence or breach of contract or whether it was the carrier or its agents that actually performed the function or service during the course of which damage was sustained. These articles form the sole foundation of the carrier`s liability in respect of loss or damage falling within the scope of those articles. In such cases, the party seeking satisfaction from the carrier need not and, in fact, cannot plead his case in common law or otherwise. It is the articles of the Amended Convention to which he must look for the exclusive cause of action and remedy.*

77 The plaintiff here submitted that what was true for the plaintiff in a carriage by air case must equally hold true for the defendant. It also argued that

if the defendant was allowed to go beyond the bounds of the Convention, there would be uncertainty in determining the merit of claims. The Convention provides for the possibility of predicting with some degree of accuracy whether the claim against the carrier will be met with a successful art 20 or 21 defence and this advantage will be lost if the defendant is able to use extraneous defences to meet the plaintiff`s claim.

78 The defendant`s reply was that the court exercises its legal and equitable jurisdictions concurrently and the equitable defences are available by virtue of s 3(b) of the Civil Law Act (Cap 43) which directs the court to give a defendant the benefit of every equitable defence available and by s 3(1) of the Application of English Law Act (Cap 7A) which confirmed that the common law of England including the principles of equity continued to be part of the law of Singapore after 12 November 1993 as it had been before that date.

79 I cannot accept the plaintiff`s submission that the equitable defences of estoppel, waiver and acquiescence have been ousted by the Convention. Whilst it does appear that the Convention was intended to be a complete code in relation to the carriage of goods and individuals by air, the principles of equity are a fundamental part of the law of Singapore and must be applied by this court unless Parliament has specifically legislated for them not to be available. Secondly, in relation to the defences available to a carrier the Convention itself appears to recognise that national law may be applicable. This is shown by art 21, which states that where the carrier can show contributory negligence on the part of the claimant, the carrier may be wholly or partly exonerated from liability in accordance with the provisions of the law of the forum. The Convention therefore recognises that whether contributory negligence is to have an effect on liability will depend on national law. National law therefore does play a part in determining the extent to which a defence of contributory negligence will

assist the carrier. If national law can be relevant to one aspect of the defence, it can also be argued that the carrier as a defence can, if the law of the forum so allows, raise other matters that relate to the conduct of the claimant. The equitable defences relied on in this case relate entirely to the conduct of the plaintiff and lie outside the strict terms of the contract. The basis of these defences is that it would be inequitable for the plaintiff to succeed because of the way that the plaintiff itself acted in relation to the transaction.

80 In my judgment, a defendant in a case like the present is entitled to plead and prove equitable defences because the court cannot allow a plaintiff who has not come to the court with clean hands to succeed simply because the defendant cannot bring himself within the provisions of art 20 of the Convention. Although, as the plaintiff stated, there is no direct authority on the point, I note that in the Hong Kong case of ***Regalite International Ltd v Aircargo Consolidation Service*** (HK) Ltd [1996] 3 HKC 453 which also concerned a claim for wrongful delivery of air cargo, a defence of estoppel was pleaded and considered. In that case, the estoppel defence failed because the judge was not satisfied that the plaintiff there had made any representation that the goods might be delivered to a third party without the consent of the consignee named in the airway bills. The judge in that case did not even consider whether estoppel was available in law as a defence. Obviously, he assumed that it must be available in a court that, like the Singapore court, administers the principles of law and equity concurrently.

81 **(2) Was there a practice that enabled Altos to take possession of goods without prior payment and did the plaintiff know about this practice?**

82 Most of the sales made by the plaintiff to Altos were on DP terms. This appears from an analysis that the defendant made of the plaintiff`s invoices to Altos between 10 January 1996 and 31 December 1996. This analysis also showed that in the first half of 1996, it usually took between two to six and half months for payment to be made on invoices which should have been settled immediately after the documents for the goods were received by the consignee bank in New Delhi. In July 1996, payment was more prompt, being made within half a month to three months of shipment, but, in August 1996, several shipments were made for which no payment was received whilst in respect of other shipments the lapse of time between payment and shipment ranged between half a month and two months. This meant that when the orders for the project were made in September and October 1996, Altos owed the plaintiff a considerable amount of money for previous shipments.

