IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 7

S1454/1991

Between

Ban Seng Lee Mobile Pte Ltd

… *Plaintiff*

And

Blue Star Crane Service Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Version No 1: 29 Oct 2026 (23:45 hrs)

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Ban Seng Lee Mobile Pte Ltd v Blue Star Crane Service Pte Ltd

[1994] SGHC 7

S1454/1991
K S Rajah JC
07 January 1994

1 **Judgment:**

2 Coram: K S Rajah JC

3 **GROUNDS OF DECISION**

4 Under a written contract dated 8 March 1991, the plaintiff contracted to buy from the defendant a crane and a fly jib. This contract did not fix any date for delivery and in it, the defendant asserted that "no warrance whatsoever are give" (sic). On 25 April 1991, the plaintiff took delivery of the crane minus the fly jib but had already paid the full price for both crane and fly jib. The plaintiff proceeded to rent the crane to a third party. On 31 May 1991, the plaintiff refused to take delivery of the fly jib and it subsequently claimed damages, rectification and other reliefs, inter alia, on the ground of breach of contract. I delivered judgment on 29 November 1993 dismissing the plaintiff's claim. The plaintiff has appealed against the whole of my decision. I now give my reasons.

5 Evidence of Plaintiff's Director

6 The plaintiff's director Seah Tong a sub-contractor is a director of two companies. He claims he does not know English and cannot read Chinese. He had purchased cranes from the defendant before in May, June and December 1990. In December 1990 Shimizu asked him to tender for work. In February 1991, Shimizu told him that they had obtained a contract and wanted a crane. The plaintiff agreed to supply a crawler crane to Shimizu. Seah Tong told defendant's Lim Yue Fook that he wanted a 335 AS crawler crane with a 30 m boom and 12 m fly jib after Yoneta a manager of Shimizu, had contacted him. The agreement with Shimizu was made in February 1991. Seah Tong approached the defendant in February and asked for the crane. The defendant said that he had the crane. Seah Tong told Lim Yue Fook (Lim) that he wanted the crane for a contract. Lim told him "no problem". The price for the crane however, was not discussed in February.

7 Under cross-examination Seah Tong admitted that in March 1991 his businesses was spread over companies and firms that owned more than 10 cranes and employed about 200 workers. In his dealings with Yoneta he would use a little English but would ask assistants to help him. Seah Tong agreed that the first time the defendant knew he did not understand the agreement of 8 March 1991 was on 27 November 1992. He was asked:

8 Court: When was it first explained to you?

9 Answer: Can't remember. It was in my office. This matter is too complex, I can't remember. I also can't remember when it was first explained to me.

10 It was put to him:

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11 Question: Did Lim tell you that he had a crane in Singapore in March which he could sell to you?

12 Answer: He told me that he did not have this kind of a crane in Singapore and that he knew the defendant had to import the crane from Japan.

13 Question: In March 91, you had reason to keep negotiations with Shimizu a secret from crane supplier.

14 Answer: I keep it secret. It is my business. I cannot tell others.

15 On 20 April 1991 Lim told him that the crane was on the way. Seah Tong was aware that Tat Hong another potential supplier, had fly jibs but the plaintiff did not purchase one from Tat Hong as it regarded $10,000 to $13,000 for a fly jib as expensive. Seah Tong also agreed that Tat Hong could deliver a fly jib in a day after having first agreed that one could be delivered within one hour.

16 Seah Tong admitted knowing that the cranes came from Japan for the three earlier transactions in 1990 and paying a deposit after negotiations. The balance of the purchase price was paid after the cranes had arrived. I find as a fact that the plaintiff knew that the defendant would have to order the crane and fly jib from Japan and that time would have to be allowed for the goods shipped to arrive in Singapore before delivery could be made.

17 Yoneta the Japanese engineer for Shimizu wanted the crane by 1 April 1991 and Seah Tong told Lim that he wanted the crane by 1 April 1991 and asked for the agreement to be reduced into writing. Lim prepared the agreement and took it to the construction site. Lim read the document out to him. Seah

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Tong asked Lim if there would be any problem about delivery by 1 April 1991. On being told that there would be no problem he signed the agreement.

