IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 181

Suit 1727/1997

Between

Eastman Lift Trucks Pte Ltd

… *Plaintiff*

And

Systematic Container (S) Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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Eastman Lift Trucks Pte Ltd v Systematic Container (S) Pte Ltd

[1998] SGHC 181

Suit 1727/1997
Lai Siu Chiu J
25 May 1998

Judgment:

GROUNDS OF JUDGMENT

1 These proceedings arose out of an accident which occurred on 24 June 1995, involving a forklift truck which the plaintiffs leased to the defendants. The plaintiffs claimed various sums against the defendants for the breach of the agreement between the parties. The defendants, in turn, counter-claimed against the plaintiffs, seeking damages for breach of the same agreement.

2 The suit came up for hearing before me over three days in January 1998. At the conclusion of the trial, I limited the plaintiffs' claim to two months' hire charges and granted the defendants judgment on the counterclaim with damages to be assessed by the Registrar. Being dissatisfied with my decision, the plaintiffs have appealed (Civil Appeal No 41 of 1998). I will now set out the grounds for my decision.

The facts

3 In 1994, the defendants were scouting around for a forklift truck to hire for the purpose of lifting and lowering empty containers for use in their business of servicing and storing containers. They were approached by the plaintiffs who recommended the Hyster Model 14.00XL (the forklift). On 1 March 1994, the parties came to an agreement whereby the defendants would lease the forklift for a period of four years at a monthly charge of S$6,000. The crucial terms of the agreement are as follows:

> 5. TERMS OF PAYMENT The hirer shall subject to the provisions of clauses 21, 22, 24 and 25 pay to the owner the said hire charges rate amounting to S$288,000.00 by 48 months of S$6,000.00 per month. The first payment of S$6,000.00 per month shall be paid on the delivery of the equipment and each subsequent month's instalment shall be made within seven (7) days from the date of the owners invoice. In default of such payment the owner shall have the right to terminate the agreement and repossess the equipment without prejudice to any remedy the owner may have against the hirer under this agreement and without prejudice to the owners claim for any instalment due up to the date of termination and for the expenses incurred in repossessing the equipment. Provided always that the owner shall have no right of terminating the agreement and repossessing the equipment if the delay in payment is due to the late despatch of the invoice by the owner. 11. Subject to the provisions of clause 21 all repairs and maintenance costs during the hire period shall be borne by the owner in respect of fair wear and tear only. 15. Third party insurance is to be taken by the hirer. The hirer shall after the signing of this agreement insure the equipment and keep the same insured during the continuance of the hiring against loss or damage by accident fire and theft to the full replacement value thereof with some insurance company under a comprehensive policy of insurance in the joint names of the owner and the hirer. 20. Subject to clauses 11 and 21 herein the hirer shall be responsible for all damage to the equipment during the hire period. Any such damage sustained by the equipment after the hirer has taken delivery shall, subject to the terms of this contract, be made good by the hirer at its expense and hire-rent shall continue to be payable until the hirer has made good such damage. Provided always the hirer shall not be liable to pay rent where the equipment is lost,

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> stolen, destroyed or damaged to such an extent as to be in the opinion of an independent surveyor incapable of repair. 21. (a) If any of the equipment is unable to function properly because of manufacturing defect or design faults, the hirer shall give notice in writing thereof to the owner and the owner shall within forty-eight (48) hours of receipt of such notice substitute a similar equipment of the same or closes (sic) specifications and capacity. All hiring charges, expenses and costs of the replacement equipment shall be borne by the owner. (b) Where the owner fails or is unable to provide a replacement equipment or where the owner does not provide a replacement equipment for any reason whatsoever, the hirer may hire a replacement equipment and all hire charges expenses and costs incurred by the hirer in hiring the replacement equipment shall be borne by the owner and shall be a debt due from the owner to the hirer. (c) Where the hirer hires a replacement equipment under this clause, the hirer shall be entitled to set off the hire-charges, expenses and costs incurred by the hirer in hiring the replacement equipment against, all the rental charges, if any, due to the owner under this agreement. (d) Any dispute as to whether any equipment suffers from manufacturers defects or design faults shall be referred to an independent surveyor or a surveyor to be approved by both parties whose decision on this matter shall be final. 23. Without prejudice to the provisions of clause 24 the hirer may at any time before the final payment hereunder fall due terminate the agreement by giving 30 days notice in writing to the owner and delivering up the equipment to the owner at or at such other address as the owner may have previously specified in writing. 25. In the event of termination of this agreement by the hirer, where the owner is not in breach of any condition of this agreement, the hirer shall pay to the owner the Hire Purchase Price of the equipment less the aggregate of:- i) The sums due under the agreement up to the date of termination.