83 There is also evidence, both documentary and oral, that the plaintiff continued to supply goods to Altos throughout its relationship with the latter even though Altos was often dilatory in its payment and the outstanding debt at times was substantial. For example, in March 1996, Altos owed the plaintiff US$146,345.78 on shipments made on sight draft terms, and, as of 5 August 1996, goods worth about US$500,000 had been shipped by the plaintiff and had not been paid for. Both Mr Kumar and Mr Pillai gave a similar explanation for the continuation of the shipments despite the non-payment. They said that if the plaintiff had stopped supplying Altos with goods, then the money owed on previous shipments would not have been paid.

84 The question that arises is what happened to these goods after they arrived in New Delhi and before payment was made for them. The position taken by Mr Pillai was that prior to September 1996, any goods ordered by Altos from the plaintiff remained in New Delhi airport until the relevant invoice had

been settled. He stated that from his experience, there had been instances where goods had been left in the airport for at least three years without being cleared. When it was put to him that this could not have been the case since Altos required the computer components urgently, he testified that in order to meet the production line`s demands, Altos would buy the goods locally even though local purchases cost ten percent to 15% more than imported goods. He also said that goods shipped by other suppliers to Altos would also lie at the airport until payment was made and that often these goods remained there for long periods of time.

85 It is difficult to accept Mr Pillai`s testimony on this aspect. There is an abundance of evidence that the goods ordered by Altos from the plaintiff and other suppliers were urgently needed for its manufacturing processes. Mr Kumar himself confirmed at the beginning of the case that in his business, computer components had to be delivered with speed. The fact of air shipment also testifies to this as Mr Patni, the banker, confirmed. Further, Mr Pillai himself admitted that the goods were required on an urgent basis and numerous letters from Altos to the plaintiff were adduced in which Altos had requested that the goods be supplied urgently. In view of such urgency, it is improbable that Altos would have been content to leave the goods at the airport for months or even weeks.

86 Neither was it credible that Altos would supply its production needs by buying locally at prices that were between ten to 15 percent higher than the cost of the imported goods. Not only would it have to bear this additional cost but it would also, when it eventually paid for the foreign goods, have to pay storage charges to the airport authorities and various persons confirmed that these charges were `pretty heavy`. In addition, the plaintiff charged interest on late payment and this added to the cost of the goods. Mr Pillai also testified that

Altos had cashflow problems and was in a financial crisis from 1993 onwards. Considering all the circumstances, I do not find it believable that, if it had an alternative, Altos chose to leave its imported goods in the airport while it incurred storage and interest charges and a premium on obtaining local replacements.

87 There was evidence that some freight forwarders operating in New Delhi were prepared to give delivery orders to big importers like Altos even though the goods concerned were consigned to a bank and that bank had not issued its BRO. Mr Mehta, the freight forwarder, testified that the practice of goods being released without the BRO was confined to a `group of few people` and that very few forwarders followed this practice. Under further cross-examination, however, he admitted that a company known as Burlington, a very big and reputable freight forwarding company in India, and a few other companies, had been involved in this practice. He also agreed that this practice `might be going on for a few years`, maybe for the previous four to five years. Mr Pillai confirmed that when he started investigating the situation he had found that reputable freight forwarders in New Delhi like Burlington, ABC Nakufreight and Continental Carriers had released goods to Altos without receipt of the BROs. He would have me believe that they only started doing so in September/October 1996. But is that probable? What was it that occurred in those months to make previously careful forwarders suddenly risk making wrongful deliveries of goods? No explanation for such a drastic change in behaviour was proffered. Further, whilst the events I am concerned with took place in 1996, the problem of the release of goods to importers without proper authorisation does not appear to have been experienced only in that year. It was still an issue in 1998 as shown by a circular issued that September by the Aircargo Agents` Association of India to all its members. So, the wrongful

deliveries made to Altos after September 1996 do not appear to have been effected in a `one-off` situation but were indicative of a persisting ability of some importers to obtain the release of goods before making payment.

88 On balance, it appears to me that Altos regularly took delivery of the goods shipped to it by the plaintiff prior to making payment for them even though those goods had been consigned to a bank and should not have been released without the bank`s authorisation.