18 The business agreement of 8 March 1991 is in the following terms:

19 BLUE STAR CRANE SERVICE PTE LTD

20 No. 36, STAGMONT RING

21 SINGAPORE 2572

22 TEL: 7627786, 7690927

23 PAGER NO: 5007163

24 Your reference:

25 Our reference: SALE & PURCHASE AGREEMENT Date: 8/3/91

26 BUYER:

27 BAN SENG LEE MOBILE PTE LTD

28 17A SURIN AVE, SINGAPORE 1953 (THE BUYER)

29 ATTN:MR SEAH TONG

QUANTITY	DESCRIPTION	UNIT PRICE
ONE UNIT	USED P&H 335AS CRAWLER CRANE	$143,000.00

30 SERIAL NO : J24267

31 YEAR MADE : 1982

32 BOOM : 30M

33 FLY JIB : 12M

34 AGGREGATE PRICE: S. DLRS ONE HUNDRED FORTY-THREE THOUSAND ONLY.

35 TERMS OF PAYMENT:S$5,000.00 TO BE PAID AS DEPOSIT UPON SIGNING OF AGREEMENT AND THE BALAN OF S$138,000.00 TO BE PAID ON DELIVERY.

36 OTHER TERMS : NO WARRANCE TERMS WHATSOEVER ARE GIVE.

37 THE BUYER BY

38 Signed

39 THE SELLER BY

40 Signed

41 BAN SENG LEE MOBILE PTE LTDBLUE STAR CRANE SERVICE PTE LTD

42 Delivery Date

43 Seah Tong said he believed that the agreement provided for delivery on 1 April 1991 and being unable to read English he had asked Lim whether

delivery would be on 1 April 1991. The absence of a delivery date is the defendant's mistake. The plaintiff intended the contract to have a delivery date. If he had known of the existence of "Other Terms" in the agreement he would not have signed it. Seah Tong signed the agreement with Shimizu on 15 March 1991 after he had entered into the sale and purchase agreement with the defendant on 8 March 1991.

44 Around 25 March 1991, Seah Tong asked about the delivery. He was told that the crane was on the way. Relying on the defendant's assurance, he told Shimizu that it was on the way.

45 The crane without the fly jib arrived on 20 April 1991. The defendant told Seah Tong of its arrival and its being at the PSA. The plaintiff's representative Mr Cheng went to inspect it and found that it had no fly jib. Seah Tong also inspected the crane. Seah Tong told the defendant that it had no fly jib and that it could ruin his contract with Shimizu but Seah Tong did not reject the crane and wanted to take delivery. He was asked:

46 Question: What did you do when you discovered that there was no fly jib?

47 Answer: Blue Star told me fly jib on the way and they wanted me to pay before taking delivery. On the one hand I take and on the other I pay.

48 Seah Tong ordered delivery of the crane without the fly jib and made full payment. Seah Tong's evidence is that he did so because Lim had told him that the fly jib was on the way. The letter prepared by a director of the plaintiff and sent to the defendant on 25 April 1991 after it had been signed by Seah Tong is in the following terms:

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49 Your Ref:

50 Our Ref: Date: 25th April 1991

51 Blue Star Crane Service Pte Ltd No. 36, Stagmont Ring Singapore 2572

52 Attention: Mr Lim

53 Dear Sir,

54 Re: Crawler Crane 335AS

55 We are now enclosing a cheque of S$20,400.00 for the final payment of the above Crawler Crane.

56 Kindly take note that you still owe us the fly-zib (sic) of the above truck.

57 Yours faithfully,

58 BAN SENG LEE MOBILE PTE LTD

59 Signed

60 SEAH TONG

61 The letter recognizes the defendant's right to cure the failure to deliver the fly jib and by doing so the plaintiff's representative wanted the defendant to deliver the crane to their worksite after inspecting it but the defendant was not prepared to do so until after payment. The plaintiff was not able to make payment and the defendant removed the crane to its store house in Jurong. The defendant then received a letter from DBS Finance.

