IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1995] SGHC 246

Suit 1447/1993

Between

Samsung Corp

… *Plaintiff*

And

Devon Industries Sdn Bhd

… *Defendant*

GROUNDS OF DECISION

Admiralty and Shipping — Carriage of goods by sea; Admiralty and Shipping — Carriage of goods by sea; Admiralty and Shipping — Carriage of goods by sea; Words and Phrases

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Samsung Corp v Devon Industries Sdn Bhd

[1995] SGHC 246

Suit 1447/1993
G P Selvam J
26 October 1995

1 **The background**

2 Cur Adv Vult

3 In February 1993, Samsung Corp (`the plaintiffs`) of Japan agreed to sell to Devon Industries Sdn Bhd (`the defendants`) 7,500 tons of soya bean oil in bulk at US$398 per ton fob Port Rosario, Argentina. Shipment was to be effected in parcels of 2,500 tons each in May, June and July 1993. Payment for the cargo was to be made `by CAD within 48 hours to Samsung Singapore Pte Ltd in Singapore`. Third party bills of lading were acceptable to the buyers. The contract called for a full set of clean on board charter party bills of lading made out to order and blank endorsed marked `freight collect`.

4 The plaintiffs` suppliers shipped on board the mv `Dolores` at Port Rosario 2,500 tons of oil as follows: 1,000 tons on 13 May 1993 and 1,500 tons on 15 May 1993. These cargoes were commingled not only between themselves but also with other cargoes. Two bills of lading Nos 003 and 006 dated 15 May 1993 and 13 May 1993 respectively were released at the end of May 1993 or early June 1993 (`the authentic bills of lading`). Thus there was a delay of some

two weeks in the release of the authentic bills of lading. Each bill of lading was endorsed with the following commingle clause:

> *Quantity covered by this bill of lading is part of a larger shipment loaded commingled in same tank.*

5 The bills were received by Samsung Singapore on 10 June 1993 with the required endorsements.

6 On 15 June 1993, Samsung Singapore handed the bills of lading and other documents to the defendants and demanded payment of US$995,000 for the goods. No payment was forthcoming.

7 It is now necessary to narrate certain disturbing events that were brought about by the defendants. As the sale was fob the defendants had chartered the `Dolores` to carry the cargo along with other cargo they had purchased for discharge at Chittagong, Bangladesh. The total quantity was 10,500 metric tons. Of this, 5,500 tons were to be loaded at Port Rosario and the rest at Port Rio Grande, Brazil. The arrangement the defendants had with the shipowners was that bills of lading would be released to the shippers only upon payment of freight which was payable within five working days after loading. The defendants paid the freight to the ship`s Singapore agents on 28 May 1993. Indisputably this was not in accordance with the contractual obligation of the defendants as regards payment of freight. Thus the defendants by their own act caused a delay in the release of the bills of lading to the shippers and therefore in the process of collecting the price from the defendants.

8 Before making payment of freight and the price of the cargo and without receipt of the bills of lading indorsed in their favour, the defendants had sold the 10,500 metric tons on board the `Dolores` to buyers at Chittagong, Bangladesh. It would appear that they sold on cif terms.

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9 **Second set of bills of lading**

10 Unbeknown to the plaintiffs, the defendants had an arrangement with the shipping agents in Singapore to issue freight pre-paid `global bills of lading` in respect of the entire quantity of cargo. This meant that a second set of bills of lading was issued reflecting the quantities sold by the defendants to different individual buyers in Bangladesh. The global bills of lading dated 24 or 25 May 1993 stated that the defendants were the shippers of the cargo. The defendants received the global bills of lading well before the shippers received the authentic bills of lading.

11 Mr Roland Ong, a director of the defendants, said in an affidavit dated 15 July 1993 and filed in these proceedings:

> *On the authorisation of the carriers, the Singapore shipping agents cut/released to the defendants twelve (12) global bills of lading on 24 May 1993, five (5) global bills of lading on 25 May 1993 and one (1) global bill of lading on 10 June 1993, covering about 9,500 metric tons of the goods. All the aforesaid eighteen (18) global bills of lading together with other required shipping documents were negotiated/discounted by the defendants with the defendants` various banks between the dates of 26 May and 16 June 1993.*

12 The effect of Mr Ong`s admission is that without paying the plaintiffs and probably other shippers the defendants sold the cargo which was not theirs to buyers in Bangladesh and received the price of cargo from the buyers or their bankers.

