IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 47

CA 270/1998

Between

Powermatic-Apcom Systems Pte Ltd

… *Appellant*

And

Concord Express (S) Pte Ltd

… *Respondent*

GROUNDS OF DECISION

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

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Powermatic-Apcom Systems Pte Ltd v Concord Express (S) Pte Ltd

[1999] SGCA 47

CA 270/1998
Karthigesu JA; L P Thean JA
07 July 1999

1 **Judgment:**

2 **KARTHIGESU JA**

3 (delivering the judgment of the court): This appeal arises from the respondents` application to strike out the statement of claim in the proceedings begun in the Subordinate Courts on the basis that it disclosed no reasonable cause of action and/or was otherwise an abuse of process. At the centre of the controversy was an issue similar to the one first considered by this court in Seagate Technology International v Changi International Airport Services Pte Ltd [1997] 3 SLR 1, and concerned the question of the appropriate form to be invoked when pleading a claim for loss and damage arising out of an international carriage of cargo by air governed by the Warsaw Convention of 1929.

4 2. ***The facts***

5

6 The appellants, who were the plaintiffs in the Subordinate Court proceedings, Powermatic-Apcom Systems, sell and export computer parts. The respondents, who were the defendants, Concord Express (Singapore), carry on the business of air freight forwarders. The appellants claimed against the respondents for the alleged misdelivery of a cargo of computer parts (`the goods`), worth some US$105,430, which the respondents were engaged to deliver from Singapore to Mumbai, India.

7 3.The appellants` statement of claim, in so far as material, states as follows:

> 3 ... It was an express, alternatively an implied term of the agreements [for the sale and purchase of the computer parts] that the purchase price of the said goods will be paid against documents by Pixtel Computers to Dena Bank of Mumbai, India, who will upon receipt of such payment:
>
> (i) Forward the purchase price to the plaintiffs, less charges;
>
> (ii) Hand over the documents, duly endorsed where applicable, to Pixtel Computers for them to obtain delivery of the said goods from the defendants and/or their servants and/or agents in Mumbai, India, upon presenting the said documents by Pixtel Computers and not otherwise.
>
> *The said documents were:*
>
> (a) a Packing List dated 21 April 1997 for Invoice No 274 and Packing List dated 8 May 1997 for Invoice No 299 in respect of Agreement 1, and Packing List dated 2 May 1997 for Invoice No 292 in respect of Agreement 2;
>
> (b) Airway Bill Nos CS-254858 dated 23 April 1997 and CS-257083 dated 11 May 1997 in respect of Agreement 1, and CS-257112 dated 4 May 1997 in respect of Agreement 2;
>
> (c) Invoice No 274 dated 21 April 1997 and Invoice No 299 dated 8 May 1997 in respect of Agreement 1, and Invoice No 292 dated 2 May 1997 in respect of Agreement 2; and

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(d) The Hongkong and Shanghai Banking Corporation Limited Drafts dated 2 May 1997 and 15 May 1997 for the amounts of US$42,600 and US$28,400 respectively in respect of Agreement 1, and Hongkong and Shanghai Banking Corporation Limited Drafts dated 12 May 1997 for US$34,430 in respect of Agreement 2.

Accordingly, the plaintiffs as sellers reserved in the agreements their right of disposal of the goods until payment of the purchase price by Pixtel Computers to the plaintiffs through Dena Bank.

4 On 21 April, 2 and 8 May 1997, the plaintiffs duly delivered to the defendants the said goods for delivery by the defendants to Dena Bank on the terms of Airway Bill Nos CS-254858 dated 23 April, CS-257112 dated 4 May 1997 and CS-257083 dated 11 May 1997, issued to the plaintiffs by the defendants as independent contractors; alternatively as the plaintiffs` agents on the recommendation of them by Pixtel Computers.