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62 There is no reference to a delivery date in the letter. Payment was made for the crane and the fly jib. On 25 April 1991, Seah Tong said his men told him that the crane had been delivered without the fly jib after Lim had told him there was a fly jib. He inspected the crane the next day and told Lim that his contract with Shimizu required the crane to have a fly jib and that without a fly jib, work could not start. He tried to find a fly jib but could not find one. Shimizu agreed to change the commencement date to 1 May 1991 I find as a fact that the plaintiff made no attempts to obtain a fly jib until it was too late.

63 Mitsuroyo Site

64 Yoneta inspected the crane that was delivered on 25 April 1991 and found no fly jib.

65 He gave the plaintiff an extension of time till the end of April. The fly jib was not delivered and on 2 May 1991 he wrote to the plaintiff stating that the contract would be terminated if the fly jib was not delivered.

66 The work at the site was not initially affected because the plaintiff had delivered a truck crane. The truck crane that was delivered was about 30 tons and had a fly jib but it did not have the reach of a 35 ton crawler crane.

67 After the crawler crane was delivered without the fly jib, Mr Yoneta suggested that it be used from 1 May 1991 to 15 May 1991 but changed his evidence and said that the reference to 15 May 1991 was not correct because the plaintiff was told to remove the crawler crane on 2 May 1991, but it is undisputed evidence that the crawler crane was on the site till 15 May 1991. The contract between Shimizu and the plaintiff was in force between 1 April 1991 and 15 May 1991 on condition that the fly jib would be delivered. Mr Yoneta

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was asked if the crawler crane delivered on 26 April 1991 was used by Shimizu. Yoneta was unable to say. Shimizu however, paid $3,685 for the crawler crane.

68 On 15 May 1991 the plaintiff was told to remove the crane as the work on the site was being affected because of the limited use of the crawler crane without the fly jib.

69 The letter written by Yoneta on 2 May 1991 refers to the plaintiff's suppliers not having delivered the fly jib to the site although there is nothing in the agreement between Shimizu and the plaintiff to the effect that delivery of the crawler crane would be made to the site by the plaintiff's supplier. The letter also makes reference to claims against the plaintiff, and provides the basis for the plaintiff's prayer for a declaration.

70 Advertisements

71 The plaintiff advertised for a fly jib for two days after its contract with Shimizu was terminated. No explanation was given for advertising for a 30 ft fly jib that was 9.144 m long instead of a 12 m fly jib which would be 39.37 ft long. Seah Tong said he advertised for a fly jib because he wanted to know the price so that he could renew his contract with Shimizu and denied that the defendant had told him on 20 May 1991 or at any time that he could collect the fly jib from the defendant when it arrived from Japan.

72 Insurance

73 The cover note insuring the crane dated 29 April 1991 taken by the plaintiff was for the period 29 April 1991 to 28 April 1992. The situation of the crane is given as "Anywhere in Singapore". The cover note insures a: boom -

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30 m, fly jib 12 m. The plaintiff insured the crawler crane for $120,000 and was the insured and described the location of the crane.

74 The Schedule to the All Risk (Machinery & Equipment) Policy with Lombard Insurance Ltd describes and identifies the crane as being:

75 P&H 335 AS Crawler Crane Serial No - J24267 Year Made - 1982 Boom - 30 m Fly Jib - 12 m

76 The condition precedent for the liability of the Insurance Company was that it would only arise with the truth of the proposal. Paragraph 2 of the Memorandum reads:

77 ... the Policy does not cover:

78 a) faults or defects known to the Insured ... at the time the contract was arranged and not disclosed to the Insurers.

79 Hire Purchase Agreement

80 On 26 April 1991, DBS Finance wrote to the defendant and asked for the release of the crane and fly jib to the plaintiff subject to the plaintiff finding it acceptable. The defendant was then to invoice DBS Finance for $117,600, the difference between the purchase price and the deposit paid to the defendant. The defendant was asked to collect the deposit from the plaintiff. The plaintiff entered into a hire purchase agreement with DBS Finance on 9 May 1991. The agreement states that the crane would be garaged or housed at or in the vicinity of 17A Surin Avenue Singapore 1953. Seah Tong signed the agreement on behalf of the plaintiff.