89 The next part of this issue is whether the plaintiff was aware of what Altos was up to. In this connection, I must consider the credibility of Mr Kumar. There were, as submitted by the defendant, many contradictions and inconsistencies in his evidence. Some of these are:

90 (1) Under cross-examination, he was asked why in November 1996 after they had discovered that goods had been released without the BROs, the plaintiff had asked the defendant to ship further goods to Altos. Mr Kumar`s reply was that after the 15 shipments in question had left Singapore, the plaintiff had stopped shipment to Altos. Subsequently, however, he was forced to concede that the plaintiff had requested the defendant to ship more goods to Altos on 4 November 1996 itself and had also made further shipments to Altos through other freight forwarders when the defendant refused to accept further business.

91 (2) Initially Mr Kumar said he could not remember the name of the forwarder who took over the shipment that the defendant refused to handle. Counsel suggested that it was Concord Express and he replied that he could not remember. But the next day, Mr Kumar remembered everything and replied

positively that the shipments had been made through Concord Express and were the same ones rejected by the defendant.

92 (3) At the first hearing, when Mr Kumar was asked why the plaintiff was still shipping goods to Altos after 4 November 1996, he replied `at that time they were not holding our payment`. Subsequently, the plaintiff had to produce accounts and these showed that as at 12 November 1996, Altos owed the plaintiff US$992,823.93 and there were overdue payments in respect of shipments made in June, July, September and October 1996.

93 (4) At the first hearing, Mr Kumar stated that on 4 November 1996, the plaintiff was worried that payment was not being made by Altos and this was the first time that this had happened. This statement was shown to be untrue by the subsequent disclosure of the correspondence between Altos and the plaintiff, which established that for Altos slow payment was a regular occurrence.

94 (5) There were inconsistencies in Mr Kumar`s evidence relating to the time that Altos took to make payment to the plaintiff as his evidence on this point changed after further discovery had been made.

95 Mr Kumar, in my judgment, was not a reliable witness in relation to his denials of any knowledge on the part of the plaintiff of Altos` practices.

96 At the time the trial started in August 1998, the plaintiff had not made discovery of any documents relating to shipments to Altos prior to September 1996. The defendant`s solicitors made several requests for these documents and finally on 25 September 1998 served a notice to produce in respect of such documents as they considered would establish the payment pattern followed by

Altos. The plaintiff, however, refused to furnish the documents until ordered by this court to do so on 5 November 1998.

97 The documents furnished were instructive. There were many letters complaining about delays in payment by Altos. In early August, the plaintiff sent Altos a letter in reference to a telephone conversation that the parties had had on planning how to fulfil Altos` requirements for August and September 1996. In the course of this letter, in relation to outstanding sight drafts, the plaintiff asked Altos to immediately organise release of its February, March and April bills amounting to US$27,398.78, US$146,345.78 and US$33,140.44 respectively. It also noted that the outstanding amount for May and June came up to US$148,837.62 and US$10,627.59. In the same letter, the plaintiff informed Altos that it would not charge Altos any interest if payment was received on its sight drafts within 20 days of the date of the relevant invoice. Altos, however, did not settle the outstanding amounts in full and as of 27 September 1996 there were still substantial amounts due for purchases made in April, June and August 1996.

98 According to Mr Pillai and Mr Kumar, the plaintiff only learned of Altos` nefarious conduct in late October/early November 1996. Its response on 4 November 1996 was to send a strong letter to the defendant accusing it of `gross breach of trust and misconduct` for allowing its New Delhi office to release the delivery orders without first receiving the BROs. On the same day, the plaintiff sent a letter to Altos stating that it could not ship various goods ordered by Altos since it had no funds and asking for the funds to be remitted to it immediately. The plaintiff went on to say that once the outstanding debt due was reduced to below US$300,000 and the interest due had been paid, it would resume shipment. Neither in this letter nor in any other subsequently sent to Altos asking for payment did the plaintiff reprimand it for taking delivery of

the goods without payment. Mr Gupta also went to Delhi to discuss the payment problem with Altos. On 7 December 1996, he wrote to the defendant stating that Altos had made assurances to the plaintiff regarding the `pending shipment documents` and had `requested for some more time to resolve this issue`. He then went on to say that the defendant could extend its own time frame for legal action (presumably against Air Link) to 31 December 1996 and that the plaintiff was doing its best to resolve the situation amicably. Obviously, the plaintiff had not threatened any legal action against Altos for taking the goods without payment.

