Subiaco (S) Pte Ltd *v* Baker Hughes Singapore Pte (trading as Baker Hughes Inteq) [2010] SGHC 265

Case Number : Suit No 42 of 2009

Decision Date : 02 September 2010

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Jainil Bhandari and Francis Cheah (Rajah & Tann LLP) for the plaintiff; K Muralitherapany (Joseph Tan Jude Benny LLP) for the defendant.

Parties : Subiaco (S) Pte Ltd — Baker Hughes Singapore Pte (trading as Baker Hughes Inteq)

Admiralty and Shipping

2 September 2010 Judgment reserved.

Belinda Ang Saw Ean J:

1 The plaintiff, Subiaco (S) Pte Ltd ("Subiaco"), is the owner of the Singapore registered vessel *Achilles*. The *Achilles* is a 'tweendecker built in 1984. By a "Conlinebooking" Liner Booking Note (1978 standard form) dated 21 January 2008 ("the Booking Note"), the defendant agreed to book space on board the *Achilles* to carry 3000 mt of barite in bags ("the cargo") from Haiphong, Vietnam, to two discharge ports in Australia. The main issue in this action revolves around the term on which freight was booked, *viz*, "free in stowed l/s/d/liner out hook".

Background facts

2 The defendant, Baker Hughes Singapore Pte, is an unlimited company incorporated in Singapore and trades under the name of Baker Hughes Inteq (hereafter referred to as "BHS" or "the defendant"). BHS is part of the worldwide group of Baker Hughes companies. Baker Hughes Drilling Fluids ("BHDF") is an operating division in the Baker Hughes group. [note: 1] BHDF is the division whose name appears on the shipping documentation.

3 By way of two purchase orders dated 24 December 2007, the BHDF office in Aberdeen, UK ("BHDF Aberdeen"), purchased from VCM Mineral & Chemical Co Ltd ("VCM"), a company in Vietnam, a consignment of 3000 mt of barite in bags of 1.5 mt each ("the cargo") on FOB Incoterms. [note: 2] The cargo was to be shipped from Haiphong to Darwin and Dampier in Australia. In this connection, the Booking Note for the shipment and carriage of the cargo of barite from Haiphong to two named discharge ports in Australia was issued to "BHDF" in Singapore as Merchant. The negotiations for the booking of space on board the *Achilles* were carried out on behalf of Subiaco by Mocean Shipping Pte Ltd ("Mocean"). The persons concerned, in so far as it may be relevant, on behalf of Mocean was a Mr Andres Henrik Hansen ("Henrik"), and on behalf of BHS, a Mr Ong Chwee Kok, also known as Patrick Ong ("Patrick").

4 In the present action, the negotiations between Henrik and Patrick were conducted orally, before the latter received a signed copy of the Booking Note containing the terms and conditions of the booking. Box 10 of the Booking Note is the freight clause. The term "free in stowed" followed by

the letters "l/s/d" (which stand for lashed, secured and dunnaged) were added to the printed form "freight" clause in Box 10 of the Booking Note. The freight rate in Box 10 is thus described as "USD 100.00 per revenue tonne free in stowed, l/s/d/ liner out hook". The phrase "liner out hook" relates to discharging operations, and is not relevant for present purposes, and henceforth is not referred to in this Judgment. Box 12 named VMC as the Merchant's representative at the loading port. Boxes 11 and 13 provided that BHS had three weather working days "SHINC" (Sundays Holidays included) to load the cargo failing which demurrage was payable at the rate of US$ 7,500 per day pro rata.

5 The Booking Note further provided, *inter alia*:

> 1. Definition.
>
> Where the term "Merchant" is used in this Bill of Lading, it shall be deemed to include the Shipper, the Receiver, the Consignee, the Holder of the Bill of Lading and the Owner of the cargo.
>
> …
>
> 4. Period of responsibility
>
> The Carrier or his Agent shall not be liable for loss of or damage to the goods during the period before loading and after discharge from the vessel, however such loss or damage arises.
>
> …
>
> 8. Loading, Discharging and Delivery
>
> Of the cargo shall be arranged by the Carrier's Agent unless otherwise agreed. … The Merchant or his Assigns shall tender the goods when the vessel is ready to load and as fast as the vessel can receive and – but only if required by the Carrier- also outside ordinary working hours notwithstanding any custom of the port. Otherwise the Carrier shall be relieved of any obligation to load such cargo and the vessel may leave the port without further notice and deadfreight is to be paid.

6 The Booking Note also contained a superseding clause, and it provided as follows:

> It is hereby agreed that this Contract shall be performed subject to the terms contained on Page 1 and 2 hereof which shall prevail over any previous arrangements and which shall in turn be superseded (except as to deadfreight and demurrage) by the terms of the Bill of Lading, the terms of which (in full or in extract) are found on the reverse side thereof.

7 The loading of the cargo at Haiphong on 1 February 2008 was carried out by stevedores from the Hoang Dieu Stevedoring Company ("Hoang Dieu"). Hoang Dieu is the only stevedoring company handling cargo operations in the Haiphong port. It is not disputed that No 2 deck crane ("the crane") and the starboard bridge wing of the *Achilles* sustained damage during loading operations. Loading of the cargo resumed after the incident on 1 February 2008. After completion of loading at Haiphong, Mocean on behalf of the carrier, Subiaco, issued two liner bills (in conline 1978 standard form), both dated 2 February 2008, for the cargo.