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81 The text of the letter received from the DBS Finance is as follows:

82 DBSF cf 200/TLF/jm

83 26 April 91

84 Blue Star Crane Service Pte Ltd 36 Stagmont Road Singapore 2572

85 Attn:Mr Lim

86 Dear Sirs

87 NAME OF HIRER:

88 Ban Seng Lee Mobile Pte Ltd

89 EQUIPMENT MODEL:

90 1 used (1982) P & H 335AS Crawler Crane c/w 30 m boom and 12 m fly jib

91 Serial No:J24267

92 AMOUNT FINANCED:$117,600

93 1. We wish to advise that we have agreed to a Hire Purchase Agreement for the above equipment with the above Hirer. Kindly release the said equipment to the Hirer subject to them finding it acceptable and invoice us for the sum stated above being the difference between the purchase price and the deposit paid to you.

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94 2. Please collect the said deposit direct from the Hirer and our payment of the captioned amount shall constitute a full settlement of your invoice.

95 Yours faithfully

96 Signed

97 TAN LAN FANG

98 CREDIT OFFICER

99 HP/LEASING DEPT

100 After the defendant had received the letter, the plaintiff wanted the defendant to release the crane to it as the plaintiff, required the crane. The defendant however, wanted full payment. On 25 April 1991, the plaintiff paid the defendant $20,400 and the defendant then delivered the crane to the worksite at Mitsuroyo as requested. Whether Seah Tong committed any offence under the Penal Code in respect of the Hire Purchaser Agreement is a matter that I do not have to consider, but I must give weight to the fact that DBS Finance was told that the Agreement was for both crane and fly jib.

101 Shimizu Agreement

102 Yoneta, the manager of Shimizu Corporation gave evidence to the effect that the crane specified in the agreement of 15 March 1991 was required but other cranes were used on a part-time basis. The crawler crane had to be rented and he made enquiries from the plaintiff in February 1991 and Tat Hong, another supplier of cranes in Singapore.

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103 The practice between Shimizu and the plaintiff who is a sub- contractor of Shimizu was to agree verbally and then exchange written contracts. Shimizu agreed verbally to rent a crawler crane from the plaintiff in the middle of February and a written contract was signed on 15 March 1991. Yoneta did not consider that any binding agreement existed in February. The written contract entered into between the plaintiff and Shimizu on the 15 March 1991 is in the following terms:

104 Your Ref:

105 Our Ref: Date: 15th March 1991

106 Shimizu Corporation

107 10 Anson Road, #26-01, International Plaza, Singapore 0207.

108 Attention:Mr Yoneta

109 Dear Sir,

110 Re: Confirmation of 35 tons Crawler Crane Rental at Mitsuroyo Project

111 Further to our teleconversation, we would like to give you a final quotation for the above mentioned crane:

112 Description - 35 tons P&H Crawler Crane

113 Boom - 30 m + 12 m fly jib

114 Commencement Date - 1st April 1991

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115 Mob/Demob - S$1,000.00

116 Rental Rate with Operator - S$7,500.00

117 Overtime Per hour- S$30.00

118 Duration Period- 8 months subject to renewal

119 Working Hour per weekday - 8 hours (8 am - 12 pm, 1 pm - 5 pm)

120 Working Hour per weekend (Saturday) - 4 hours (8 am - 12 pm)

121 Working day per week - 5+ days (Monday - Saturday)

122 Working day per month - 26 days

123 Term of Payment- 30 days credit

124 Insurance (Operator/Machine) - On Ban Seng Lee A/C

125 Insurance (3rd Third Party/Others) - On Shimizu A/C

126 Cranage (Loading, Unloading,Assy, Disassy - On Ban Seng Lee A/C

127 Fuel, Lifting Gear, Ground Access - On Shimizu A/C

128 Kindly please confirm by signing and returning this letter to us as soon as possible.

129 Thank you.

130 Yours faithfully

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131 BAN SENG LEE

132 I agreed the above condition MOBILE PTE LTD SHIMIZU CORPORATION

133 Signed

134 Signed

135 GINA SEAH Mr Yoneta

136 The plaintiff's contract with Shimizu shows that the plaintiff produced a contractual document in English. The plaintiff must have as a matter of routine made reference to the agreement of 8 March 1991. I reject the plaintiff's evidence that no reference was made to this agreement of 8 March 1991 around 15 March 1991 or soon after it was signed.