99 The plaintiff would have me accept that up till late October/early November 1996, it believed that all the goods that it sent to Altos on DP terms remained in the custody of the New Delhi airport until Altos settled the bills. As can be seen from the figures mentioned above, the plaintiff`s monthly shipments to Altos were large. The plaintiff is saying that, notwithstanding that at the end of every month a substantial portion of the goods it had sent to Altos had not been collected and remained at the airport, it continued in the following month to accept big orders from Altos for shipments to be made on an urgent basis, knowing or at least suspecting, on the basis of the previous track record, that Altos would allow a large part of the future shipments to remain in the airport warehouse.

100 Considering all the circumstances, including the plaintiff`s actions in November and December 1996, I find that the plaintiff was aware before it sent the goods for the project that Altos had been taking delivery of goods prior to payment. I should make it clear that this finding is limited to knowledge. I do not find that the plaintiff expressly consented to the practice or that it connived at it in any way.

101 As a result of the above findings, I have also to consider whether at the time the plaintiff made the project shipments it expected that Altos would change its practice or whether it was likely to follow the same procedure. Mr Pillai`s evidence was that in respect of the project for which Altos required a huge amount of imported materials to be delivered on an urgent basis, its suppliers were reluctant to make shipments because of outstanding payments on earlier sales. Accordingly, when he placed the orders with them, he gave a commitment that Altos would make payment for project goods within seven days. As regards the plaintiff, Mr Pillai gave this commitment verbally and personally to Mr Gupta in September 1996. If he had in fact done this, Mr Gupta would probably have expected that on arrival of a project shipment at New Delhi, Altos would immediately make arrangements to settle the plaintiff`s sight draft and then, having obtained the BRO, take delivery of the goods. Since Altos was going to pay within seven days, it would not need to ask the freight forwarder to release the goods without the BRO.

102 Mr Pillai`s evidence on this point is, however, open to question. There is nothing in writing from Altos to the plaintiff confirming that there would be a special arrangement in respect of the project goods. Even more significantly, there is nothing in writing from the plaintiff to Altos referring to this arrangement. Of the 15 shipments in respect of which this action was started, the first four were sent to New Delhi on flight SQ408 that left Singapore on 6 October 1996. The plaintiff`s invoices for these shipments are dated 2 October and 5 October and the invoice values total US$61,605. The goods would have arrived in New Delhi on 7 October and, according to Mr Patni`s evidence, the documents would arrive seven to ten days after the flight ie by 17 October. Accordingly, if the payment schedule promised by Mr Pillai had been adhered

to in respect of the shipments made on 6 October, payment for the same should have been made immediately on arrival of the documents.

103 On 14 October Mr Gupta wrote a letter to Altos entitled `Finalisation of Terms` in which he brought forward many points for consideration by Altos in order to persuade Altos that it should make payment immediately for all goods sold by the plaintiff. In that letter he made no mention of Altos` promise to make immediate payment for the project goods nor did he indicate that he was expecting imminent payment for 6 October shipments. He wrote again to Altos on 24 October asking that it settle the outstanding invoices for interest and related accounts immediately. Again no mention was made of the seven-day arrangement though by this time 18 days had passed from 6 October. On 4 November when he sent a fax asking for immediate remittance of funds because without `rotation of money` the plaintiff could not meet its expenses, Mr Gupta did not remind Altos of its promise to pay for the project shipments within seven days. All he said in relation to those shipments was that he had hoped to do a `quick rotation` for the project but that even there he had found that `payments [were] not coming`. He then went on to say `we are not in a position to wait beyond 30 days for our payment under any circumstances. Therefore please remit funds as promised by you earlier`.

104 It appears to me that no specific promise was given by Altos to pay for project goods within seven days. Mr Pillai might have told Mr Gupta that payments for such goods would be speedier than usual because of the nature of the project, but he stopped short of binding Altos to any particular payment period. Accordingly, at the time that the plaintiff made the project shipments whilst it was expecting relatively speedy payments, it would not have been expecting such payments to be made within seven days or probably, even two weeks. In those circumstances, knowing the urgency with which Altos required

the goods, if it had considered the matter it would have realised that these goods too would most probably have been taken by Altos soon after arrival at the airport.

