Singapore Airlines Ltd and Another v Fujitsu Microelectronics (Malaysia) Sdn Bhd [2000] SGCA 66

Case Number : CA 21/ 2000

Decision Date : 30 November 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : P Selvadurai, Lok Vi Ming and Lawrence Teh (Rodyk & Davidson) for the appellants; Belinda Ang Fong SC and Gerald Yee (Ang & Partners) for the respondents

Parties : Singapore Airlines Ltd; Another — Fujitsu Microelectronics (Malaysia) Sdn Bhd

Carriage of Goods by Air and Land – Carriage of goods by air – Contracts of carriage – Consignment of seven packages of integrated circuit dies – Non-delivery of one package – Whether carrier and/or its agents entitled to limit liability under art 22 of amended Warsaw Convention

Carriage of Goods by Air and Land – Carriage of goods by air – Contracts of carriage – Consignment of seven packages of integrated circuit dies – Non-delivery of one package - Whether carrier and/or its agents were reckless and had knowledge that damage would probably result – Actual knowledge required

(delivering the judgment of the court): ***Introduction***

On 17 April 1996, seven packages of flash memory integrated circuit (IC) dies were shipped from Tokyo to Kuala Lumpur via Singapore by Singapore Airlines Ltd (`SIA`), the first appellant. The consignment arrived at Kuala Lumpur the next day and were placed into the custody of the Malaysian Airlines System (`MAS`) Bhd`s Cargo Centre. However, on the following day, only six packages could be found and delivered to the consignee. The respondents instituted an action to claim for the loss. At the trial, it was not disputed that the respondents should be compensated for the loss. The issue was whether the appellants were entitled to invoke the limitation of liability under the Warsaw Convention as amended by the Hague Protocol (`the amended Convention`). The High Court ruled that the appellants were not entitled to the protection of the limitation of liability provided in the amended Convention. [See [2000] 3 SLR 69.] This has led to the present appeal.

The background

SIA is the national carrier of Singapore and operates scheduled international commercial flights between, inter alia, Singapore/Tokyo and Singapore/Kuala Lumpur. The second appellant, MAS, is the ground handling agent of SIA at Kuala Lumpur.

The goods in the seven packages were sold by the second respondent to the first respondent. The third respondent was the consignor of the goods and the fourth respondent, the consignee and they both acted as agents for the second respondent and the first respondent respectively.

It was not in dispute that the seven packages were carried from Tokyo to Kuala Lumpur (via Singapore) and was delivered into the MAS Cargo Centre (Cargo Centre) at Subang International Airport, Kuala Lumpur at about 7.05am on 18 April 1996. For that carriage SIA issued airway bill No AWB 618-4101-8994 (`AWB 8994`) and the packages bore that number.

The computer system at the Cargo Centre maintained by MAS showed that as at 10.47am on the

same day, the seven packages, after being unloaded from the aircraft, were placed in bin No H031/C-6. However, about two hours later, a cargo clerk at the warehouse, Mr Nordin bin Abdullah (`Nordin`), found a package bearing airway bill AWB 8994 at bin F095/B-2. He made an entry to that effect in the computer. However, as was the practice at the Cargo Centre, he left the package where he found it and did not put it back into its proper bin. But Nordin did enter the new bin number into the computer. There is no evidence as to how the package found its way into bin F 095/B-2.

At about 6.19pm the same day, the fourth respondent asked for the delivery of the consignment. By 3.49am on 19 April 1996, only six of the seven packages could be found, five from bin H031/C-6 and the sixth from bin F095/B-2. The seventh package was never found and never delivered.

The claim of the respondents was on the basis of a breach of the contract of carriage and/or a breach of duty as carrier under the amended Convention and/or a breach of the common law duty of care.

Decision below

The trial judge ruled that the amended Convention applied to the carriage. This was not really in dispute. Article 22 of the amended Convention limits the liability of the carrier (and its agents) to 250 francs per kilogramme. However, art 25 provides that the limitation would not apply if it is proven by the claimant that the damage resulted from an act or omission of the carrier or its agents done with intent to cause damage or recklessly and with knowledge that damage would probably result.