8 The printed terms of the liner bills of lading are identical to those stated on page 1 of the Booking Note. Apart from that, BHDF Aberdeen was the named shipper, and BHDF Perth (BHDF's office in Perth) was the named consignee. [note: 3] The liner bills of lading were marked "FREIGHT PREPAID",

and there was no incorporation of the matters appearing on page 2 of the Booking Note including the term "free in stowed, l/s/d" in Box 10 of the Booking Note (hereinafter referred to as the "f.i.s. l/s/d term"). The Mate's Receipt named VMC as the shipper and not as the Merchant's representative at the loading port, contrary to Box 12 of the Booking Note. [note: 4]

9 In this action filed on 14 January 2009, Subiaco claims against the defendant damages for breach of contract (*ie*, the Booking Note) in respect of the damage sustained by the vessel and the crane on 1 February 2008 at Haiphong.

The competing arguments

10 It is convenient, at this juncture, to explain the position adopted at the trial by BHS which, in my view, removed from the fray any privity of contract issue. Counsel for BHS, Mr K Muralitherapany ("Mr Murali"), accepts that the parties to the Booking Note were BHS and Subiaco, but he reserved the defendant's rights under the superseding clause. However, in closing submissions, Mr Murali confirmed the following matters:

(a) Despite references to BHDF in the Booking Note and relevant bills of lading, BHS accepts that, in the present action, it is the contracting party as it had pleaded in para 4 of the Defence (Amendment No 1).

(b) The *Achilles* and the crane sustained damage. Whilst the nature of the damage was as reported by Subiaco, BHS was not admitting that the damage was caused by the stevedore during loading operations, and that the stevedore was negligent or incompetent as alleged.

As regards, the defendant's concession, Subiaco accepts that the Booking Note contract was with BHS, and rejects the position adopted by BHS in so far as the liner bills of lading are concerned. In the final analysis, the conflicting positions, in my view, are not material, and nothing significant turns on them.

Subiaco's case

11 Subiaco claims that during cargo loading operations on 1 February 2008, a stevedore from Hoang Dieu operated the vessel's crane without the permission and/or authority of the vessel's crew, and in a negligent manner caused the crane jib to hit against the underside of the starboard bridge wing of the vessel, thereby resulting in damage to the crane and the vessel. Subiaco argues that BHS is liable for the act or neglect of the stevedore because the loading operations at the load port were expressly agreed to be at the defendant's own risk and expense. In support of its contention, Subiaco relies on the Booking Note and, in particular, the f.i.s. l/s/d term in Box 10 of the Booking Note. Read in the context of the factual matrix described below, counsel for Subiaco, Mr Jainil Bhandari ("Mr Bhandari"), submits that the phrase "free in, stowed l/s/d" is to be understood to, *inter alia*, mean that the defendant at its own risk and expense would (whether by itself, or its representatives at the load port) load, stow, secure, lash and dunnage the cargo at load port, and/or engage/appoint stevedores necessary for the cargo operations as described.

12 Furthermore, the agreement to load cargo at the defendant's own risk and expense was also based on:

(a) the conduct of the defendant, whereby the defendant appointed agents and/or representatives at the load port, namely VMC, to carry out the cargo operations, and those operations were carried out by stevedores appointed by VMC from Hoang Dieu; and/or

(b) an established course of dealings between the parties since around June 2007, whereby Subiaco had previously shipped bagged barites for the defendant from Haiphong to Dampier and Darwin on "free in, stowed" terms, and the usual and/or customary procedure adopted by the parties was for the defendant to carry out the cargo operations through stevedores appointed by its agents or representatives at the load port.

13 It was contended that the defendant, being responsible for cargo operations, was obliged to carry them out properly and/or carefully through the stevedoring company appointed by VMC as agents for and on behalf of the defendant. In breach of contract, an employee of the stevedoring company, who was under the care and responsibility of the defendant, negligently damaged the vessel and the crane during loading operations.

14 Alternatively, if Subiaco was responsible for loading the cargo, the fallback argument is that the defendant had agreed to appoint or arrange for the stevedores (through its representatives at the load port), and it was an implied term of the contract evidenced by the Booking Note that the defendant would appoint and/or nominate reasonably competent stevedores to load stow and secure the cargo. In breach of this duty, the stevedore who operated the crane was incompetent. The damage caused to the vessel and the crane was due to the stevedore's incompetence.

The defendant's case

15 The defendant rejects Subiaco's contentions. While the loading operations were free of cost to Subiaco, the defendant did not agree, whether by Box 10 of the Booking Note, by conduct or through a previous course of dealings, to carry out the loading operations at its risk and expense. The defendant maintains that: (a) it did not appoint the stevedoring company; and (b) it was not required and/or did not ask VMC to appoint stevedores on its behalf. VMC appointed the stevedoring company for itself as FOB seller of the cargo and/or as agents for Subiaco. Alternatively, the defendant does not admit that (a) the crane was being operated by the stevedore when the crane and the vessel were damaged; and (b) the damage was due to the stevedore's negligence or incompetence.

The issues

16 The issues of liability and quantum have been bifurcated following a consent order dated 2 October 2009. On the liability issue, the arguments throw up one main area of dispute: was it Subiaco or BHS who bore the contractual responsibility for loading the cargo and the risk of cargo operations at load port? If the answer is that the loading was at the risk (but not at the expense) of Subiaco, there is no need to deal with the subsidiary defence relating to the alleged negligence of the stevedore including the appointment of competent stevedores, and whether negligence and incompetence have been proven.