105 **(3) Is the plaintiff estopped?**

106 Essentially, para 20 of the defence, which is the main one dealing with estoppel, contends that the plaintiff is estopped from making this claim because of its acquiescence in the practice followed by Altos of taking unauthorised delivery of the goods. The defendant here was relying on the doctrine of estoppel by acquiescence. In its final submissions, however, it made arguments which implied that it was also relying on a more general theory of estoppel.

107 ***Halsbury`s*** According to 16 ***Halsbury`s Laws of England*** para 1473, the term acquiescence applies when a person (A) having a right, and seeing another person (B) about to commit, or in the course of committing, an act infringing that right stands by in such a manner as to induce B, who might otherwise have abstained from doing the act, to believe that A assents to it being committed. Generally, five circumstances must be present in order that the estoppel may be raised against A:

108 (1) B must be mistaken as to his own legal rights;

109 (2) B must expend money or do some act on the faith of his mistaken belief;

110 (3) A must know of his own rights;

111 (4) A must know B`s mistaken belief;

112 (5) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal right: see para 1474 of .

113 What is the position here? The first requirement is that the defendant must have been mistaken as to its own legal rights. In this case, it must mean that the defendant must have believed, mistakenly, that it was entitled to deliver goods to Altos, the notify party named on the HAWB, without the authorisation of the consignee bank. During cross-examination, Mr Tan stated that the HAWB contained both the names of the bank and Altos in the column provided for particulars of the consignee`s name and address. He stated that in those circumstances, either one could have been the consignee and the defendant was free to deliver the goods either to the bank or to Altos at its discretion. He admitted, however, that he had not mounted this argument as a defence. The omission to take this point in defence can only have been because Mr Tan`s reading of the HAWB was not a reasonable one. Any ordinary businessman would know that if the consignee is described as `Bank of India, Joythi Building, Nehru Place, New Delhi A/c Ms Altos Pte Ltd`, the named consignee was Bank of India and that the reference to Altos was simply to identify which of the bank`s customers was the actual purchaser.

114 Further, the pleaded defence contained no particulars of any mistake on the defendant`s part and neither was such an allegation made in Mr Tan`s affidavit of evidence-in-chief. There his position was that once the goods had arrived in India, it was the duty of Air Link to ensure that they were cleared and delivered to the proper party and that the defendant could not be held liable for any mistake made by Air Link. It appears to me that the defendant was content to leave all delivery arrangements in the hands of Air Link and was completely passive as to what happened in India. Since it had taken no interest in what was

being done by its Indian agent, it cannot argue that it was mistaken as to its legal rights.

115 Even if the defendant had been able to establish the first requirement , it would, in my opinion, have had difficulty with the fourth one. It would have had to show that the plaintiff knew that it mistakenly believed that it was entitled to deliver the goods to Altos without the BROs. There is nothing in the evidence to support such knowledge on the part of the plaintiff. There is no evidence of any discussions between the parties prior to any of the shipments as to the person to whom the defendant was going to make delivery or the manner in which such delivery was to be made. Mr Tan may have thought from the way that the HAWBs had been typed up that he was entitled to deliver to Altos or the bank as he chose but he certainly never sought to obtain confirmation of his understanding from the plaintiff. In any case, the shipping instructions were clear: the consignee was the bank and there was no reason for the plaintiff to think, in the absence of any query from the defendant, that the manner in which the consignee had been described had led to any misunderstanding on the part of the defendant.