137 Litigation

138 The plaintiff's solicitor wrote to the defendant's solicitor on 15 May 1991 inter alia, giving notice to the effect that if the fly jib was not delivered, proceedings would be instituted. The defendant replied on 17 May 1991 to the effect that on 16 May 1991 Mr Seah Tong had had a discussion with Mr Lim and that the defendant had been given three days to deliver the fly jib to the plaintiff and that Mr Lim and Mr Seah Tong on behalf of the parties had reached an amicable settlement. Much was made of the three days, but it had to be seen in the context of the Insurance Policy and Hire Purchase Agreement to which reference will be made later.

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139 On 16 May 1991, 24 May 1991 and 30 May 1991, the defendant's Lim saw the plaintiff in connection with the fly jib and wanted further extension of time. The fly jib arrived on 31 May 1991. The plaintiff refused to accept the fly jib.

140 On 22 May 1991, the defendant's solicitor wrote denying breach of contract, stating that the plaintiff had inspected the machinery before taking delivery and that the plaintiff was fully aware that the fly jib would be made available in due course as the defendant was then in the process of shipping it from overseas.

141 Buy Back Offer

142 On 23 May 1991, the plaintiff denied having inspected the crawler crane at the defendant's premises although the crane had been examined at P.S.A. It may well be that the defendant's crane was not inspected at the defendant's premises but the fact remains that the crane was inspected by Cheng. The fly jib was in transit and was accepted as such. The plaintiff accepted the crane when they could have rejected it and did not when they could have made it clear that the "all or nothing rule" applies. (See s. 11 and s. 35 of the Sale of Goods Act 1979). The insurance and hire purchase documents show that the plaintiff accepted the crane minus the fly jib and even paid for the fly jib before delivery of the same, and chose to accept the defendant's assurance that delivery of the fly jib would be within a reasonable time. The plaintiff's letter makes clear that later delivery for the fly jib was accepted.

143 On 27 May 1991, the defendant offered in writing to buy the crane for $143,000 to avoid litigation. The offer was not accepted.

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144 On 12 June 1991, the defendant offered to pay the plaintiff on an ex-gratia basis $5,000, and accept the machinery in full and final settlement of the various claims that arose out of the sale and purchase agreement. The offer was not accepted. The defendant made a further offer to purchase the crane for the purchase price of $143,000 together with an ex-gratia payment of $5,000. The offer was not accepted. On 9 July 1991 the plaintiff instituted proceedings.

145 The plaintiff supplied a mobile crane to Shimizu from 15 April to 30 April 1991, and a crawler crane from 2 May to 15 May 1991. The crawler crane that was supplied to Shimizu was delivered to a worksite by the defendant and used by Shimizu.

146 Seller's Rights

147 In addition to the real rights, the seller has his personal action upon the sale for breach of contract by the buyer which action may take one of two forms. It may be an action for the price of the goods sold or it may be an action for damages for non-acceptance. The distinction between an action for the price and an action for damages is important because there may be a difference between the price of the goods and damages for non- acceptance. Moreover, if the property has passed to the buyer, the seller is under no obligation to mitigate his damage by attempting to resell the goods. The goods belong to the buyer and not the seller, and it is the buyer's responsibility to take delivery of the goods or otherwise dispose of them. (See P.S Atiyah Sale of Goods 8th Ed (p. 467)).