4. According to Mr Wan Meng ("Wan"), the managing director of the defendants, the plaintiffs represented that the replacement parts were readily available; that repairs would be carried out in reasonable time and even if replacement parts were required, it would take only a few days; that if the forklift took more than two weeks to repair, a replacement forklift would be provided at no additional cost; that no hiring charges would be payable for the days when the forklift could not be used for whatever reason. In his affidavit, Wan added that the defendants gave the assurance that the forklift was fit and

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suitable for the purposes contemplated by the defendants, who required a forklift which could lift and lower containers of up to five containers high. He was also not informed by the plaintiffs that the defendants had to take out an insurance policy nor was it insisted upon after the signing of the contract. Under cross-examination during the trial, Wan admitted that the topic of insurance was never brought up prior to the signing of the agreement. Wan added that the defendants did have a public liability insurance. It should be noted that the plaintiffs took out a comprehensive insurance policy with Cosmic Insurance Corporation Ltd ("Cosmic") through their brokers, Seabanc Insurance Brokers Pte Ltd ("Seabanc") as it was a requirement under their contract with DBS Finance (the plaintiffs purchased the forklift by way of a hire-purchase arrangement). There was some dispute as to the nature of the agreement: the plaintiffs contended that, from the terms of the agreement, it was clearly a hire-purchase agreement; the defendants, on the other hand, argued that a hiring arrangement was contemplated. According to Wan, one Mr Tan Cher Hwee ("Tan"), the director of the plaintiffs, told him that the agreement was in standard form and which the plaintiffs used for agreements for hire.

5 The forklift (which was brand new) was delivered to the defendants on 25 March 1994. From that point in time, the defendants faced numerous problems with the machine as it was beset with defects, which caused it to function improperly. I will elaborate on this point in greater detail later as it was material to my findings on the issue of the cause of the accident.

6 On 24 June 1995, at about 4.30 pm, the defendants' forklift operator one Jupri Bin Sayit ("Jupri"), was carrying out his usual routine of moving some containers around with the forklift. At the time of the accident, he was bringing down a forty-foot empty container from a height of five storeys. When the container was brought down to the height of four storeys, he reversed the forklift

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slowly away from the stack of containers in a curved path towards the work bay when suddenly, he saw someone to his right. His immediate reaction was to step on the brakes of the slow-moving vehicle. For some reason, the forklift toppled forward and crashed onto the ground, with two wheels in the air and the mast of the forklift crushing the container it was moving. Jupri's actions in response to this potentially dangerous situation was the subject of much contention on both sides. The point of disagreement was as to the way Jupri stepped on the brakes of the forklift. This would be elaborated on below. Colleagues rushed forward to help the shocked and stunned Jupri out of the vehicle. Wan informed the plaintiffs of the accident on the same day. The plaintiffs in turn informed Seabanc on 26 June 1995 that they would like to make a claim under their insurance policy with Cosmic.

7 I mentioned earlier about the uncertainty over Jupri's braking action. The plaintiffs submitted that it was Jupri's negligent act in applying the brakes too quickly which caused the forklift to topple over. Their evidence was this. On 26 June 1997, one Mr Martin Allan ("Mr Allan") of Cunningham International Pte Ltd, the loss adjusters appointed by the plaintiffs' insurers, Cosmic, together with Tan, went down to the defendants' premises to investigate into the damage and cause of the accident pursuant to the plaintiffs' insurance claim. Mr Allan interviewed Jupri on the details of the accident. As Jupri was not very fluent and conversant in English, the defendants' operations manager, one Syed Naim bin Ibrahim Ali Alsagoff ("Naim"), was also present during the interview to assist in interpreting the questions and answers as and when necessary. Mr Allan recorded a statement from Jupri, the relevant portions of which are as follows:

> When I brought the container down to the 4th level I started to reverse slowly away from the stack. I then saw someone on the right side of me *so I braked as quickly as possible*. The container started to tilt forward and move up and down. The container started to move downwards, tilting away from me and I hold

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> hard on to the steering wheel. The container kept dropping and the whole machine tilted forwards so that the rear wheels were in the air. The whole thing happened so quickly. The mast crushed the container as it went forward and the back of the machine lifted up.