13 The practice of cutting and releasing `global bills of lading` is perfectly in order provided the authentic bills of lading issued to the real shippers, the true owners of the cargo at that stage, have been accomplished, that is that they have been received lawfully by the defendants duly indorsed and surrendered to the shipowners or their agents. In other words shipowners may issue `global bills

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of lading` in exchange for the first set of bills of lading issued to the shippers. That did not happen in this case. In abject disregard of the plaintiffs` interests, the shipping agents combined with the defendants and unlawfully issued a second set of bills of lading. The defendants unlawfully negotiated them and received enormous sums of money. In short the defendants acted fraudulently with the co-operation of the shipping agents.

14 In these circumstances, the defendants, for reasons not disclosed to the court, found themselves in dire financial straits and failed to pay the plaintiffs. Soon after these events the defendants placed themselves under judicial management. Hence this action to retrieve the authentic bills of lading in the possession of the defendants.

15 **The defendants` case**

16 The defendants said that they took legal advice according to which they were not obliged to return the authentic bills of lading to the plaintiffs even though they had made no payment for the goods. The defendants sought to rationalize their refusal to return the authentic bills of lading on two grounds. First they said that the plaintiffs had waived payment of cash against documents and that title in the authentic bills of lading and therefore the cargo had passed to them. The defendants were required to make payment only after they acquired such title but subsequently they were unable to make payment because circumstances necessitated their being placed on judicial management. Secondly, the defendants contended that the 2,500 tons of oil shipped by the plaintiffs were commingled with similar cargo from other suppliers when loaded into the tanks of the ship and remained commingled when discharged into customs authorities` tanks at the discharging port in Bangladesh. The plaintiffs` cargo thus was no longer identifiable as their cargo. Thus the cargo

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had been converted and appropriated to the global bills of lading. I rejected the defendants` contentions and granted the reliefs sought by the plaintiffs. I shall now state my reasons for my decision.

17 **Passing of property**

18 Under the true fob contract, property like risk passes to the buyer upon shipment. But this is not an inviolable rule. The question of passing of property must be decided not merely by reference to the letters `fob` in the contract but by the true intention of the parties ascertained from the terms of the contract in the context of the commercial realities of the sale and purchase. The following words of Roskill LJ in ***Albacruz (Cargo Owners) v Albazero (Owners)*** [1977] AC 774 at p 809 provide a valuable pathway:

> *It is a trite observation that what is sometimes called a true fob or a true cif contract is a comparative commercial rarity. Contracts vary infinitely according to the wishes of the parties to them. Though a contract may include the letters fob or cif amongst its terms, it may well be that other terms of the contract clearly show that the use of those letters is intended to do no more than show where the incidence of liability for freight or insurance will lie as between buyer and seller but is not to denote the mode of performance of the seller`s obligations to the buyer or of the buyer`s obligations to the seller. In other cases, though the letters cif are used, other terms of the contract may show that the property is intended to pass on shipment and not upon tender of and payment against the documents so tendered or though the letters fob are used, other terms may show that the property was not intended to pass on shipment but upon tender and payment, the seller by the form in which he took the bill of lading intending to reserve his right of disposal of the property until he was paid against the shipping documents.* ***Mitsui & Co Ltd v Flota Mercante Grancolombiana SA*** *[1988] 1 WLR 1145; [1988] 2 Lloyd`s Rep 208 is authority for the proposition that:*
>
> *... The expression `fob` determines how the goods shall be delivered, how much of the expense shall be borne by the sellers, and when the risk of loss or damage shall pass to the buyers. It does not necessarily decide when the property is to pass.*

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19 The modern law on the question is succinctly summarized in ***The Sale of Goods*** by Atiyah (9th Ed, 1995) at p 372 :