5 The said Airway Bills provided, inter alia, as follows:

(a) Shipper: Powermatic-Apcom Systems Pte Ltd

(b) Consignee: Dena Bank, Mumbai, India

(c) Notify Party: Pixtel Computers, India

6 The said Airway Bills and other documents itemised in para 3 hereof were duly forwarded to Dena Bank by the plaintiffs on or about the month of May 1997 through the plaintiffs` bankers, The Hongkong and Shanghai Corporation Bank Limited, Singapore.

7 The defendants, either by themselves or by their servants and/or agents in Mumbai, India, failed to deliver the goods to Dena Bank or at all.

8 Instead, the defendants either by themselves or by their servants or agents in Mumbai, India, delivered the said goods to Pixtel Computers without first obtaining from Pixtel Computers the documents itemised in para 3 hereof.

9 To date, Pixtel Computers have not paid the purchase price to Dena Bank and/or the plaintiffs.

10 In the event, the documents itemised in para 3 hereof were returned to the plaintiffs in Singapore on or about 1 December 1997.

11 The property in the said goods accordingly remained throughout with the plaintiffs as sellers.

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> 12 In the circumstances, the defendants are in breach of duty and/or contract and/or duty as bailees and/or guilty of conversion.

8 4.On 26 January 1998, the appellants applied for summary judgment against the respondents for the sums of US$105,430, being the value of the goods, and S$1,776.25 for bank charges. The respondents responded by taking out an application to strike out the writ and statement of claim under O 18 r 19, Rules of Court, alternatively under the inherent jurisdiction of the court, on the basis that they disclosed no reasonable cause of action and/or were an abuse of process. The respondents` application was dismissed. The respondents appealed to the High Court.

9 5.The appeal was heard before Judith Prakash J, who agreed with the respondents that the statement of claim did not disclose a reasonable cause of action. However, as she was satisfied that the facts relied on by the appellants in the statement of claim did give them a cause of action provided it was properly pleaded, she gave them leave to amend their statement of claim within 14 days, failing which the action would be struck out. The amended statement of claim, incorporating a claim founded on the provisions of the Warsaw Convention as amended by the Hague protocol of 1955, was filed on 20 October 1998. Notwithstanding this, the appellants, being dissatisfied with the learned judge`s decision, appealed to this court.

10 6. ***Warsaw Convention as amended by the Hague Protocol***

11

12 At the heart of the present appeal lies the Warsaw Convention, which governs the international carriage of goods by air. In Singapore, the Carriage by Air Act (Cap 32A) provides that the Convention, both in its unamended form

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(`the Warsaw Convention`) and as amended by the Hague Protocol of 1955 (`the Amended Convention`), has force of law whenever there is an international carriage by air of persons, baggage or cargo, that is a carriage between the territories of two or more contracting parties, performed by aircraft for reward. Both Singapore, the place of origin, and India, the destination, are contracting parties to the Amended Convention. The Warsaw Convention was conceived for the purpose of providing a uniform code fixing certain conditions of contract for international air carriage, and thereby circumventing the choice of law problems inherent in such claims. In particular, the Warsaw Convention introduced a special regime where, in return for a presumption of liability against the carrier for loss or damage suffered, the carrier enjoys limited liability (subject to certain provisos) in the more common cases of accident or delay. In respect of loss or damage to cargo, the carrier`s liability is currently limited to the sum of 250 francs per kilogramme where the value of the cargo is not declared (art 22(2)(a)).

13 7.In view of the special regime introduced by the Amended Convention, it is not sufficient for the limits of liability to be pleaded as a defence by a carrier. Instead, where the alleged loss or damage arises in circumstances falling within the scope of arts 17, 18 and 19 - which prescribe the liability of the carrier in respect of death or personal injury, damage to registered baggage and cargo, and delay respectively - these articles must be pleaded by the claimant in the statement of claim. At the same time, he is precluded from pleading his claim on any other basis of liability, such as at common law in negligence, breach of contract, bailment and conversion. This is because the articles of the Amended Convention form the sole and exclusive foundation of the carrier`s liability, and hence provide the exclusive cause of action against him.