The container didn't move from side to side but it did move forwards. The twist locks were on and it was okay.

In their preliminary report, the loss adjusters were of the view that it was Jupri's actions which caused the accident:

> Based upon the enquiries undertaken thus far and, paying particular attention to the physical evidence and the statement obtained from the operator, *we must consider that the accident occurred through the actions of the latter.* There are no obvious defects within the forklift, particularly given its age and generally excellent appearance, and the evidence points to simply the hard breaking movement causing a reaction in the weight at the top of the mast. The momentum was sufficient to cause the machine to topple forward onto its front. You will note from the attached statement that the operator has confirmed that the container did not swerve from side to side thus suggesting that the twist locks and metal hooks themselves were in a sound condition. If this had not been the case then we would have expected the forklift to have fallen in a sideways movements rather than forwards and the container would have become dislodged from the metal hooks. Further inspection of the container itself revealed that the eyelets themselves were still in a satisfactory condition and there is no evidence to suggest that there has been a failure of the machine at this stage.

The defendants, on the other hand, submitted that the accident was caused by the defective forklift and that it was not of merchantable quality nor fit for the purpose for which it was hired. With respect to the statement he made to Mr Allan, Jupri testified that it was inaccurate in so far as it stated that he *"braked as quickly as possible"*. He said that he stepped on the brake pedal slowly and did not brake hard or quickly as there was no need to since the forklift was moving very slowly at the time. Both Naim and Jupri stated that the former

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translated what was written down in the statement to the latter quickly and haphazardly, thus omitting to point out to Jupri the crucial part as to the way he applied the brake.

8 On 27 June 1995, the plaintiffs towed the mast and the spreader attachment of the forklift away, leaving behind the truck, which they subsequently removed on 9 February 1996 (the forklift was composed of the mast, the spreader attachment and the truck). There was a series of correspondence between the parties in which each side put the blame on the other for the accident. The defendants vehemently denied that they were required to take out insurance under the agreement. They repeatedly demanded a replacement forklift but none was forthcoming from the plaintiffs. On 25 August 1995, the defendants issued an ultimatum and stated in their letter that if the plaintiffs did not provide a replacement by 2 September 1995, they would terminate the contract with immediate effect. On 1 September 1995, the plaintiffs replied, saying that they did not have any equipment available at that moment. They added that they had verbally communicated to the defendants in early July 1995 with respect to an additional forklift at a rent of $4,500 a month but had not received a positive reply to that; the defendants denied receiving such an offer.

9 Meanwhile, the plaintiffs were negotiating with their insurers on the amount of compensation payable. The plaintiffs initially set the total cost of repairs of the forklift at $189,115; the replacement for the spreader attachment alone was estimated at a cost of $80,000. The final cost was set at $82,651.12 (the replacement for the spreader attachment was set at $50,000). On 1 November 1995, the plaintiffs accepted their insurers' offer of compensation of $80,751.12 with the remaining policy excess of $1,900 to be recovered from the hirer. The cheque for the full and final settlement of the insurance claim was made in favour of the plaintiffs on 24 September 1996.

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10 From the time of the accident, the defendants consistently inquired with the plaintiffs as to the status of the repair of the damaged forklift. By way of a letter dated 24 August 1995, the plaintiffs informed the defendants that the repairs would take another two to three months. On 3 October 1995, the defendants again inquired about the repairs. As there was no reply and their operations were seriously affected without a forklift to carry on the business of repairing and storing containers, the defendants hired another forklift from ST Capital Limited at a monthly rental of $6,000 on 6 October 1995. After yet another letter dated 30 November 1995 from the defendants with regards to the repairs, the plaintiffs replied on 1 December 1995, stating that the spreader attachment which they had ordered would arrive only in March 1996. It is pertinent to point out that the plaintiffs placed an order for a spreader attachment only on 24 October 1995 at a price of $38,500. On 9 February 1996, the plaintiffs towed the truck from the defendants' premises to the plaintiffs' workshop for repair.