148 The general rule laid down in s. 49(1) and s. 50(1) of the Sale of Goods Act 1979 is that an action for damages is the appropriate remedy where the property has not passed and an action for the price is available when the property has passed. The principle is complicated by the fact that the property in goods

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may pass to the buyer before they have been delivered to and accepted by him, as in this case, where the property has passed to the buyer and the buyer refuses to take delivery, the seller has the option of suing for the price, under s. 49(1) where the price has not been paid or for damages where the property has passed and the buyer refuses to take delivery. The refusal to take delivery of the fly jib after having paid for it causes some difficulty but the plaintiff's conduct and delivery of the crane cannot be ignored because the price has been paid.

149 In Johnson v Agnew (H.L.(E.)) < 1980 > AC 367, Lord Wilberforce said (p. 400):

150 (2) The general principle for the assessment of damages is compensatory, i.e., that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach - a principle recognised and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

151 In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. ...

152 The plaintiff gave reasonable time for the delivery of the fly jib after the crane had been delivered. The court has power to fix such other date as is appropriate in the circumstances of this case for delivery. The fly jib was

delivered on 31 May 1991 but was not accepted because the Shimizu contract had been terminated on 15 May 1991.

153 In Clough Mill Ltd v Martin < 1984 > 3 All ER 982, the buyer paid the purchase price before the seller's repossession and resale. The view was taken that a buyer must be credited with such part payment for otherwise it would be recoverable by him as money paid on a total failure of consideration.

154 The plaintiff in this case accepted the crane, derived an income from it and rejected the fly jib because the Shimizu contract had been terminated, but if the plaintiff's planning went wrong he cannot put the blame on the defendant.

155 Shimizu had no express or implied contractual relations with the defendant. The contract entered into between the plaintiff and Shimizu does not make any reference, directly or indirectly to the contract entered into between the plaintiff and the defendant on 8 March 1991.

156 Exemption Clause

157 If a seller relies on an exemption clause, he will first have to show that the clause was incorporated in the contract, and that it was part of his offer which was accepted by the buyer or show that the clause was brought to the notice of the buyer.

158 In this case, the defendant has done both by the defendant's Lim having read aloud the 8 March 1991 contract to the plaintiff's Seah Tong and the plaintiff who has signed the contract cannot rely on the fact that the buyer has not understood, or even read the contract. The issue of Seah Tong's not understanding or reading the contract or the clause in question is immaterial (see

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L'Estrange v Graucob < 1934 > 2 KB 394) unless it can be shown that the seller misrepresented the effect of the clause, fraudulently or innocently, in which case the seller will not be able to rely on it. I find it difficult to believe that Seah Tong after having asked for the agreement to be reduced into writing did not notice the terms of the contract and that no reference was made to the agreement of 8 March 1991 when the agreement of 15 March 1991 was drawn up by the plaintiff and Shimizu for the use of the crane with the fly jib on 1 April 1991. The plaintiff had equipment at his disposal and he was a known sub-contractor of Shimizu. The plaintiff thought he had time and could manage. Seah Tong made an error of judgment to which the defendant did not contribute except for the fact of fly jib coming in later but there is affirmation of the contract at common law.

159 I find no express oral statement made by the defendant which can be treated as a warranty or condition which overrides the terms of the written agreement of 8 March 1991, and I reject Seah Tong's evidence to read into the written contract terms and conditions of his own making.

160 Deliverable State

161 Under s. 61(5) the buyer is not bound to take delivery of defective goods but it does not follow that all defective goods are not in a deliverable state or that s. 61(5) prevents property passing where the goods could not be said to be in a deliverable state physically where the buyer had taken delivery. Possession of goods can always be transferred in law, where the parties intend to transfer it without regard to the physical condition of the goods. The evidence shows and I find that the parties intended property in the crane and fly jib to be transferred to the plaintiff at the time of payment.