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14 8.The reason for this practice was explained by the court in ***Seagate Technology International v Changi International Airport Services*** , a case which involved a claim for loss of cargo brought by the shipper, Seagate Technology, against the cargo handling agents at Changi Airport, CIAS. The cargo of hard disk drives was wrongfully diverted by one of CIAS`s employees while it was awaiting shipment from Singapore to Amsterdam by air on board a KLM Royal Dutch Airlines flight. CIAS was KLM`s cargo handling agent. Seagate commenced proceedings against CIAS, alleging that it was liable on the bases of negligence, bailment and conversion. In its defence, CIAS pleaded that Seagate was not entitled to bring any action at common law but had to rely on the provisions of the Amended Convention, both Singapore and the Netherlands being high contracting parties to the Amended Convention. On appeal, a three-judge court agreed with the arguments of counsel for Seagate. Karthigesu JA, who delivered the judgment of the Court of Appeal, said (at [1997] 3 SLR 1 at p 8):

> *Counsel for Seagate`s argument on appeal was straightforward. He relied on the plain and unambiguous interpretation of the Act and the Amended Convention. It was argued that arts 17, 18 and 19 created liability on the part of the air carrier in respect of delay or damage to the persons and property occurring in the course of an international air carriage, but these articles do not create any liability on the part of the carrier`s agents or servants. In fact, there is no mention of either the carrier`s agents or servants in those `liability-creating` articles. So, when an action is brought against the carrier for damages in cases covered by arts 17, 18 and 19, it is necessary for the claimant to plead the appropriate article since it is the article that is the basis for the carrier`s liability. However, when an action is brought against the carrier`s agent or servant for damages, even if the loss is one contemplated by arts 17, 18 or 19, the claimant must plead his action at general law, say, in negligence or bailment if Singapore law is the governing law, since it is the general law that provides the basis for the agent`s or servant`s liability, not any article in the Amended Convention or any provision in the Act.*
>
> *We think that there is merit in counsel`s argument. Articles 17, 18 and 19 stipulate the various situations under which the carrier will incur liability for events occurring in the course of a*

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

15 9.In the present proceedings, it was plain that the original statement of claim filed by the appellants did not raise any cause of action founded on the provisions of the Amended Convention. Instead, the appellants pleaded their claim exclusively on common law causes of action of negligence, breach of contract, conversion and bailment. The respondents then claimed that the pleadings were defective because, on the authority of ***Seagate Technology International v CIAS*** (supra), the provisions of the Amended Convention formed the sole and exclusive basis for the respondents` liability. Accordingly, the statement of claim disclosed no reasonable cause of action or was otherwise an abuse of process because the respondents` liability was not found at common law, and ought properly to be struck out under O 18 r 19, alternatively under the inherent jurisdiction of the court.

16 10.The single issue in this appeal was whether the appellants` claim for the loss of the goods was one which fell within the scope of art 18 of the Amended Convention. It was common ground at the hearing before us that the other liability-creating provisions of the Amended Convention did not apply to

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the present facts. Article 18 governs the liability of a carrier for loss or damage to registered baggage and cargo in the course of the carriage by air. It states:

> *Art 18*
>
> (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.
>
> (2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in the charge of the carrier, whether in an aerodrome or on board an aircraft or, in the case of a landing outside an aerodrome, in any place whatsoever.
>
> (3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

17 11.As the party applying to strike out the statement of claim, the onus was on the respondents to satisfy the court that the appellants` claim fell within the scope of art 18 such that this article formed the sole and exclusive cause of action for the claim against the respondents.

18 12.Before us, counsel for the respondents contended that, as freight forwarders, the respondents were a `carrier` whose liability for loss or damage to cargo was governed by art 18. While he conceded that the respondents did not undertake the actual physical carriage by air of the goods themselves, nonetheless he argued that the term `carrier` did not merely refer to physical, or `actual`, carriers of cargo but extended to `contracting carriers` as well. The respondents were `contracting carriers` since they contracted with the appellants for the air carriage of the goods. The appellants paid the respondents one price

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for transporting the goods from Singapore to India and were not concerned with the identity of the actual air carriers, ie the operators of the aircraft carrying the goods from Singapore to India. As far as the appellants were concerned, the respondents were the party responsible for ensuring the safe delivery of the goods to Mumbai. The contract of carriage was evidenced by the three in-house air waybills issued by the respondents in which the appellants were named as shippers.