While the trial judge found that neither MAS nor its employees had acted with intent to cause damage, he nevertheless, having examined the operational systems adopted at the Cargo Centre, including the practice of leaving `unlocated` cargo where it was found without putting it back to its designated bin, the understaffed manpower condition, the volume of shipment handled, the numerous instances of cargo/mail reported lost or missing, held that the situation prevailing at the Cargo Centre exposed the imported air cargoes to a huge risk of loss through theft or misdelivery to the wrong consignee. He felt, in particular, that `the loss of that package was precisely the kind of loss that MAS must have known would probably result from its practice of leaving a package which is found where it should not be in a warehouse where cargo can be concealed to pass through the exits undetected.` In his view, MAS acted recklessly when it continued with that practice and that such continuation was `with knowledge that damage would probably result.` He further found that the loss of the seventh package resulted from this practice. In the light of this finding, he held that MAS, and thus SIA, were deprived of the right to rely on art 22 to limit their liability for the loss of that package.

Relevant provisions of the amended Convention

As stated, the sole issue in this appeal is whether, in the light of the circumstances under which the seventh package was lost, the appellants are still entitled to enjoy the limits of liability under art 22. Also relevant in this regard are arts 25 and 25A(1) and (3). We should mention that the provisions of the amended Convention have been incorporated as part of the law of Singapore by virtue of the Carriage by Air Act (Cap 32A) and it is common ground between the parties that those provisions of the amended Convention governed this carriage.

As the case turns entirely on the construction and application of these clauses, we shall set them out in full:

Article 22(2)(a)

In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of 250 francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger`s or consignor`s actual interest in delivery at destination.

Article 25

The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

Article 25A

(1) If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.

...

(3) The provisions of paragraphs (1) and (2) of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

It will be seen that the limitation of liability enjoyed by a carrier will be removed if the carrier, or its agents, intended to cause the loss or has acted recklessly and with knowledge that damage would probably result. The court below found no evidence to indicate that the carrier, or its agents, intended to cause the loss. So what we are concerned with is the second limb, and for that second limb to apply, two conditions must be satisfied. First, it must be shown that there was recklessness (hereinafter referred to as the `first condition`). Second, it must be established that the carrier, or its servants or agents, knew that their act/omission would probably cause the loss (hereinafter referred to as the `second condition`). The burden of proving that these two conditions have been satisfied rests on the claimant.

The system in Cargo Centre

At the Cargo Centre, the bins came in two sizes: either rectangular measuring 4 ft by 8 ft or square,

4 ft by 4 ft. Each bin was protected on three sides by wire netting up to a height of 4 feet. The bins were placed on open shelves in double rows to a height of four bins and the open side of the bins faced each other. The location of each bin was identified by a number and the number was clearly marked on each bin.

The evidence shows that on 18 April 1996, Nordin, who was a member of the warehouse `Unlocated Team` found one package from the shipment AWB 8994 at bin F095/B-2. He was then looking for some other unlocated cargo. Fortunately, the airway bill number was on the package. Nordin entered the new bin number into the computer against that package.

There is also evidence indicating that various security measures were in place at the warehouse to ensure that goods were not taken out either deliberately or accidentally, by staff or consignee who had come to collect their consignments. One of the measures was the installation of close-circuit television cameras. Careless forklift drivers were suspended from work and control at the exits had been tightened up following the gold heist of 1994. In that part of the warehouse dealing with incoming cargo, there were at the time about 60 employees, working in three shifts, and they attended to about 1,000 shipments a day, involving some 14,000 pieces of air cargo.

The complex where the Cargo Centre was located was built in 1986 to handle up to 200,000 tonnes of cargo daily. Because of the booming Malaysian economy, the volume handled at the Cargo Centre shot up to 260,000 tonnes at the time of the incident. Clearly there was a problem of congestion. At the time, the new Kuala Lumpur International Airport at Sepang was not completed and was due to be completed in 1997. There was reluctance on the part of MAS in incurring expenditure to upgrade the existing facilities at the Subang Airport.