17 The contractual question involves, *inter alia*, (a) the construction of the f.i.s. l/s/d term in the Booking Note for its meaning and effect in the light of the printed standard terms on page 1 of the Booking Note; and (b) whether, on the facts and circumstances of the case, the f.i.s. l/s/d term has an extended meaning argued for by Subiaco (hereinafter referred to as "the extended meaning argument"). The extended meaning argument, in my view, correctly characterises the real issue rather than the somewhat inaccurate plea founded on an agreement by conduct or arising from a previous course of dealings. Mr Bhandari has appreciated this inaccuracy, and, in his closing submissions, has rightly distilled Subiaco's pleaded case to essentially the extended meaning argument. He states: [note: 5]

... [Subiaco's] case is that this term [f.i.s. l/s/d], when viewed in the context of the entire

> factual matrix in which the parties were operating at the material time (including the other relevant terms of the Booking Note and the previous course of dealings between the parties) meant that [BHS] had agreed to (whether by [itself, or its] representatives at the loadport) load, stow and secure the [cargo], and engage or appoint the stevedoring necessary for these operation.
>
> …
>
> Consequently, it is submitted that as a matter of law, [BHS is] responsible for the consequences of the stevedore's lack of care and skill in operating the [crane] in order to perform the loading operations, and are therefore liable for the damage.
>
> [emphasis in the original]

Construction of the freight rate clause "free in stowed, l/s/d/" in Box 10 of the Booking Note

18 The starting point is the common law rule that, in the absence of express agreement, it is the shipowner's responsibility to load and stow the goods, at least as soon as the goods are on board the vessel: Stewart C. Boyd *et al*, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 21st Ed, 2008) at pp 158-162 ("*Scrutton*"). Separately, the Booking Note is subject to the Hague or Hague-Visby Rules (see the General Paramount Clause (clause 2) in the Booking Note). By Article III r 2 of the Hague or Hague-Visby Rules, the carrier is to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. As the House of Lords pointed out in *G H Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1957] AC 149, approving the dictum of Devlin J in *Pyrene Company Ltd v Scindia Navigation Company Ltd* [1954] 2 QB 402 ("*Pyrene v Scindia*"), the parties to the contract of carriage can by express agreement depart from or vary their respective responsibilities, for example, the operation of loading under Art III r 2. For convenience, the *Pyrene v Scindia* reasoning (per Devlin J) is as follows (at p 418):

> [The object of the Rules] is to define not the scope of the contract service but the terms on which that service is to be performed. ... On this view the whole contract of carriage is subject to the rules, but t*he extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide*. [emphasis added]

19 The authorities and textbooks on this topic are unequivocal on the point: a departure from the common law position, and for that matter, the responsibilities of loading and discharging under Art III r 2, is a matter of express agreement. In short, it is founded on express terms, and does not arise by implication of law or, by implication from the booking note or charterparty.

20 The first question, therefore, is whether the f.i.s. l/s/d term *on its own* is clear enough to transfer the risk of loading operations (not expense alone) from Subiaco to the defendant. If the answer is no, are there appropriate term(s) in the Booking Note to effectively transfer the risk of loading operations when read together with the f.i.s. l/s/d term? The question of risk, however, has to be distinguished from expense, meaning the costs of and associated with the loading operations.

21 In this particular case, the freight rate was booked "free in stowed, l/s/d/ liner out hook" (see Box 10), and the loading and discharging under clause 8 was to be arranged by the carrier's agent unless otherwise agreed. Notably, the f.i.s. l/s/d term appears in connection with the freight rate in Box 10, and that of its own does *not* transfer the risk of loading from Subiaco to the defendant. Box 10 of the Booking Note states as follows:

10. Freight rate (also indicate whether prepayable or payable at destination)

USD 100 per revenue tonne

Free in stowed, l/s/d liner out hook

Freight Prepaid within 10 working days after completion of loading

22 In Guenter Treitel & FMB Reynolds, *Carver on Bills of Lading*, (Sweet & Maxwell, 2nd Ed, 2005) ("*Carver*"), the editors, in their commentary on the "FIO", "FIOS" "FIOST" clauses at para 9-128 said:

> … clauses specifically referring to loading and unloading such as "free in and out" "free in and out stowed" "free in and out stowed and trimmed"... are usually charterparty clauses, and they usually appear in connection with the statement of the freight. ... *Where such special clauses appear, of themselves they merely indicate who pays for these items [ie, loading and unloading] not who undertakes responsibility*. It is perfectly possible to have a situation in which a carrier engages and takes responsibility for stevedores but is reimbursed for the cost; or where the shipper employs stevedores and takes responsibility for them, but is reimbursed by the carrier. *If however, there is reinforcing wording (which may be in an incorporated charterparty only) indicating that the carrier not only does not pay for these operations but also does not undertake responsibility for loading and/or unloading, the result of the Pyrene v Scindia reasoning is that the duty may by incorporation of the charterparty into the bill of lading be transferred consistently with the Rules*. [emphasis added]

23 Julian Cooke *et al*, *Voyage Charters* (London: Informa, 3rd Ed, 2007) ("*Voyage Charters*") at p 345, para 14.52, cites *Jindal Iron and Steel Co Ltd and Another v Islamic Solidarity Co Jordan Inc* [2003] 2 Lloyd's Rep 87 ("*The Jordan II* (*CA*)"), and confirms that a provision that cargo will be carried at the rate of freight f.i.o.s.t or any variant of the f.i.o.s.t clause *will not of itself* transfer from the shipowner to the charterer the responsibility for proper performance of the loading and stowage operations.