19 13.No definition of `carrier` is found in the Amended Convention nor in the Carriage by Air Act. Some guidance however as to the scope of the term is afforded by the Guadalajara Convention of 1961. While Singapore is not a contracting party to the convention, our courts have previously adopted the terminology introduced by it: see ***Seagate Technology International v Changi International Airport Services*** 3 SLR 1 at p 6). The Guadalajara Convention introduced two terms of art, namely, `actual carrier` and `contracting carrier`. Article 1 defines the `contracting carrier` as a person who as principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor. On the other hand, the `actual carrier` is the person who performs the whole or part of the carriage but who is not the contracting carrier. The impetus behind the Guadalajara Convention were developments in the nature of air carriage following the Warsaw Convention, in particular the rapid growth of the charter flight industry. At the time the Warsaw Convention was drafted in 1929, charter flights were relatively uncommon, but by the early 1960s, these `wet-leasing` arrangements had become widespread and there was fear that the actual carrier might be deprived of the protection offered by the Warsaw Convention. Hence the Guadalajara Convention was introduced to give to an actual carrier the same rights and liabilities under the Warsaw Convention as a contracting carrier.

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20 14.In view of the history behind the Guadalajara Convention, we did not agree with counsel that the respondents, as freight forwarders, were a `contracting carrier` and were therefore subject to the regime of the Amended Convention. In this respect, we found the judgment of Choo Han Teck JC in **Seagate Technology International v Changi International Airport Services** [1997] 1 SLR 750 , when the matter went to trial before him, to be highly instructive. The learned judicial commissioner declined to find that the freight forwarders in that case, LEP International, were the `contracting carrier` and held instead that KLM was both the actual and contracting carrier. There was no appeal from this finding and the Court of Appeal agreed with the learned judge below (at p 6). In his judgment, Choo Han Teck JC said he found it inconceivable that the drafters of the Warsaw Convention would have intended to extend the rights and obligations of a `carrier` under the Convention to freight forwarders, a creature which had not yet come into existence at the time the Warsaw Convention was conceived in 1929. He said (at p 757):

> *If counsel for the plaintiffs is right [ie that the freight forwarders LEP are the `contracting carrier`], then no airline in Singapore would receive the protection of the Convention, and no customer would be entitled to a strict liability compensation under it either as the `contracting carrier` would invariably be the freight forwarder, a creature that can hardly be said to be in existence when the Convention was conceived in 1929. Conversely, a customer would enjoy the benefit of the strict liability provision as against the contractual carrier and still pursue a claim for the balance against the unprotected airline. On this ground alone, in my judgment, the actual carrier would be entitled to the protection under the [Amended] Convention even if it was not the contractual carrier. For the avoidance of doubt, I find that KLM in this case was both the contractual and actual carrier.*

21 15.Neither did the learned judge accept the argument that LEP had contracted with the shippers as principal because they issued their own house air waybills. He did not consider the proposition in **Troy v Eastern Co of Warehouses, Insurance and Transport of Goods (of Petrograd)** [1921] 8

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Lloyd LR 17, where the English Court of Appeal held a party who described themselves as `forwarding agents` but who issued a through bill of lading contracted for the carriage of goods as a principal and not as agents, to be of general application. Instead, the learned judge noted that (at p 756):