11 On 5 June 1996, the plaintiffs' solicitors wrote to the defendants' solicitors, stating that the repair of the forklift would be completed by 11 June 1996 and asked if the defendants would take delivery of the forklift. On 11 June 1996, the defendants' solicitors replied, stating that their clients would not take delivery of the forklift as the plaintiffs had breached the agreement.

12 On 13 September 1996, the plaintiffs instituted proceedings against the defendants, claiming the sums of $73,020 for outstanding hire charges between June 1995 and June 1996, $124,830.71 pursuant to clause 25 of the agreement, $1,900 for the excess costs which were not recoverable from the plaintiffs' insurers and damages for the defendants' repudiation of the agreement plus interest and costs. The defendants counterclaimed for damages for loss of business and/or misrepresentation by the plaintiffs, hiring charges for an

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alternative forklift plus interest and cost.

The issues

13 In granting judgment to the defendants, the following issues were, in my opinion, pertinent to the outcome of the proceedings:

(i) the nature of the agreement

(ii) whether the defendants were required to take out an insurance policy with respect to the forklift

(iii) the cause of the accident

(iv) whether the plaintiffs were obliged to supply a replacement forklift

(v) whether there was unnecessary delay in the plaintiffs' repair of the forklift

(vi) when the agreement was terminated

They were dealt with in turn.

The nature of the agreement

14 The parties were at odds as to the nature of the agreement: was it a hire-purchase agreement or an agreement of hire? This depended on the court's construction of the contract. The paramount object in the construction of a contract is to discover the intention of the parties to the agreement. With regards to the interpretation of contracts which have been reduced into writing, the presumption is that the parties intended what they in fact said, so that their words must be construed as they stand, ie the meaning of the document is to be sought in the document itself. This is known as the rule against parol evidence. If the

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contract is concluded partly in writing such that the document does not contain all the terms of the contract, the rule against parol evidence will not apply.

15 How does one determine the intention of the parties? The court applies the objective test of agreement and intention. Under that test, a party cannot enforce the contract in the sense which he gave to the words, if that sense differs from the one which the other party reasonably gave to them. Intention does not mean motive, desire or state of mind but intention as objectively expressed in the contract. Lord Diplock gave some valuable insight in aiding the court to determine the objective intention of the parties in the seminal case of *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570. His Lordship said (at pp 574 - 575):

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the contracts, the market in which the parties are operating... It is often said that, in order to be admissible in aid of construction, these extrinsic facts must be within the knowledge of both parties to the contract, buth this requirement should not be stated in too narrow a sense. When one speaks of the intention of the parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or of object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties. It is in this sense and not in the sense of constructive notice or of estopping fact that judges are found using words like 'knew or must be taken to have known'...

16 Applying the principles above, the first question which I posed was whether the parties intended the written agreement dated 1 March 1994 to contain all the

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terms of the agreement between them; I found this to be not the case here. Thus, the rule against parol evidence did not apply. From all the evidence, I found that the parties' true objective intentions were reflected not only from the document but also from their conduct and oral communication. That the written agreement was not a complete exposition of their bargain was clear from the uncertainty over these contractual issues which I will elaborate on below: whether it was an agreement of hire or a hire-purchase agreement; whether the defendants were required to take out an insurance policy and whether the plaintiffs took too long to repair the damaged forklift.

17 Despite the clear words in the agreement, I was of the view that the parties intended to enter into an agreement of hire. First, contracts of hire-purchase resemble contracts of sale very closely and, indeed, in practically all cases of hire-purchase, the ultimate sale of the goods is the real object of the transaction. Here, I found not an iota of evidence to suggest that the parties' intention was that the defendants should purchase the forklift at the end of the four-year period. The defendants firmly stated that they wanted a forklift for hire and nothing else. The plaintiffs did not try to argue that the real aim of the transaction was the purchase of the forklift eventually, besides saying that the written agreement unequivocally stated that it was a hire-purchase agreement. I was inclined to believe Wan's testimony that the document was a standard one which the plaintiffs utilised for hiring purposes. This was confirmed by Tan during cross-examination (N/E 8-9):

> Q: This contract drafted by plaintiffs? A: Yes, our standard contract. … Q: You are familiar with this standard contract and it is used other than for special customers? A: Yes for long term hire.