116 If the ingredients of estoppel by acquiescence are analysed in conjunction with the facts of the case, it becomes obvious that the defendant cannot satisfy them. This may have been why in its final submissions the defendant did not go through these ingredients in detail but instead concentrated on trying to establish that there was a duty on the part of the plaintiff to tell the defendant of the practice followed by Altos. Although the pleading indicated a defence of estoppel by acquiescence, the defendant in its final submission seemed to be proceeding more on the basis of the general theory of estoppel as explained by Lord Denning in **Amalgamated Investment & Property Co Ltd**

v Texas Commerce International Bank Ltd [1982] QB 84 at p 122 where his Lordship said:

> *The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It is evolved during the last 150 years in a sequence of separate developments: proprietory estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on a basis of a underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them would be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.`*

117 If the above statement of law is used as the basis of the defendant`s plea of estoppel, the defendant would have to show that the transaction proceeded on the basis of an underlying assumption which arose from misrepresentation or mistake. I have already dealt with mistake. I now deal with misrepresentation. The plaintiff`s position is that there was no representation let alone a misrepresentation.

118 The defendant accepts that the plaintiff did not make any express representation to it that the goods should be delivered to Altos and that its express representations (as contained in the shipping instructions, which specified the bank as consignee) were to the contrary effect. The defendant`s argument is that the plaintiff had a duty to disclose to it that Altos was in the habit of taking delivery of goods without the BRO and that its silence on this

point amounted to a representation by conduct that the plaintiff acquiesced to the release of its cargo without the BRO.

119 **Greenwood v Martins Bank** [1933] AC 51 is the authority for the principle that mere silence cannot amount to a representation but when there is a duty to disclose deliberate silence may become significant and amount to a representation. The issue then becomes whether the plaintiff had a duty to tell the defendant that Altos had in previous transactions with the plaintiff been able to obtain its goods without the authorisation of the named consignee, and that it might very well be able to do the same in this case. It should be noted that the plaintiff had had no prior dealings with the defendant and that it had used the defendant`s services for the project shipments because Altos had so specified in its purchase orders.

120 In ***Greenwood*** itself, a wife forged the signature of her husband on cheques drawn on an account that the plaintiff husband maintained with the defendant bank. During the currency of the account, the husband became aware of the forgeries but being persuaded by his wife to say nothing about them he kept silence for eight months. When he finally determined to disclose the forgeries to the bank, the wife committed suicide. The husband then sued the bank to recover the money paid out under the forged cheques. It was held that he owed a duty to the bank to disclose the forgeries when he became aware of them and so enable the bank to take steps to recovering the money wrongfully paid on the forged cheques and that his failure to fulfil this duty had prevented the bank from bringing an action against the husband and his wife for the tort committed by the wife until after her death when any action against the husband for the wife`s tort abated. He was therefore held to be estopped from asserting that the signatures on the cheques were forgeries. The court commented that the husband`s silence had been deliberate and intended to produce the effect which

it in fact produced, namely leaving the bank in ignorance of the true facts so that no action might be taken by it against his wife.

121 In a subsequent case, **Spiro v Lintern** [1973] 1 WLR 1002, the defendant`s wife purported to sell the defendant`s property to the plaintiff. The plaintiff sued the defendant for specific performance of the contract and it was held that he was estopped from proving that the contract had been made without his authority because he had known that the plaintiff was acting in a mistaken belief that there was a legal obligation on the defendant to sell the house to the plaintiff. In those circumstances, the defendant had been under a duty to disclose to the plaintiff that his wife had acted without his authority and his failure to do so amounted to a representation by conduct that she had his authority.

122 The above cases and others have been considered in ***Bullen & Leake & Jacob`s Precedents of Pleadings*** (13th Ed) which concludes that a duty to speak will arise where silence would create an erroneous impression which causes the prospective representee to alter his position for the worse (at p 1146). In ***Greenwood`s*** case, the erroneous impression created was that the cheques had been duly signed and this prevented the bank from taking any action to recover the amounts paid from the forger. In ***Spiro & Lintern*** , the purchaser did various things thinking that he had a valid purchase contract, which he would not have done otherwise. In this case, it is difficult to see how silence on the part of the plaintiff created an erroneous impression in the mind of the defendant, which caused it to alter its position. The plaintiff`s original instruction was clear and it was up to the defendant to carry out that instruction. The defendant had complete independence of action in the manner in which it did so. The defendant had to deal with its agent in New Delhi so as to ensure that the defendant`s obligations under the contract of carriage were properly carried out. Silence on the part of the plaintiff could not cause the defendant to

believe that it did not have to fulfil its obligation of making delivery to the named consignee. Neither did the plaintiff`s silence cause the defendant to commit any act which it would not otherwise have done. All that the plaintiff`s silence meant was that the defendant followed its usual course of dealings with Air Link. The plaintiff was not to know what these were since it had had no previous experience with the defendant in relation to shipments to Altos. The plaintiff was not the defendant`s keeper and had no duty to tell it how to conduct its business.