In 1996, about six to ten cargo/mail survey reports (`CMR`) were issued a day. That works out to 42-70 CMR per week. Of that figure, only 5% were for shortlanded, not received, unlocated and missing cargo. But it was the practice of the Cargo Centre to classify a package as damaged even though its contents were also missing. About 60-65% of the CMR were classified as damaged. The evidence from an SIA employee indicated that SIA received roughly about three CMR per week. The problem must have caused some concern to SIA for it to have assigned a special staff to work with MAS whose duties were to do `warehouse search, supervising breakdown and (attend to) all telex correspondence`, though the witness from SIA hastened to emphasise that such a staff was assigned essentially to ensure quality service to its customers. However, the trial judge found that SIA was concerned with the problem of short deliveries and thus adopted that measure.

The court also received evidence from Mr Denis Phipps, a partner in ASGARD Security Management Service, which is an independent consultancy service specializing in aviation security management. He expressed the view that in the light of the high rate of loss occurring at the warehouse, it was an accepted industry cargo security principle to investigate all losses to:

(i) ascertain how the loss occurred;

(ii) identify deficiencies in the system;

(iii) design measures to rectify any revealed deficiencies;

(iv) deter and/or identify those responsible for the loss.

He also said:

> *The scenario involving internal theft of the subject cargo was a very likely scenario. It is well known in the industry that a prevalent method of committing theft in a cargo warehouse is to remove an item from its assigned location in the warehouse and place it elsewhere. If the item is not located for delivery, it is subsequently removed from the warehouse by the thief or an accomplice visiting the warehouse for other purposes after any subsequent investigation/search has taken place and the item has been written off as mishandled.*

Cause of the loss

There is no concrete evidence as to the cause of the loss or how the loss occurred. The trial judge seemed to think that it had much to do with the practice at the Cargo Centre of not restoring a package which was found in a wrong bin to its rightful bin. He said:

> *The practice of leaving a package which has been found to be where it should not be is likely to lead to short delivery to the consignee rightfully entitled to it. MAS was aware of the problem of short deliveries and loss of cargo. It was aware or had reason to believe that missing cargo was passing through the exits. Its principal SIA was concerned with short deliveries and asked for something to be done. Yet the practice continued. It was part of the system employed by MAS. Cargo was passing through the exits which required `tightening up` and it was passing through together with concealed cargo to which the receiver was not entitled. I think MAS was aware that `damage` (ie loss of cargo) would probably result from such practice and nevertheless continued that practice regardless of that probability.*
>
> *...*
>
> *The loss of that package was precisely the kind of loss that MAS* ***must have known*** *would probably result from its practice of leaving a package which is found where it should not be in a warehouse where cargo can be concealed to pass through the exits undetected. [Emphasis added.]*

The recklessness on the part of MAS which the trial judge found was its practice of leaving a package which was found to be at a wrong location to remain there (hereinafter referred to as `the practice`). He also found that MAS knew that damage would probably result from the practice. It seems to us that he had adopted an objective test in determining such knowledge.

Construction of arts 25/25A(3)

We will now turn to consider the two conditions laid down in arts 25/25A(3). There are a number of cases which have examined these two articles. A leading case would appear to be **Goldman v Thai Airways International Ltd** [1983] 3 All ER 693[1983] 1 WLR 1186. There, injuries were caused to the claimant during a severe clear air turbulence. The English Court of Appeal held that the test to determine recklessness in art 25 was subjective and that the pilot had acted recklessly if it was proved that he had omitted to order the passengers to wear seat belts when he was aware (or indifferent to his knowledge) of the fact that damage of the kind that did occur would probably result.