24 In *The Jordan II (CA)*, the plaintiff's steel coils were carried in the defendant's vessel from India to Spain. The cargo was shipped under two bills of lading on the Congenbill form. The bills of lading incorporated the terms and conditions of the Stemmor 1983 form voyage charterparty. The acronym FIOST ("free in and out stowed and trimmed") and the words "lashed/secured/dunnaged" had been added to the printed form freight clause (clause 3). Clause 17 of the charter provided "Shippers/charterers/receivers to put the cargo on board, trim and discharge cargo free of expense of the vessel." After the cargo was discharged, the plaintiff alleged that it had been damaged by defective loading, stowage or discharge. The issue on appeal was whether the charter transferred the obligation to load, stow and discharge from shipowners to charterers. The English Court of Appeal held that the use of the word "free" in clause 3 meant only at *no cost* to the shipowner, and the fact that the charterers were to pay for the cargo operation did not mean that they had also agreed to carry it out or be liable if it was done badly. However, clause 17 (the second sentence of clause 17 on the obligation to trim the cargo was found to be redundant and should have been deleted because trimming was not required for a cargo of steel coils) should be read together with clause 3 which was intended to relieve the defendant of all responsibility for cargo operation; the parties' intention was to transfer the obligation to perform all cargo work to the charterer. Accordingly, if all the cargo work had to be performed by charterers, they would be liable if it was not properly or carefully carried out.

25 In reaching its decision, the Court of Appeal held at [9] that:

> It was agreed that *at common law the obligation to load, stow and discharge the cargo was on the shipowner* and that *if this responsibility was to be transferred to the charterer, clear words were required*. [emphasis added]

26 In *The Jordan II (CA)*, the responsibility was held to have transferred not because of the term "FIOST" in clause 3 but because it stood with and was read together with clause 17 which provided the clear words required to effect such a transfer. Tuckey LJ held that (at [17]):

> In some contracts so-called FIOST clauses do transfer responsibility to charterers, but it does not follow that use of the acronym on its own will always do so.

Tuckey LJ also approved of the trial judge's conclusion (whose judgment *("The Jordan II (HC)"* is reported in *"The Jordan II (CA)"* in full at 88) that (at [24] p 92):

> *Had clause 3 stood alone it would have been arguable that the charterparty would not have contained clear words transferring responsibility for the proper performance of loading, stowing, lashing, securing, dunnaging and discharging the cargo to the charterers. It is in a freight clause and whilst it is apt to transfer liability for the expense of cargo operations it could be said not clearly to transfer responsibility for the proper performance of cargo operations*; see in this respect the South African case of *The Sea Joy* [1998] (1) SA 487. However, it is not necessary for me to determine the effect of clause 3 had it stood alone because it does not stand alone. [emphasis added]

27 This brings me to two important points. First, unlike *The Jordan II(CA)*, other than the f.i.s. l/s/d term in Box 10 of the Booking Note, in the present case there is significantly no other clause in the Booking Note that Subiaco can point to as providing clear words to transfer responsibility and risk of loading to the defendant. The f.i.s. l/s/d term on its own does not transfer the responsibility and risk of loading to the defendant, and I so hold. In fact, there are printed clauses on page 1 of the Booking Note that reinforce this finding. I refer to clauses 4, 8 and 18 of the Booking Note.

28 Clause 4 of Booking Note is consistent with the f.i.s. l/s/d term in Box 10, and it underscores the fact that responsibility and risk for loading operations remain with Subiaco as shipowner and carrier. Clause 4 deals with the period of responsibility *before* loading. It expressly states that "the Carrier or his Agents shall not be liable for loss of or damage to the goods during the period *before* loading and after discharge from the vessel however such loss or damage arises". In the absence of any express provision to the contrary, it is clear that the responsibility of loading and stowage of the goods remains with Subiaco. Notably, by clause 2 the Booking Note (*ie*, the paramount clause), the contract was expressly made subject to the Hague or Hague Visby Rules. In this regard, Art III r 2 of the Hague or Hague-Visby Rules applies since there is no provision in the Booking Note to vary or contract out of Subiaco's loading obligations under Art III r 2 (see [18] above). In short, clause 4 can be read harmoniously with Art III r 2.

29 I now turn to clause 8 of the Booking Note and will compare it with the f.i.s. l/s/d term in Box 10. The f.i.s. l/s/d term deals with the expense of loading, stowing, lashing, securing and dunnaging of the goods at load port whereas the carrier under clause 8 is to *arrange* for loading (which activity includes stowage, see *Scrutton* at p 158 which is referred to in [34] below). Furthermore, clause 8 requires the Merchant to *tender* the goods to the carrier for loading. The rest of the clause refers to *loading* of the goods by the carrier who retains the right to shut out the goods in the circumstances described in clause 8.

30 Lastly, the "Himalayan" clause (in clause 18) provides for exemptions and immunities of all

servants and agents of the carrier. It is clear that the abovementioned clauses (*ie*, clauses 4, 8 and 18) are consistent with the fact that responsibility for the loading operations at load port remained with Subiaco as shipowner and carrier.