123 ***Bullen & Leake*** in the same paragraph goes on to state that apart from the situation where an erroneous impression may be created by keeping silent, a duty to speak will only arise where there is an existing legal relationship between the parties, and if the duty is not created by any express or implied term of a contract between the parties, none will be created in tort. In this case, the defendant has not pleaded the existence of any express or implied term, which created a duty on the plaintiff to inform the defendant of its knowledge of Altos` previous practices. I do not think that such a pleading could be made, in any case, since no express term exists and it is not necessary for the efficacy of the contract to imply such a term.

124 The defendant also faces a difficulty in establishing that the plaintiff`s silence on the issue caused it to act to its detriment. No doubt if the plaintiff had told it that Altos had previously taken unauthorised delivery of the goods, the defendant might have thought it fit to expressly notify Air Link that this should not be allowed in this case. However, even without such information, it was the defendant`s duty to tell its counterpart that delivery should only be made to the consignee or to a third person who had been authorised by the consignee to take delivery. The plaintiff`s silence did not stop the defendant from carrying out its duty. What the defendant is really saying now is that the plaintiff should have

warned it that its counterpart Air Link might make an unauthorised delivery and thereby impose a liability on the defendant. I find this a difficult argument to accept especially in this situation where the defendant was not the plaintiff`s choice of carrier but was nominated by Altos at the request of Air Link. The plaintiff was entitled to believe that the defendant knew what it was doing when it undertook the carriage and it did not have any duty to warn the defendant about what might happen in India.

125 The problem that the defendant has lies in showing that both it and the plaintiff operated on the joint assumption that the goods were to be delivered to Altos instead of to the bank. The plaintiff knew that this had happened in previous cases but it did not do anything to indicate to the defendant that if this practice was followed in relation to the project shipments, the plaintiff would have no objection thereto. Rather by naming the bank as consignee it was telling the defendant it wanted delivery to be made to the bank or to its order. The defendant itself had no assumptions at all about delivery and left that procedure entirely to the discretion of Altos. This conduct on the defendant`s part was due to the relationship between the defendant and Air Link and not in any way to the relationship between the plaintiff and the defendant.

126 In all the circumstances of this case, I find that the defence of estoppel has not been established by the defendant despite the plaintiff`s knowledge of the Altos practice.

127 **(4) Did the plaintiff waive the defendant`s breach of contract?**

128 The elements of the defence of waiver are concisely set out in the following extract from 16 ***Halsbury`s Laws of England*** (4th Ed, Reissue) (at para 922):

> *It seems that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance has been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration.*

129 To succeed in this defence, the defendant has to show that the plaintiff made an assurance which was intended to affect the legal relations between them and to be acted on and that the defendant did in fact act on this assurance and alter its position in reliance on the same. The relevant paragraph of the defence dealing with waiver is quoted in [para] 14 above. From this, it can be seen that the defendant has not pleaded an express assurance. Rather the plea is that the plaintiff`s silence about its knowledge of the goods being released without BROs and its failure to insert a specific condition in the shipping instructions that further goods could only be released against a BRO amounted to a waiver of the defendant`s breach of contract thereafter. The defendant further pleaded that the plaintiff had this knowledge by 26 October 1996 and should have included this specific instruction in the shipping instructions given after that date.

130 The difficulty the defendant has here is that the plaintiff did not request the defendant to act outside of the contract in any way nor did it give any indication to the defendant that it expected such conduct from the defendant. The defendant`s actions were not influenced by the plaintiff and the defendant did not change its position on the basis of any indication from the plaintiff. No express waiver can be found in the present circumstances.