Eveleigh LJ explained what constituted `recklessness` and `knowledge` as follows (at [1983] 3 All ER 693, 699; [1983] 1 WLR 1186, 1194):

> *When conduct is stigmatised as reckless, it is because it engenders the risk of undesirable consequences. When a person acts recklessly he acts in a manner which indicates a decision to run the risk or a mental attitude of indifference to its existence. This is the ordinary meaning of the word, as I understand it, ... One cannot therefore decide whether or not an act or omission is done recklessly without considering the nature of the risk involved. In the present case the omission relied upon was the failure to order seat belts to be fastened. The risk with which we are concerned, therefore, is the risk of injury to the passenger whose belt should have been fastened. If the article had stopped at the word `recklessly`, I would have been prepared to say that, on the judge`s findings, the plaintiff had proved his case. This is because, on those findings, the pilot had deliberately ignored his instructions which he knew were for the safety of the passengers, and thus demonstrated a willingness to accept a risk. Also it might be said that he thought that he knew better than those responsible for the manual and, while this might mean that he in his own mind saw no risk, he was in fact taking the risk that his judgment was better than that of other experts. If this is so, I would be prepared to say, as did the judge, that a deliberate disregard of the rule must be considered recklessness in the circumstances of the case. I shall consider later whether or not a deliberate disregard of instructions has been proved. However, the doing of the act or omission is not only qualified by the adverb `recklessly,` but also by the adverbial phrase `with knowledge that damage would probably result.` If the pilot did not know that damage would probably result from his omission, I cannot see that we are entitled to attribute to him knowledge which another pilot might have possessed or which he himself should have possessed.*

In coming to his decision, Eveleigh LJ also referred to the ***travaux preparatoires*** of the Conference which adopted the Hague Protocol, and which brought into being arts 25 and 25A(3). It should be noted that at the Conference, three alternative phrases were placed before the delegates:

(a) and has acted recklessly;

(b) and has acted recklessly and knew or should have known that damage could probably result;

(c) and has acted recklessly and knew that damage would probably result.

It was alternative (c) which was preferred by delegates and eventually adopted by the Conference.

It would be apparent that of the three alternatives, (c) imposes the heaviest burden in order to deprive the carrier (and its agents) of the benefit of the limitation of liability. A claimant must prove both conditions, recklessness as well as the knowledge that damage would probably result. We would emphasise that such knowledge does not necessarily follow from recklessness. An act may be reckless when it involves a risk, even though it cannot be said that the danger envisaged is a probable consequence. Of course, where the risk is remote then the act may not even be reckless. The knowledge required is actual knowledge that damage would likely happen following from the reckless act.

In this regard it may be useful to compare the wording of the amended Convention with the wording under the original Warsaw Convention, where it was prescribed that a carrier would not be able to enjoy the limitation of liability if `the damage is caused by his wilful misconduct or by such default on

his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct.` Under the original wording, the courts of signatory States differed in their interpretation as to the term `wilful misconduct`, whether it imported an objective or a subjective standard of mind and behaviour. The new formulation in arts 25 and 25A(3) effectively rejected the objective standard and adopted actual knowledge as an essential prerequisite in order to deprive a carrier, or its servants or agents, of the protection of limited liability.

It seems to us clear that the scheme of things envisaged by arts 25 and 25(A)(3) is that for unlimited liability to arise, the requirements are high. This is apparent from the comments made by the UK delegation at the Conference where the Hague Protocol was adopted:

> *The proposal ... to amend art 25 of the Convention raises the question whether the amended article is too favourable to the carrier ... The UK agrees with the view that, as a reasonable limit is set to the operator`s liability in return for giving the claimant a right to secure compensation without the burden of proof of negligence, the Convention* ***should limit very narrowly indeed****, that is to those where there is an element of criminal intent, the cases where liability is unlimited.*

In our view, this is entirely reasonable having regard to the fact that the consignor could easily overcome that by declaring the true value of the goods and paying for the additional premium.