31 At this juncture, I should mention Mr Bhandari's reliance on the defendant's agreement to pay demurrage as a factor to support its argument that Subiaco could not have undertaken responsibility for the cargo operations. Mr Bhandari submits that it would not make any sense for the defendant to agree to pay demurrage if the obligation to load the cargo was placed on Subiaco. Mr Bhandari's argument breaks down at this point. There is an element of circularity in seeking to derive assistance from the demurrage provision in the Booking Note to ascertain the true construction of the f.i.s. l/s/d term. Box 11 of the Booking Note provides that:

> 11. Demurrage/Detention rate (if agreed)
>
> USD 7,500 per day pro rata
>
> If cargo and/or documents not ready at loading and/or discharging

Box 13 is for the special terms. It provides:

> 13. Special terms, if agreed
>
> - Carried under deck only
>
> - 3 weather working days SHINC allowed for loading
>
> - ...

32 Both Patrick and Henrik explained that VCM was having problems with meeting the vessel's laycan, and as such demurrage was re-negotiated. The parties agreed on a laytime of three weather working days SHINC for loading, and deleted the original "Loading CQD" term in Box 13. [note: 6] The demurrage rate was also changed from "US$12,500" to "US$7,500" per day pro rata. [note: 7] In any case, the demurrage clauses in Box 11 and Box 13 do not import an obligation to load the cargo on the defendant. It merely provides that the defendant has to pay demurrage in the event the vessel is detained beyond the laytime stipulated.

33 Moving to my second point, Subiaco cited a large number of English cases in support of its submissions. Again, none of the English authorities assist Subiaco. Unlike the present case, the English cases usually involved charterparty clauses (such as New York Produce Exchange form, Stemmor form, Gencon form, and Baltime form) where clear words are used to transfer the expense, responsibility and risk of loading to the charterers. In this regard, the editors of *Voyage Charters* commented that no general rule can be derived from those cases save for the proposition in the *Jordan II (CA)* that each case depends upon the wording of the clause in question and the context in which is made. That said, *Voyage Charters*, at para 14.55, sets out some guidelines to construction deduced from some of the authorities:

> 1. Since the responsibility for loading and discharging operations within the ship, and for stowage, is normally that of the owner, clear words are necessary to transfer the responsibility for these operations to the charterer.
>
> 2. A clause which confers upon the charterer the right to appoint stevedores does not, without

more, transfer to him the responsibility for their acts or omissions.

3. A clause which makes the charterer responsible for the expense of employing stevedores to perform loading, stowage or discharging does not, without more, transfer responsibility.

4. A clause which provides that the charterer shall perform loading, stowage or discharging does transfer responsibility for those operations. It was said to have been rightly conceded in The Jordan II that if all cargo work had to be performed by the charterer, he would be liable if it was not properly and carefully carried out.

34 With the above guidelines to construction in mind, I repeat that any departure from the shipowner's duty to load and stow is founded on express terms and do not arise by implication of law or by implication from the charterparty or, in this case, the Booking Note. I held in [27] above that, in this particular case, the f.i.s. l/s/d term which appears in connection with the freight rate in Box 10 does not without more transfer responsibility for loading to the defendant. "Free" in the f.i.s. l/s/d term does not mean free of risk *and* expense following the natural meaning of "Free" in the *Jordan II (CA)*. In this case, the natural meaning of "Free" is that of being at no cost to Subiaco. The f.i.s. l/s/d term complements clause 8 which provides that loading and discharging is to be *arranged* by the carrier's agent unless otherwise agreed. No agreement has otherwise been expressly agreed in the Booking Note. The obligation to arrange loading was not "otherwise agreed" by the f.i.s. l/s/d term which relates only to the expense of cargo operations at the load port. I have already pointed out that the question of risk has to be distinguished from expense, meaning the costs of and associated with the cargo operations at the load port (see *Scrutton* at p 158 where stowage and lashing to secure the goods are said to be part of loading operation).

35 For completeness, I should mention the case of *Olbert Metal Sales Ltd v Cerescropt Inc (T.D.)* [1997] 1 FC 899 ("*Olbert Metal*"). [note: 8] It is one of the many authorities referred to by Mr Bhandari, and ostensibly supports his contention. *Olbert Metal* is a Canadian case decided by a single judge in the trial division of the Federal Court of Canada, Vancouver. In that case, the court was simply asked to decide on two motions: the plaintiffs' motion for discontinuance, and the defendants' motion for an affidavit verifying the destruction of documents. I do not see how that case can assist Subiaco. In relation to the bill of lading marked "FISLO" (*ie*, Free in stow, liner out), the judge simply stated that the term indicated the shipper's obligation to load and stow with the cost of the discharge included in the freight. There was no discussion of how the Judge arrived at his view which was confined to the paragraph [7] of the case report. Henrik has also confirmed during cross-examination that Subiaco is relying only on the f.i.s. l/s/d term in support of its claim that the responsibility for carrying out the cargo operations has been transferred to the defendant. [note: 9] I have already concluded that the f.i.s. l/s/d term of itself does not transfer loading operations to the defendant.

The extended meaning argument: can the f.i.s l/s/d term be given an extended meaning based on the facts and circumstances of the case

36 Mr Bhandari submits that the f.i.s l/s/d term can be given an extended meaning that transfers both expense and risk of cargo operations at the load port to the defendant. This extended meaning, he argues, is based on the facts and circumstances of the case. Mr Bhandari's arguments are inspired by Tuckey LJ's observations in the *Jordan II (CA)* at [15]:

We have been referred to a number of cases in which the courts have had to consider whether the words in a particular contract do or do not transfer the obligation to carry out cargo work. These cases are helpfully summarised and commented upon in Voyage Charters (2nd edn., 2001)

at paras. 14.53 – 14.55. *I think, however, that the only sure principle which can be derived from these cases is that each case depends upon the contract in question and the context in which it is made*. I agree with the editors of Scrutton on Charterparties 20th edn. (1996) at p. 175 that *no general rule can be derived from these*.