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162 Insurance

163 In Donaghy's Rope and Twine Co Ltd v Wright, Stephenson & Co (1906) 25 NZLR 641, the first question was whether property in unascertained goods had passed. Cooper J said (p.651):

164 But, assuming that the property did not pass, then, in my opinion, the evidence establishes an agreement between the parties by which the risk was transferred from the plaintiff company to the defendants. ... The plaintiff company, in consideration of the risk being undertaken by the defendants, agree to store the twine until the next season free of charge, any insurance which the defendants might consider necessary to be effected by the defendants. That such an agreement is effective, although the property in the goods may not have passed, is established by the judgment of the Exchequer Chamber in Castle v Playford LR 7 Ex 98, a case where the goods were lost at sea, and Martineau v Kitching LR 7 QB 436, in which the goods were destroyed by fire. In Martineau v Kitching LR 7 QB 436 all the Judges (Cockburn, C.J., Blackburn, Lush, and Quain, JJ.) agreed that there may well be in the case of the sale of goods the property in the seller and the risk in the buyer, and that whether that is so must in the case of the loss of the goods be ascertained from the terms of the contract between the parties, and that there need not be an express agreement that the buyer should bear the risk, but that such agreement may be implied from the terms of the contract and the conduct of the parties ... In Allison v. Bristol Marine Insurance Company 1 App. Cas. 209, a case in which the Judges were summoned, Mr. Justice Blackburn said, "Merchants, according to my experience, attach very great weight to a stipulation as to who is to insure, as showing who is to bear the risk of loss." This observation was quoted with approval by Lord Selborne in Anderson v. Morice 1 App. Cas. 713, 728, His Lordship stating, "I agree in that remark, which is confirmed by several

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authorities." In Anderson v. Morice 1 App. Cas. 713, 728 the Lords were equally divided as to the nature of the risk undertaken by the buyer, but no doubt was thrown upon the soundness of the principle enunciated in Castle v. Playford L.R. 7 Ex. 98 and Martineau v. Kitching L.R. 7 Q.B. 436. Lords Chelmsford and Selborne quote Castle v. Playford L.R. 7 Ex. 98 with approval, Lord Chelmsford citing it as establishing that purchasers of goods may agree to take the risk of loss of the goods, although the property had not passed at the time of the loss and Lord Selborne as deciding that such an agreement may be inferred from the conduct of the parties and the understanding and intention of the parties as to insurance. ...

165 In this case the parties had agreed that the defendant owed a fly jib to be physically deliverd at a later date. The plaintiff proceeded to insure the crane and fly jib on the basis that both property and risk had passed to itself.

166 I find as a fact:

167 (1) that the defendant was not told of the Shimizu contract;

168 (2) that rectification of the contract of 8 March 1991 is unnecessary;

169 (3) that there was no misrepresentation by the defendant;

170 (4) that the plaintiff took delivery of the crane after inspection;

171 (5) that the loss of the Shimizu contract could have been avoided if the plaintiff had taken reasonable action and obtained a fly jib from Tat Hong. This is a question of fact and not law (see Payzu Ltd v Saunders < 1919 > 2 KB 581);

172 (6) that the plaintiff was not reasonable;

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173 (7) that the plaintiff's unreasonable conduct in not obtaining a fly jib led to the termination of the Shimizu contract;

174 (8) that the defendant reasonably continued to have the contract completed and tendered the fly jib; and

175 (9) that the defendant's Lim was a more credible witness.

176 The plaintiff did not prove its case on a balance of probabilities. I made no order for delivery up of goods as the fly jib was available from 31 May 1991 to the plaintiff and there was no interference with the plaintiff's proprietory rights. The order to take delivery was made having regard to the seller's rights and payment. I dismissed the plaintiff's claim and made the following orders:

177 1. The plaintiff to take delivery of the defendant's tender of the fly jib within seven days failing which the defendant be at liberty to dispose the fly jib in any manner the defendant thinks fit.

178 2. The plaintiff's claim be dismissed with costs.

179 3. Defendant given leave to withdraw the $15,000 paid into court on 25 May 1993.

180 4. Hong Kong Shanghai Bank bankers guarantee for $60,000 deposited by the defendant be discharged.

181 The plaintiff applied for a stay of execution of the first order. The plaintiff's conduct and the merits of the case did not justify a stay of execution The application for stay of the order to take delivery of the fly jib was refused.

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Khush Chopra (M/s Khush Chopra) for the plaintiff
Aqbal Singh (Chor Pee & Co) for the defendant

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