> *In modern times, any general presumption that property passes with risk on shipment in an fob contract has probably largely disappeared. Although this may still sometimes be the case if the contract contains no contrary provision, the practice of treating the shipping documents as security for the payment of the price is now so well established in international sales that contractual terms requiring payment against (ie in exchange for) the shipping documents is probably the norm in fob contracts these days, just as much as in cif contracts where this practice may have first originated. Where payment is only to be made against documents, the seller will normally have himself named as the consignee in the bill of lading (that is, the goods will be deliverable under the bill of lading to, or to the order of, the seller), so that s 19(1) and (2) become relevant. Section 19(1) has already been set out above. Section 19(2) provides :*
>
> *`Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal.`*
>
> *This reservation of the right of disposal makes the appropriation conditional under s 19(1) so that property does not pass until the condition is satisfied. It is clear that today there is nothing contrary to the nature of the fob contract in the seller doing this, and indeed, as already said, it is nowadays very common. The result is that the shipment is treated under s 19 as only amounting to a conditional appropriation, the condition being that the seller must be paid before property passes.*

20 The defendants relied on ***Panda OHG v Circle Products Ltd*** [1970] 1 Lloyd`s Rep 171 as authority for the proposition that in an fob contract providing for cash against documents the property in the goods passed upon shipment. In that case Sir Frederic Sellers said at p 504:

> *The essence of an fob contract is that the goods are to be shipped free on board a ship (ie at the seller`s expense) and consigned to the buyer or his agent. On shipment the goods are appropriated to the contract and the seller cannot thereafter rightfully withdraw or otherwise dispose of the goods. The property in them passes to the buyer, who is responsible for the freight and the goods are at the buyer`s risk.*

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21 The bald assertion made by the defendants and the statement made by Sir Frederic Sellers should be read in the context of the law I have stated.

22 Whether property was intended to pass upon shipment must be discerned from all relevant terms of the contract and surrounding circumstances. An essential element of a true fob contract is that the goods must be ***consigned to the buyer or his agent*** . This position was recognised both by the Bills of Lading Act 1855 and the English Carriage of Goods By Sea Act 1992 (Singapore Bill of Lading Act (Cap 384, 1994 Ed).

23 In the ***Panda*** case the contract as a matter of construction was held to be on true fob terms. In the present case I hold that as a matter of construction there was no fob contract in the traditional sense of the term. The principal reason is that the cargo was not consigned to the defendants but made to order. The contract expressly required the plaintiffs to provide `full set of clean on board charterparty bills of lading made out to order and blank endorsed marked "freight collect"`. Given that, property was intended to pass upon blank indorsement and delivery to the defendants provided the defendants made payment in exchange. The purpose of `fob` was to define the obligations of the plaintiffs for the price that had been agreed on. It had no bearing on passing of property to the sellers. The defendants accordingly could acquire title to the cargo only if they acquired possession of the authentic bills of lading - the indicia of title - in their own right. Did they acquire such a right? That depends on what the provision `CAD with 2 days` means.

24 **Meaning of CAD**

25 Benjamin`s ***Sale of Goods*** (4th Ed), para 5-107 states as follows :

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> *If the terms of the contract or appropriation expressly provide that delivery of the goods, or of a document giving control of the goods, is to be made or given against payment of the price or the provision of security for the price, the seller may be held to have reserved the right of disposal and retained ownership of the goods until payment has been made or a security provided. But such an inference is not inevitable, and it is a question of fact in each case whether the passing of property is conditional upon such an event.*

26 The acronym CAD stands for `cash against documents`. It does not mean actual cash in coins and currency notes. As the price of $995,000 was in United States dollars and payment was to be made in Singapore, the parties could not have intended that currency notes must pass hands. What it means is payment against documents. The word `cash` was used to make it clear that it was not a credit sale.

27 The word `against` in this case does not mean that payment and delivery of documents should be simultaneous events. That would be practically impossible. The word means `in return for`. It in effect meant that payment was a condition for delivery of documents and until payment was made the defendants did not hold the documents beneficially but subject to the condition that they must make payment before they may consider the documents their property.

28 The two-day stipulation was to put as a limit within which the defendants may inspect and make arrangements for transfer of funds in US dollars to Samsung Singapore.