[emphasis added]

37 Mr Bhandari also relies heavily on *Canadian Transport Company Limited v Court Line Limited* [1940] 1 AC 934 ("*Canadian Transport*"). In particular, Subiaco has sought to rely on the conduct of the defendant, and the course of dealings between the parties to prove that the f.i.s. l/s/d term has an extended meaning. In the following sections, I will examine the cases of *Jordan II (CA)* and *Canadian Transport*, the conduct of the defendant, and the course of dealings between the parties to determine the validity of Subiaco's extended meaning argument.

38 Before I begin with an examination of the two cases, it should be stated that it is not Subiaco's case that the terms of the contract of affreightment are partly in writing, partly inferred by conduct and/or through a course of dealings. Subiaco is relying on extrinsic evidence – the conduct of the defendant and the previous course of dealings – as an aid to construction. On any view, I do not see how the so-called extrinsic evidence will advance Subiaco's case in light of the superseding clause in the Booking Note, which provides that "*this Contract [ie, the Booking Note] shall be performed subject to the terms contained on page 1 and 2 which shall prevail over any previous arrangements*" (see [6] above). In this regard, this portion of the superseding clause effectively negates any oral terms which the parties may have agreed upon between themselves by the conduct of the defendant. By the same token, any term arising by implication from the previous course of dealings or the facts and circumstances of the present action will also be negated. That said, it is arguable that the use of the words "previous arrangements" seek to expressly preclude as an aid to construction any reference to background facts, prior conduct and/or previous course of dealings (see *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [41]). Mr Bhandari may say that it is still open to Subiaco to argue that the italicised portion of the superseding clause does not prevent a court from adopting a contextual approach in contract interpretation.

(i) Jordan II (CA) and Canadian Transport

39 At the outset, the cases of *Jordan II (CA)* and *Canadian Transport* do not support Mr Bhandari's argument that the f.i.s. l/s/d term could be given an extended meaning based on the facts and circumstances of the case. In *Jordan II (CA)*, the English Court of Appeal clearly held that the default position at common law is that the obligation to carry out the cargo operations was on the shipowner, and clear words are required if this responsibility is to be transferred from the shipowner to the charterer. Mr Bhandari's argument is that it may be inferred from the words used in the context of the case that the defendant or the FOB shipper (*ie*, VCM) is to perform the loading operations. Even if this was so, I find that Subiaco has not shown any words from which such a transfer of responsibility to the defendant can be inferred. The earlier comments in [34] made with reference to the meaning of "Free" and clause 8 of the Booking Note are also relevant to this part of the analysis.

40 In *Canadian Transport*, a cargo of wheat was damaged due to improper stowage. The owners were liable to the receivers of the cargo for the damage and claimed an indemnity from the charterers. Of particular interest to the present action is the fact that clause 8 of the charterparty provided that (at p 937):

The charterers are to load, stow, and trim the cargo at their expense under the supervision of the captain who is to sign bills of lading for cargo, as presented in conformity with mates or tally

clerks' receipts. [emphasis added]

The House of Lords held that the words in italics necessarily import that the responsibility for those cargo operations was transferred to the charterers. As such, the shipowners were entitled to receive an indemnity from the charterers.

41 It is noteworthy that clause 8 in *Canadian Transport* is by all accounts very similar to clause 17 in the *Jordan II* (*CA*), which provided that the shipper/charterers/receivers were to "put the cargo on board, trim and discharge free of expense to the vessel". *Canadian Transport* concerned the effect of the intervention proviso in clause 8. It was held in the *Jordan II* (*CA)* that when read with clause 3 (which stated that freight was payable "FIOST lashed/secured/dunnaged"), clause 17 provided the clear words necessary to transfer the responsibility to carry out the cargo operations from the shipowner to the charterers. Therefore, it was not surprising that the House of Lords in *Canadian Transport* went on to hold that clause 8 provided the clear words which transferred the responsibility for the loading and stowing of the cargo to the charterers, and thereby relieved the shipowners of liability. As the court in *Jordan II (HC)* pointed out at [23], *Canadian Transport* "was not a decision on the meaning of the acronym FIOST standing alone".

42 From the above discussion, it is clear that both *Jordan II* (*CA*) and *Canadian Transport* involved clear words which transferred the responsibility for the cargo operations from the shipowner to the charterer. Reading these two cases in their proper context, Mr Bhandari's reliance on these two cases – to argue that an agreement that the charterer/shipper is to perform the cargo operations may be inferred from the words used in the context of the case – is misplaced.

43 More importantly, and as stated, Subiaco has not been able to point to any words, either in the Booking Note or the bills of lading, which expressly or inferentially transfer the responsibility to carry out the cargo operations from itself to the defendant. In the present action, Subiaco is relying only on the f.i.s. l/s/d term in support of its claim that the responsibility for carrying out the cargo operations had been transferred to the defendant. Accordingly, *Canadian Transport* is of no assistance to Subiaco.

(ii) Conduct of the defendant

44 Mr Bhandari argues that the f.i.s. l/s/d term can be given an extended meaning based on the conduct of the defendant, that is to say, the defendant appointed agents and/or representatives at the load port, namely VMC to carry out the cargo operations, and the cargo operations were carried out by stevedores from Hoang Dieu, being the stevedoring company appointed by VMC.