Secondly, in hire-purchase agreements, the amount which the hirer is bound to pay under the contract is usually far in excess of that which he would have had

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to pay if he were really hiring the goods. In this case, the monthly rental was $6,000. This was not an exorbitant rate for the hire of a forklift as the plaintiffs hired another forklift from ST Capital Limited at the same rate of $6,000. Thirdly, the common characteristic of hire-purchase arrangements is that the legal purchase price for which the hirer has the option to buy the goods is frequently nominal only. Here, clause 6 of the agreement (which provides for the option to purchase) stated that a further sum of $175,000 was payable as an option fee. Perhaps the most telling piece of evidence as to the parties' true intention was Tan's implicit admission during his continued cross-examination (N/E 9) that a hire-purchase agreement was *not* intended:

> Q: But not a hire purchase agreement? A: No, we are not a finance company, operating lease agreement, not hire purchase. Q: As far as you understand, under this contract you must maintain equipment? A: Yes as owner. Q: Meaning you purchased it to rent out? A: Yes.

There was no doubt that the written agreement of 1 March 1994 was not accurate in this sense. The plaintiffs themselves believed that a hiring arrangement was intended all along and not otherwise.

Whether the defendants were required to take out an insurance policy for the forklift

18 Although this issue was not pivotal to my decision in favour of the defendants, I decided that it should be dealt with since the parties made relatively lengthy arguments on this and since it weighed in my finding that the contract was part oral and part written.

19 Clause 15 of the agreement stipulated that the hirer was to take out both third-party and comprehensive insurance policies. However, I found that, from the

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extrinsic evidence, the parties did not intend that the defendants were to take out a comprehensive insurance policy but only a third-party policy. That this was the real position was clear from Tan's testimony during cross-examination (N/E 15):

> Q: Look at AB1-6 again, para 15 on question of insurance. You claimed on basis defendants should have insured forklift? A: Yes but for third party, not for our forklift. Q: What sort of coverage did you want them to take out? A: Third party insurance because the driver of forklift is not ours. Q: You didn't require them to take out comprehensive insurance? A: Third party not comprehensive.

Tan clarified that what the plaintiffs expected the defendants to have was a third-party insurance. The insurance was not in respect of the forklift but for third-party liability. In this respect, the document was ambiguous as to the type of insurance required. In any event, the defendants did possess a public liability insurance policy. The nature of such a policy is such that it indemnifies the insured against all sums which they shall become legally liable to pay as compensation in respect of loss of or damage to property. This includes any third-party liability in respect of such loss or damage caused. Wan testified that the public liability insurance policy covered all claims made against the defendants for damage to the forklift. Tan, too, agreed that the plaintiffs were concerned as to whether the defendants had taken out a public liability policy at the time of the accident (N/E 23-24):

> Q: When accident happened 24.6.94 you told them defendants should have taken out comprehensive insurance? A: No, public liability policy. … Q: So your position is, you wanted to know whether they had public liability cover? A: Yes.

20 As such, I found that the defendants had not in any way breached the agreement by not taking out the comprehensive insurance policy. In fact, they had fulfilled their contractual obligation since they had obtained a policy

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covering public liability, which was what the plaintiffs required.

The cause of the accident

21 This was the most contentious issue. I reviewed the affidavits, supporting documents and the various testimonies in great detail and came to the opinion that the cause of the accident was not the negligence and mishandling by Jupri, the defendants' forklift operator. I found that the accident was most probably caused by the defective forklift.