Another case which is relevant is **SS Pharmaceutical Co Ltd v Qantas Airways Ltd** [1991] 1 Lloyd`s Rep 288, a decision of the Court of Appeal in New South Wales, Australia. There, air cargo in transit was damaged because the defendants left it in the open and exposed it to heavy rain. The cartons containing the cargo bore a sign indicating that exposure to water would damage it. The weather forecast for the day in question had been of rain. The defendants chose not to call any evidence to explain their conduct. Rogers J found on the evidence that the defendants knew of the likelihood of damage having regard to the specially vulnerable cargo in the weather condition then prevailing. His decision on the facts was upheld by a majority of the Court of Appeal. However, Rogers J, as well as the full panel of the Court of Appeal, accepted the interpretation of art 25 enunciated in ***Goldman*** that proof of actual knowledge on the part of the carrier, its servants or agents, was essential and that such knowledge must exist at the moment of the alleged act or omission.

In a very recent case **Nugent & Anor v Michael Goss Aviation Ltd & Ors** (Unreported) the English Court of Appeal again reaffirmed the need to prove actual knowledge that damage would probably result. At first instance, Burton J said:

> *... it is therefore not open to Mr Wood QC to argue ... that it is not necessary to show actual knowledge of the probability of death resulting, but only that the probability was within his knowledge, ie would have been apparent to him if he had turned his mind to it. This alternative method of formulation ... seems to me only another way of alleging negligence or perhaps gross negligence or even turning a blind eye. But none of this would amount to actual knowledge as defined and expressed by the Court of Appeal decisions and has been found by them, in construing art 25, to be required.*

This statement of the law was approved by the Court of Appeal. There, Auld LJ, having reviewed the authorities, observed that the knowledge which must be proved would have to be in the sense of an `appreciation or awareness at the time of the conduct in question, that it will probably result in the

type of damage caused.` He added `Nothing less will do.`

It is true that in ***Nugent*** the court was concerned with death brought about by the action of the pilot. Similarly in ***Goldman*** , it was the conduct of the pilot that was in issue. In the present case what is involved was the loss of property. But art 25 is of general application. It is applicable to death/personal injury, as well as to loss or damage to property. So is art 25(A)(3). But whether it is death or damage to property, the same criterion applies. This was recognised by Auld LJ who said that `the article has to be construed consistently over its whole field of operation and not skewed to meet one particular aspect of it.` Indeed, error on the part of the pilot is not the only circumstance that could give rise to death or personal injury. An act or omission of the ground maintenance staff could also give rise to that. Therefore, whether in a particular case proof of knowledge of injury or damage would result has been established, is a question that can only be answered in the light of the prevailing circumstances there.

We would point out that in ***Nugent*** , counsel for the claimant advanced the argument that to determine `knowledge` the `store of knowledge` must be taken into consideration. In this regard, Pill LJ`s views differed from that of Auld LJ because while Pill LJ accepted that the court must not impute to the actor knowledge he does not have, it should not ignore his store of knowledge and experience in assessing the actor`s knowledge at the material time. He found it artificial to say that one could isolate what a person is thinking at a particular moment from his store of knowledge. To illustrate his point he referred to the example:

> *As a simple land-based example, I mention a driver on a busy road. He would not escape liability on the art 25 use of the word `knowledge` by claiming that he had forgotten for a moment that vehicle drivers on the left hand side of the road (in the UK) or that it is a red traffic light which means stop. There are no doubt equivalent basic rules in the air. The pilot in* ***Goldman*** *would not have escaped liability on the ground that he had forgotten at the relevant moment that seat belts provide protection against damage.*

However, the third member of the quorum in ***Nugent*** , Dyson J, shared the views of Auld LJ. He explained the point as follows:

> *There is nothing in the language of art 25 or the* ***travaux preparatoires*** *to indicate that it was intended to include some, and not all, categories of knowledge not present to the mind at the time of the act or omission. Why should knowledge that has been temporarily forgotten be excluded? If a person fails to apply his mind to a fact because he has temporarily forgotten it, he has no more and no less actual knowledge of that fact at the time of his act or omission than a person who fails to apply his mind to it because he has been temporarily distracted.*

Dyson J also referred to the example given by Pill LJ of a driver who drove through a red traffic light. He said that in such a situation there was recklessness. But he asked the question whether in such a case the driver would have known that that was what he was doing. Dyson J seemed to think not. He recognised that this would mean that in practice it would be difficult to prove in any case that the condition relating to mental knowledge had been satisfied. However, to him that was not surprising as art 25 should be of very restricted application.