45 Mr Bhandari also contends that where the charterer has to arrange and pay for all cargo operations, stevedores even if in practice appointed and paid for by the charterer's clients would, as between the shipowner and charterer, be regarded as the charterer's stevedores. According to Mr Bhandari, this principle is grounded on common sense because it is not in dispute that the defendant, BHS, was liable for the loading costs and that VMC were in effect loading the cargo on behalf of the defendant.

46 Mr Bhandari's argument is firstly premised on a finding that the Booking Note obliges the defendant to *arrange and pay* for the cargo operations at load port. I have already ruled that there was no such obligation. Secondly, VMC was the FOB seller and the buyer was not BHS but BHDF Aberdeen. The FOB seller's duty is to "make available at the port of loading and to ship free on board" the contractual cargo, and to pay all handling and transport charges in connection with the aforesaid cargo loading operation (see David M Sassoon, *CIF and FOB Contracts* (Sweet & Maxwell, 4th Ed,

1995) at para 442 ("*Sassoon*"). It is not inconceivable that the loading operations arranged by VCM were in discharge of its own obligations under the FOB sale contract as argued by BHS. Thirdly, Subiaco's conclusion that VCM was the defendant's agent is based on Box 12 of the Booking Note where VCM's name and address appeared as the Merchant's representative at the load port. The defendant has repeatedly denied an agency relationship with VCM. I note that Henrik and Dennis Gallagher, a director of Subiaco, conceded that Subiaco has no other evidence that VCM was the defendant's agent having no knowledge of the arrangement between the two entities. Contrary to Mr Bhandari's submissions, there is no evidence that VCM were asked to carry out the cargo operations at Haiphong as the agent of the defendant, or that VCM appointed the stevedoring company on the defendant's behalf. Mr Bhandari's reliance on Box 12 is ill-founded and misplaced. First, it was Henrik who inserted the name and address of VCM in Box 12; the information did not come from Patrick. Second, the purpose of inserting a name in Box 12 was for communication. Henrik explained at [35] of his affidavit of evidence-in-chief that:

> The purpose of inserting the Merchant's "representatives" name in Box 12 of the Booking Note is so that the carrier can inform their port agent whom they should contact, so that the port agent can keep the Merchant's representative updated on the Vessel's arrival and other port formalities that need to be carried out prior to the Vessel's arrival.

47 It is clear from Henrik's written testimony that the fact that VMC was named as the Merchant's representative in the Booking Note did not necessarily mean that VMC appointed the stevedores to carry out the cargo operations on behalf of the defendant. I accept as plausible the defendant's evidence that it did not appoint the stevedores or require and/or ask VMC to appoint stevedores on its behalf. Instead, it was VMC who appointed the stevedores in discharge of its obligations under the sale on FOB terms. AG Guest *et al*, *Benjamin's Sale of Goods* (Sweet & Maxwell, 7th Ed, 2006) at para 20-012 provides that:

> *It is the duty of an f.o.b. seller to put the goods on board a ship nominated or designated by the buyer*… it must be emphasized that a mere "delivery of the goods to a carrier" within that subsection [section 32(1) of the Sale of Goods Act 1979] is not sufficient to discharge the seller's duty under a f.o.b. contract, since *he must not merely deliver the goods to the carrier but actually put them on board the ship*. [emphasis added]

48 Mr Bhandari cited the case of *The Flintermar* [2005] 1 Lloyd's Rep 409 at [42]-[43] in support of its argument that the stevedores, even if they were, in practice, appointed and paid for by the charterer's clients (*ie*, VCM), they would, as between the shipowner and the charterer, be regarded as the charterer's stevedores. However, it is important to note that it was expressly agreed in that case that the charterer was "to arrange" the cargo operations. This is in contrast to the present action, where clause 8 of page 1 of the Booking Note expressly provides that it was for Subiaco to arrange for loading unless otherwise agreed. Subiaco has not been able to prove that there was such an agreement "otherwise" (see also [34] above).

49 Besides clause 8, there is no clause in the Booking Note conferring the right to appoint stevedores upon the defendant. Even if, for the sake of argument, the stevedoring company was somehow appointed by the defendant, it does not of itself mean that the defendant is responsible for the acts or omissions of the stevedoring company. As case law has made clear, in the absence of clear words transferring the responsibility for the cargo operations to the defendant, Subiaco remains responsible for the cargo operations at load port. In this regard, the commentary in *Scrutton* at p 160 is instructive:

> It is very usual to find a provision in charterparties whereby the charterer secures the right to

> appoint a stevedore and under such a clause a question often arises whether a stevedore so appointed is, as between the owners and the charterers, the servant of the owners or the charterers. No general rule can be derived from the cases. *Where, however, the responsibility for stowage is not transferred from the owner to the charterer, and remains with the owner, it seems probable that in most cases the stevedore, though appointed or nominated by the charterer, is the servant of the shipowner*. [emphasis added]

Against the finding that the responsibility for loading was not transferred to the defendant under the f.i.s. l/s/d term, even though the stevedoring company, Hoang Dieu, was engaged by VCM to handle the loading of the cargo at Haiphong, it would probably be the servant or agent of Subiaco as described in the above passage from *Scrutton*.