> *This passage [in* ***Troy v Eastern Co of Warehouses*** *(supra)] which counsel for the plaintiffs relied on does not support his contention that the mere issuance of a bill of lading or, in the present case, a house air waybill, determined the capacity of the issuer. The capacity of the parties are determined by the nature of the agreement and the intention of the parties ...*
>
> *In addition to the General Trading Conditions and his evidence of the explicit intention of LEP to act only as agent, Loo [LEP`s finance director] also explained why the house air waybill was necessary.* ***The house air waybill was a product of necessity. The carrier airline would not insert the name of the shippers in a consolidated master air waybill. Hence, it became the industry practice to insert the name of the freight forwarder in the master air waybill and the freight forwarder, in turn, issues a house air waybill to each of the shippers. The shippers may then present the house air waybill as part of the required documentation in their commercial or financial transactions with consignees or banks. Loo said that the carrier airlines do not release any copy of the master air waybill to the shippers in the case of a consolidated air waybill as in this case****. [Emphasis added.]*

22 16.We think the same findings would apply to the present facts. The term `contracting carrier` is somewhat misleading in that it appears to suggest that any person who contracts to make arrangements for an international air carriage is a `carrier` for the purposes of the Warsaw and Amended Conventions. However, it is plain from the background to the Guadalajara Convention that the drafters of the convention did not intend to extend the scope of application as wide as this. As freight forwarders, the respondents did not undertake to perform any part of the carriage by air. They merely undertook the ancillary land transportation to and from the respective airports and arranged for the shipment of the goods from Singapore to Mumbai. The carriage by air

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itself was carried out by a separate party: Qantas Airways (QF 123) in the case of the shipment on 23 April 1997, and Air India (AI 4777) in respect of the other two shipments on 4 and 11 May 1997. Both Qantas and Air India issued their own master air waybills which were distinct from the in-house air waybills issued by the respondents. The reference numbers of these master air waybills (or `MAWB`) were inserted on the in-house air waybills issued by the respondents. It was clear that the goods were intended to and in fact moved on these master air waybills from Singapore to Mumbai. In other words, the in-house air waybills issued by the respondents were nothing more than the freight forwarders`, ie the respondents`, receipt to the shippers for the goods and not the air waybill contemplated in arts 5 to 16 of the Amended Convention. Hence, the fact that the respondents issued their own air waybills was immaterial vis--vis the Amended Convention and did not make them a `carrier` whose liability was governed by art 18 or the other liability-creating articles. Instead, we hold that the actual and contracting carriers for the carriage by air in question were Qantas and Air India respectively.

23 17.The functional difference between a freight forwarder and a carrier is obvious. One makes the arrangement for the carriage of the goods and the other carries the goods. As in carriage by sea cases, the freight forwarder may act as principal or agent for the carrier or the shipper, or both, depending on the facts of the case and the construction of the contract in question. In certain circumstances, a freight forwarder may be held to be acting as agent for the carrier: this was the case in ***Seagate Technology v CIAS*** (supra) where the freight forwarders, LEP, contracted for the carriage of goods under a cargo agency agreement between themselves and KLM. However, in other circumstances, it may well be that the freight forwarder undertakes the contract for carriage not as an agent for the carrier nor for the shipper, but as a principal:

see, for example, **Ocean Projects Inc v Ultratech Pte Ltd** [1994] 2 SLR 369 , 375.

24 18.We were not informed whether the respondents contracted with the appellants for the carriage of goods as agents for the carriers, Qantas and Air India. No cargo agency agreement with Qantas or Air India was exhibited in the sole affidavit filed on the respondents` behalf by their sales manager, Chia Cheng. However, this has no effect on the outcome of the present appeal since in both circumstances, whether the respondents contracted as principal or as carriers` agents, the basis of their liability would not fall to be founded under the Amended Convention but at common law. Article 25A of the Amended Convention merely extends the same limits of liability to a carrier`s agents and servants, but does not prescribe the basis of the respondents` liability (***Seagate Technology International v CIAS*** (supra)). Hence, regardless of whether the respondents contracted for the contract of carriage as Qantas` and Air India`s agents or on their own behalf, the Amended Convention is silent on the question of their liability. By default, the appellants were entitled to plead their claim against the respondents for loss of the cargo at common law in negligence, breach of contract and so on.