131 Further, even though ***Halsbury`s*** does state later in the same paragraph that where there is no express waiver the person entitled to the right may so conduct himself that it becomes inequitable to enforce it (a case of implied waiver), the passage goes on to say that in such cases the right is lost on the ground either of estoppel or of acquiescence. I have already found there to be no estoppel. As to acquiescence, the evidence is that on 4 November 1996 the plaintiff told the defendant of its information that the project goods were being released without the BRO and made it quite clear that such conduct was not acceptable to it. The customs documents adduced by the plaintiff indicate that the shipments in question were only released to Altos on dates falling after 16 November 1996. By then the plaintiff had made its position on unauthorised release plain. It cannot therefore be held to have, even impliedly, waived the release of such goods.

132 The defence of waiver therefore also fails.

133 **(5) Clause 4(a) of the conditions of contract and arts 20 and 21 of the Convention**

134 Condition 4(a) of the defendant`s Conditions of Contract provides that except as the Convention or other applicable law may otherwise require, the defendant would not be liable to the plaintiff as shipper for any damage of whatsoever nature arising out of or in connection with the carriage of goods unless such damage is proved to have been caused by the negligence or wilful default of the defendant and there has been no contributory negligence of the shipper.

135 The defendant concedes that the above condition cannot be relied on by it if the same is inconsistent with art 23 of the Convention which provides that

any contractual provision tending to relieve the carrier of liability shall be null and void. The defendant, however, argued that its condition 4(a) basically says the same thing as arts 20 and 21 of the Convention and therefore does not offend art 23. Thus it can be used as a defence. I do not agree on either point. Condition 4(a) goes further than the articles in question because it puts the onus on the claimant to prove negligence and wilful default on the part of the carrier in order to recover whereas under those articles once there is loss, the carrier is liable unless he proves that he has taken all necessary measures to avoid the damage or that it was impossible for him to do so. Secondly, as far as defences arising from the contract of carriage itself are concerned, all such defences have been avoided by the terms of art 23 and the carrier has no alternative if it wants to avoid liability but to show that the circumstances bring it within the provisions of arts 20 and 21. I therefore find that condition 4(a) cannot be relied on by the defendant.

136 As regards the defences available under the Convention, art 20 does not assist the defendant because it has been unable to show that it and its agents have taken all necessary measures to avoid the damage since it was the wilful default of Air Link, which in this case has to be considered the defendant`s agent, that caused the damage. The defendant cannot rely on art 21 either since it has not pleaded or proved contributory negligence on the part of the plaintiff.

137 **(6) Limitation of liability**

138 Under art 22(2)(a) of the Convention, in the carriage of registered baggage and cargo, the liability of the carrier is limited to 250 francs per kilogram unless the consignor has made a special declaration of interest and has paid a supplementary freight. By the Carriage by Air (Singapore Currency Equivalents) Order, 250 francs is equal to $49.58. The defendant seeks to rely

on this limitation provision since the plaintiff did not make any special declaration of interest at the time of shipment of the goods.

139 The plaintiff submitted that the defendant is not entitled to the benefit of limitation because of art 25 of the Convention, which says:

> (1) The carrier shall not be entitled to avail himself of the provisions of this schedule which exclude or limit his liability, if the damages is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court seized of the case, is considered to be equivalent to wilful misconduct. (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any servant or agent of the carrier acting within the scope of his employment.

140 The plaintiff supported the argument that its loss was caused by the wilful misconduct of the defendant or its agent, Air Link, by reference to the ***Regalite*** case. It was held there that the deliberate delivery of goods to a third party in blatant disregard of the contractual obligation imposed by the terms of the airway bill to deliver the goods to the consignee amounted to wilful misconduct. In that case too, the mis-delivery had been made by the carrier`s agent at the airport of discharge and not by the carrier itself. I agree that a deliberate breach of a contractual obligation must be wilful misconduct and that in a situation where a carrier is aware of his contractual duty but has chosen to flaunt it he cannot seek thereafter to limit his liability for the loss his breach has caused.

141 ***Conclusion***

142

143 There will be judgment for the plaintiff in the sum of US$283,771.50 being the price of the 15 mis-delivered shipments together with interest at 6% pa from the date of the writ to judgment and costs.

144 **Outcome:**

145 Plaintiff`s claim allowed.

Judith Prakash J

Arjan Chotrani and Haresh Kamdar (Arjan & Co) for the plaintiff
PE Ashokan and K Anparasan (William Chai & Rama) for the defendant