50 It is also clear from Mr Bhandari's closing submissions on this point that he is proceeding on the basis that the responsibility for the cargo operations has been transferred to the defendant. For example, in arguing that the defendant's position as to VMC's role in undertaking the cargo operations for itself is untenable, Mr Bhandari submits: [note: 10]

> *The case law clearly establishes that where the charterer* (or the merchant, under a booking note) *assumed the contractual obligation of performing the cargo operations*, it matters not if those operations were in fact performed by a shipper or receiver or other person who is not a party to the contract of carriage.
>
> [emphasis in original]

51 The authorities that Mr Bhandari has relied on all involved facts whereby there were clear words which transferred the obligation to carry out the cargo operations to the charterers or shippers (see, for example, *Brys & Glysen v Drysdale* [1920] 4 Lloyd's Rep 24 and *The Apostolis (No 2)* [2000] 2 Lloyd's Report 337). These authorities are clearly inconsistent with the factual matrix of the present action, where such clear words are not present.

52 In light of the above, Subiaco cannot rely on the conduct of the defendant to justify an extension of the meaning of the f.i.s. l/s/d term so that the defendant was obliged to carry out the cargo operations at its own risk and expense, and be held liable for the alleged negligence of the stevedore.

(iii) Established course of dealings

53 I now come to the next consideration which may be summarised thus: Against the background of an established course of dealings, how is the freight term in Box 10 to be construed?

54 Mr Bhandari is arguing that the f.i.s. l/s/d term has an extended meaning because of an established course of dealings between the parties since around June 2007, whereby Subiaco had previously shipped bagged barites for the defendant from Haiphong to Dampier and Darwin on "free in stowed" terms, and the usual and/or customary procedure utilised by the parties was for the defendant to carry out the cargo operations through its stevedores' agents or representatives appointed at the load port. For the alleged three previous shipments of the defendant's goods, one was on board the vessel *Achilles* ("AC 701"), while the other two were on board the vessel *Territory Trader* ("TT 703" and "TT 705").

55 The three shipments were previously arranged by Henrik and Patrick. Henrik had stated that the carriage of the cargo on the basis of the f.i.s. l/s/d term was in accordance with the "usual practice"

that Patrick and he had adopted for the previous shipments of barites from Haiphong, namely, the three previous shipments: AC 701, TT 703 and TT 705.

56 For the AC 701 shipment on board the *Achilles*, the "Conlinebooking" standard form was used. Moreover, the terms in Boxes 10 to 13 were identical to the Booking Note in the present action. It is common ground that the *Territory Trader* did not belong to Subiaco, and the TT 703 and TT 705 shipments did not involve the use of booking notes. There are also no documents to show the agreed terms. According to Henrik, these shipments were on "free in" (which he understood to mean "free in stowed") and "free in stowed" terms respectively. [note: 11] This is in contrast to Patrick, who stated that both shipments were on "free in" terms. Despite these differences, it is clear that the shipments were on terms which were different to the f.i.s. l/s/d term in the present action. In short, there was no consistency in the course of dealings between Subiaco and the defendant to give rise to an established practice. More importantly, according to Henrik, Mocean and not Subiaco time chartered the *Territory Trader* and the counterparty for the TT 703 and TT 705 shipments was Mocean and not Subiaco. It is also unclear, evidentially, whether the defendant contracted with Mocean, and Subiaco in the case of AC 701, in its own right.

57 In the circumstances, there is no established course of dealings between the parties to justify the extension of the meaning of the f.i.s. l/s/d term as imposing on the defendant to obligation to carry out the cargo operations at its own risk and expense so as to be made liable to Subiaco for the alleged negligence of the stevedore.

Whether the defendant appointed or arranged for the stevedores through their representatives (VMC) at the load port

58 Subiaco has a fallback argument advanced as its alternative case. The argument is that, in the context of the case, the f.i.s. l/s/d term meant that BHS had agreed to appoint or arrange for the stevedores through its representatives (*ie*, VMC) at the load port. Consequently, it was an implied term of the contract of carriage that BHS (through its representatives) would appoint and/or nominate reasonably competent stevedores to carry out the cargo operations. Subiaco asserts that BHS had breached this duty because the stevedore who operated the crane in this case was incompetent.

59 Subiaco's alternative case is premised on the defendant's appointment of the stevedoring company. It is common ground that it was VMC who appointed and/or arranged for the stevedoring company to load the cargo. The issues of whether it was an implied term of the contract of carriage that the defendant, through VMC, would appoint and/or nominate reasonably competent stevedores to carry out the cargo operations, and whether the defendant has subsequently breached that duty will only be relevant if VMC is found to have appointed and/or arranged for the stevedores to carry out the cargo operations on behalf of the defendant. It is no longer a "live" issue given my finding on this point in [46] and [47] above where I accepted that the stevedoring company was not appointed by the defendant or on its behalf. It was VMC who appointed and/or arranged for the stevedores to carry out the cargo operations for itself in discharge of its own obligations under the sale on FOB terms. It follows that there can be no implied term that the defendant would appoint and/or nominate reasonably competent stevedores to carry out the cargo operations.

60 It remains to be said that having reached the conclusion that the loading operations were not at the risk of the defendant, there is no need to deal with the subsidiary defence relating to the alleged negligence of the stevedore including the appointment of competent stevedores, and whether negligence and incompetence have been proven.

Result

61 For the reasons stated, Subiaco's action fails and is dismissed with costs.

[note: 1] Defence (Amendment No 1) at para 7

[note: 2] AB38-39

[note: 3] AB 97-100

[note: 4] AB 103

[note: 5] PCS at [7] - [9]

[note: 6] AB 59

[note: 7] AB 59 and 69

[note: 8] PCS at para 102

[note: 9] Transcripts of Evidence dated 8 February 2010 at p 22

[note: 10] PCS at [123]

[note: 11] Henrik's AEIC paras 75-76 and 84.