25 19.We need only say further that we found the American authorities to which counsel for the respondents referred us to be of little assistance. The US courts are subject to different statutory regime, in particular the US Civil Aeronautics Board explicitly recognises the existence of an `indirect air carrier`. In the Board`s Economic Regulations 14 CFR [sect ] 296.1(e), an `indirect air carrier` is defined as `any citizen of the United States, who undertakes indirectly to engage in air transportation of property only, and who (1) does not engage directly in the operation of aircraft in air transportation, and (2) does not engage in air transportation pursuant to any Board order which has been issued for the

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purpose of authorising air express service under a contract with a direct air carrier`. There is no equivalent provision in Singapore. It follows that American cases such as ***Royal Insurance v Amerford Air Cargo*** 21 Avi 17, 482, in which the New York District Court, held that a freight forwarder was an `indirect air carrier` and therefore entitled to claim the limitation of liability under art 22 of the Convention, are of little assistance to the respondents` case.

26 20. ***`Carriage by air`***

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28 While the above finding is sufficient to dispose of the appeal, we address here the second submission raised by counsel for the respondents, which was that the alleged loss of the cargo occurred during the period of `carriage by air`. The carrier is liable under art 18 only where the `occurrence which caused the damage so sustained took place during the carriage by air`. Article 18(2) provides that the `carriage by air` comprises the period during which the baggage or cargo is in the charge of the carrier, whether in an aerodrome or on board an aircraft of, in the case of a landing outside an aerodrome, in any place whatsoever, while art 18(3) expressly excludes any carriage by land, by sea or by river performed outside an aerodrome. However, art 18(3) goes on to raise a presumption that where the carriage by land, by sea or by river takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, the damage caused to the baggage or cargo is presumed, ***subject to proof to the contrary*** , to be the result of an event which took place during the carriage by air [our emphasis].

29 21.Counsel for the respondents contended that, by virtue of art 18(3), the alleged misdelivery of the cargo was a loss which occurred during the period

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of `carriage by air`. He argued that the respondents were engaged to pick up the cargo from the appellants` premises in Singapore, to transport it by land to Changi Airport, to arrange for the cargo to be loaded onto an aircraft and shipped to Mumbai, and subsequently to deliver the cargo to the proper party. Hence he submitted that the presumption in art 18(3) should apply such that the loss during the delivery process could be presumed to have been the result of an event which took place during the carriage by air.

30 22.We do not agree with him. The operative words in art 18(3) for our present purpose are not `for the purpose of loading, delivery or transhipment`, but `subject to proof to the contrary`. Clearly, the presumption of art 18(3) was intended to operate only where the circumstances surrounding the loss or damage of the baggage or cargo are shrouded in doubt. In such a situation, the loss or damage would be presumed to have taken place during the period of the carriage by air and accordingly, the basis and extent of the carrier`s liability would fall to be governed by the Amended Convention. The presumption does not apply, however, to avail the carrier of the limits of liability afforded by art 22 where the circumstances leading to the loss or damage are undisputed or easily proved, as in the present case. It was not disputed by the respondents that the alleged loss of the goods was caused by their wrongful delivery to Pixtel, and not as the result of an event which took place while the goods were on board the aircraft or in the aerodrome. Accordingly, the presumption in art 18(3) was rebutted and did not apply to assist the respondents.

31 23. ***Conclusion***

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33 For the foregoing reasons, we are satisfied that the appellants are entitled to plead their claim against the respondents for loss of the goods at common law as the Amended Convention does not create any basis for the respondents` liability. As freight forwarders, the respondents are not a `carrier` within the meaning of art 18, nor was the loss by misdelivery of the goods to Pixtel, instead of the consignors Dena Bank, a loss arising in the circumstances prescribed in art 18. Accordingly, the appeal is allowed with costs here and below, and the security deposit will be refunded to the appellants.

Karthigesu JA
L P Thean JA

Govindarajalu Asokan and Adrian Loke (Rodyk & Davidson) for the appellants
Chua Chok Wah and Magdalene Chew (Khattar Wong & Partners) for the respondents

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