22 As stated earlier, there was much debate over Jupri's braking action. Did he apply the brakes too quickly and too hard, as the plaintiffs claimed, or did he step on the brakes in the usual manner, as the defendants submitted? I was inclined towards the latter view. I gave very little weight to the statement from Jupri recorded by Mr Allan on 26 June 1997. Both Jupri and Naim consistently asserted in their testimonies that Naim had translated to Jupri the contents of the statement very quickly and failed to bring to the latter's attention the portion which stated that Jupri "*braked as quickly as possible*". Jupri further testified that there was no need to apply the brakes so quickly as the forklift was moving slowly. Mr Allan, on his own part (N/E 70), undermined the plaintiffs' case on this point when he appeared to suggest that it was not what Jupri actually said to him but his own opinion that Jupri braked hard, formed by the impression given to him by Jupri:

> Q: Your conclusion that operator braked quite hard was your view? A: Impression Jupri gave me was that he saw someone from corner of eye so he knew how dangerous that was, he wouldn't have braked slowly but fairly rapidly.

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I believed that the so-called statement of admission of liability by Jupri was discredited by the testimony of both Jupri and his superior, Naim.

23 Having found that Jupri did not apply the brakes in the fashion the plaintiffs claimed he did, it was easy for me to conclude that it was not the forklift operator's negligence which caused the accident. Mr Allan admitted (N/E 69) that he came to the conclusion that the cause of the accident was the driver's negligence as a result of Jupri's alleged statement with regards to the braking action:

> Q: You concluded it was operator's negligence because you thought he braked hard? A: Yes. Q: What if he didn't brake hard? Would that have made difference to your findings? A: Yes, potentially.

Furthermore, Mr Allan testified that if he had been provided with a copy of the technical specifications of the forklift when writing his preliminary report on the accident, he might have reached a different conclusion as to the cause of the accident. The defendants were in no way responsible for the accident, vicariously or otherwise.

24 On the contrary, I found that the plaintiffs were in breach of the implied condition of the contract that the forklift would be in a reasonably fit condition for the purposes required by the defendants. The common law rule is that the owner impliedly assumes contractual responsibility for the fitness of the chattel for the purpose for which the hirer requires it (see *Fowler v Lock* [1872] LR 7 CP 272). In *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, it was held that the owner must take reasonable care to ensure that the chattel was fit for the purpose of the hirer. Here, almost immediately after the delivery of the forklift on 25 March 1994, it was plagued with problems and required constant repairs, as evidenced by the numerous job time sheets listing out the repairs carried out.

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This was surprising especially since the forklift was a new unit. As early as 28 March 1994, the twist lock was not working. Some defects to its hydraulic system were never completely repaired. On 24 June 1995, the forklift toppled over when it was used in the ordinary course of operations even though the brakes were applied in the ordinary manner. Taking into consideration the history of the forklift's malfunctioning record, I was of the view that, on a balance of probabilities, the machine supplied was not of a merchantable quality and was not reasonably fit for the purposes required by the defendants.

Whether the plaintiffs were obliged to supply a replacement forklift

25 Following from my findings that the plaintiffs had breached the implied term to supply a forklift fit for the purposes of the defendants as a result of its manufacturing defects, cl 21 of the agreement applied and the plaintiffs were contractually bound to supply a replacement forklift at their own cost. This they did not do, despite repeated requests from the defendants. They had thus breached cl 21 and the defendants were entitled to claim the hiring charges for an alternative forklift.

26 The plaintiffs alleged that they had offered the defendants an additional forklift at a rent of $4,500 per month verbally by phone. The defendants denied ever receiving such an offer. Other than the plaintiffs' bare assertion, I found no other evidence to support their allegation. In any event, they were bound by cl 21(a) to provide a substitute forklift at no extra cost to the defendants.

Whether there was unnecessary delay in the plaintiffs' repairs of the forklift

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27 Since the cause of the accident and damage to the forklift was the plaintiffs' failure to provide a forklift which was of merchantable quality and fit for the defendants' purposes, cl 20 did not apply. The plaintiffs were responsible for repairing the forklift. Although the written agreement did not stipulate that repairs were to be made in reasonable time, it was only logical and in the name of commercial efficacy that this term should be implied into the contract between the parties. As a matter of fact, Tan admitted under cross-examination (N/E 46) that the plaintiffs had assured the defendants that repairs would be made within a reasonable time:

> Q: Put that you represented to defendants all repairs would be undertaken and completed within reasonable time? A: Yes.