29 My construction of the contract between the parties is that on the facts of this case the parties did not intend that the defendants would acquire title to the goods or the documents before they made payment in return for the documents. As the defendants failed to make payment and were not in a position

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to make payment as provided in the contract I ordered them to return the documents and in particular the original first set of bills of lading to the plaintiffs.

30 My construction of the contract before me is supported by the case of ***Re An Arbitration between Shipton, Anderson & Co and Harrison Brothers & Co*** [1915] 3 KB 676 which decided that a `CAD` or `cash against documents` term in the contract is a case where the seller by the terms of the contract reserved the right of disposal. In that case, the contract was for a parcel of `about 42,800 centals winter wheat ex ***Delacrest*** , ex grain storage; payment in cash within seven days against transfer order.` Lord Reading CJ held at p 680:

> *By s 19, where the contract is for the sale of specific goods the seller may, by the terms of the contract, reserve the right of disposal of the goods until certain conditions are fulfilled, in which case the property in the goods does not pass until those conditions are fulfilled. The question in this case depends upon whether or not the right of disposal of the goods had been reserved by the sellers under the terms of the contract until payment had been made. It appears to me that under this contract the sellers did reserve such a right of disposal by making it a term of the contract that cash was to be paid within seven days against transfer order; that the intention of the parties was that they should have this right of disposal until payment had been made; and that, consequently, the property had not passed to the buyers. Therefore the answer to the first question is, in my judgment, that the property in the goods sold had not passed to the buyers under the contract.*

31 **Commingled cargo**

32 In view of my decision that property in the cargo remained with the plaintiffs and that the bills of lading must be returned to them, commingling of the plaintiffs` cargo with other cargo was no longer a matter of concern to the defendants unless the other cargo was the property of the defendants. With the bills of lading in their hands the plaintiffs would be in a position to demand

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delivery of the cargo. If they could not obtain delivery of their cargo because it had been converted by the defendants, the plaintiffs would have a cause of action against the defendants, the shipowners and their agents. In order to assert their rights against the various parties the plaintiffs must have possession of the bills of lading. All the facts relating to the bulk cargo which included the plaintiffs` cargo were not placed before the court. I shall, nonetheless, consider the defendants` argument on the assumption that they had an interest in part of the commingled bulk cargo which included the plaintiffs` cargo.

33 The plaintiffs` demand for the cargo would be against the shipowners. The bill of lading contained a clause to the effect that the plaintiffs would be entitled to receive a proportionate part of the commingled cargo equal to the quantity they had shipped. This term in the bill of lading in my judgment defeated the defendants` contention.

34 Even if the shipowners were not in possession of all the cargo in bulk the plaintiffs were not, as a matter of law, in a worse position. In ***Indian Oil Corporation Ltd v Greenstone Shipping Co SA*** [1988] 1 QB 345; [1987] 3 All ER 893 it was held that where a party wrongfully mixed the goods of another with his own goods which were substantially of the same nature and quality, and they could not be separated for practical purposes, the mixture was held in common and the innocent party was entitled to receive from it a quantity equal to that of his goods which had gone into the mixture. If doubt remained as to either quantity or quality, the matter should be resolved in the innocent party`s favour. That in my judgment equally applies to a situation where cargo is commingled with the consent of all concerned and it is agreed that each owner would receive a quantity of the commingled cargo equal to that shipped by such owner. Every owner is bound by that clause. The defendants being aware of the clause in the bill of lading cannot deny the plaintiffs` right to receive from the

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commingled cargo a quantity of 2,500 tons or thereabouts which they had shipped.

35 It is a well established rule of common law that where one consignment becomes unidentifiably mixed with another and the shipowner cannot be made liable for such admixture, the owners of the consignments so mixed become tenants in common of the whole commingled cargo in the proportions in which they would have severally contributed to that whole for that is the only way to do real justice to all parties concerned. See ***Gill & Duffus (Liverpool) Ltd v Scruttons, Ltd*** [1953] 2 Lloyd`s Rep 545; [1953] 2 All ER 977. In this case all parties agreed to act in accordance with the rule.

36 Claim allowed.

G P Selvam J

Vangatharaman Ramayah (Wee Ramayah & Pnrs) for the plaintiffs
Teo Guan Teck (Winston Chen & Co) for the defendants

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