28 What is a "reasonable time" depends on the particular circumstances of the case. On the evidence, it was clear that the plaintiffs had breached their contractual undertaking to carry out the repairs within a reasonable time frame. From the time of the accident on 24 June 1995 to the time when the forklift was finally repaired in June 1996, almost a year had lapsed. There was absolutely no plausible reason or excuse for this long delay, even if one were to take into account the time required to order the replacement parts needed for the repairs. Tan gave evidence that the plaintiffs would take two to three months for the replacement spreader attachment to be delivered from the supplier and another two to three months to repair the forklift. However, it should be pointed out that the plaintiffs took no action at all in this respect until 24 October 1995. It was only on that date that they ordered the spreader attachment, even though they well knew that without the spreader attachment, repairs could not be carried out. In fact, it was only after the plaintiffs confirmed that they would be receiving $50,000 for the replacement spreader attachment from the insurers did they place an order for an "Eleme" brand spreader attachment with their supplier at the price of $38,500. This emerges from the cross-examination of Tan (N/E 33):

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> Q: So after you were told you would receive $50,000 you negotiated with Eleme? A: Yes, after Hyster quoted $80,000 to us. Eleme had another quotation. Q: So finally you agreed to $38,500? A: Yes.

There was no reason why the plaintiffs had to wait until after they had negotiated with their insurers with regards to the compensation under the policy before they placed an order for the spreader attachment. I could only hazard a guess that they wanted to ensure that the price they spent on the replacement attachment would not cost more than the compensation they would receive. The plaintiffs cannot have their cake and eat it. They were liable to the defendants for damages arising from their inefficiency and tardiness in breach of the agreement.

When the agreement was terminated

29 I have held earlier that the plaintiffs had breached the contract in three ways: first, in providing a forklift which was unmerchantable and not fit for the defendants' purposes; secondly, for failing to supply a replacement forklift; thirdly, for failing to carry out the repairs within a reasonable time. I found that all these terms were conditions of the contract, the breach of which would constitute a repudiation by the party in default of his contractual obligation and entitle the innocent party to treat the contract as at an end. By virtue of any of the breaches of contract, the defendants, as the innocent aggrieved party, had the right, if they chose, to regard themselves as absolved or discharged from further performance of the contract. The plaintiffs had wrongly repudiated the contract by reason of their breaches of the contract. It is trite law that the innocent party has the option either to treat the contract as still continuing or to regard himself as discharged by reason of the wrongful repudiation of the contract by the other party. In my opinion, the defendants terminated the

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contract on 2 September 1995 when the plaintiffs failed to supply the replacement forklift. This was reflected in their letter of ultimatum on 25 August 1995. The requirement of a thirty-day notice under cl 23 of the agreement did not apply as there was a breach of a condition of a contract which entitled the defendants to rescind the contract immediately. There was thus no question of the defendants having repudiated the contract on 11 June 1996 when they refused to accept the delivery of the repaired forklift as their contractual obligations were discharged as at 2 September 1995.

30. Accordingly, I awarded the plaintiffs judgment in the sum of $19,220 for the hire charges from June 1995 to 2 September 1995 when the agreement was terminated. I fixed the costs at $3,000 and full disbursements up to 29 October 1997. The plaintiffs would bear the court fees up to $2,500, with the difference of $500 to be borne by the defendants. I granted judgment to the defendants on their counterclaim with costs of assessment to be reserved to the Registrar. I was informed by counsel for the defendants that her clients had made an offer to settle on 29 October 1997 of four (4) months' hire ($24,000) to the plaintiffs which was subsequently increased to six (6) months' hire on 26 December 1997; the plaintiffs did not accept either offer. Under O 22A r 9(3) of the Rules of the Supreme Court, as the plaintiffs obtained judgment on terms less favourable than the terms of the defendants' offers to settle, I awarded the defendants costs on an indemnity basis for the claim from 30 October 1997 (that being the date after the first offer to settle was made) up to 19 January 1998, including costs of amendment (fixed at $300) of the Reply and Defence to Counterclaim.

Lai Siu Chiu

Judge

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Lai Siu Chiu J

Mohamed Firoze Hashim (Soh Ng & Partners) for the plaintiffs
Joan Lim Pheck Hoon (Chan Kam Foo & Associates) for the defendants

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