We think one must differentiate between `turning a blind eye` or a `conscious desire to put

something out of one`s mind`, which suggest a conscious act, and `oversight` or `carelessness`, which indicates absence of mind. It does not follow that just because something is obvious that a person could not have overlooked it. But the more obvious a matter, the more the court will be inclined to find there was not only negligence but recklessness. However, the fact that there was recklessness did not necessarily mean that the person knew that damage would probably result. Of course, in appropriate circumstances the court would be entitled to draw inferences in determining the presence of such knowledge for the purposes of arts 25/25A(3). Inferring knowledge is different from imputing it and while in particular circumstances there could be difficulties in categorising, they do not destroy the reality of the difference.

In our opinion, it is clear that the knowledge which must be proved is the actual knowledge of the wrongdoer, be it an individual or a group of individuals in a company. The fact that the amended Convention requires proof of recklessness as well as knowledge that damage would probably result, unmistakably indicates that recklessness per se is not sufficient. Here we find this observation of Eveleigh LJ in ***Goldman*** (at [1983] 3 All ER 693, 699; [1983] 1 WLR 1186, 1194) germane: `... I cannot believe that lawyers who intended to convey the meaning of the well known phrase "when he knew or ought to have known" would have adopted "with knowledge"`. Equally pertinent is this comment of Kirby P in ***SS Pharmaceutical*** (at p 302): `Even proof of reckless conduct is itself, and alone, not enough. It must be shown that, at the time of the reckless conduct, the servants or agents of the carrier concerned knew that such conduct would cause damage but went ahead regardless.`

Cause of loss

The trial judge held that the loss of the missing package was due to the practice adopted at the warehouse of leaving a package which was found in a position that was not its rightful location. The appellants submit that this finding is not supported by the evidence. We agree with this submission. It will be recalled that the sixth package which was found by Nordin in a different location was left where it was. What Nordin did was to enter into the computer system the new location of the sixth package. That package was found by the trial judge to have been delivered to the consignee. In fact, he found that at the time of delivery only five packages were found at bin H031/C-6. This disproves, rather then substantiates, the thesis that when such a package was left in its new location (although an entry was made in the computer as to its new location) that it would, as a matter of course, be lost.

The truth of the matter is that neither MAS nor its Cargo Centre staff knew what happened to the missing package. While the trial judge did say that `there is a real possibility that as in the case of the package found at F095/B-2, the (seventh) package could have been in the wrong location but it was not discovered. It was not found, or if it was, then the air waybill number on it was obliterated (or the labelling was missing)`, he was really only speculating. What is clear is that someone must have taken it out of the bin either by accident or deliberately. In our view, one cannot say that the practice was, or even was probably, the cause of the loss. The loss could just as well have occurred without the seventh package being misplaced by anyone in the wrong bin. It will be remembered that besides the seven packages, there were also 15 other packages in the same bin. Thus, while we would agree that perhaps the better management practice might have been to restore a package found in a wrong bin to its rightful bin (instead of just entering the new bin number against that package and leaving the package where it was) we do not think that the adoption of the practice necessarily amounted to negligence on the part of the management of the Cargo Centre, let alone recklessness.

Damage: probable or just possible

It seems to us that the totality of the evidence before the court painted this picture of that part of the warehouse dealing with incoming cargo. First, it was handling more cargo than the premises were originally designed for. Secondly, the MAS was not prepared to upgrade the facilities available then because the new Kuala Lumpur airport at Sepang was due to be completed the following year. Thirdly, there is evidence that the warehouse was understaffed, considering the volume of cargo it was handling. Fourthly, the rate at which cargoes in the Cargo Centre were lost or damaged was sufficiently significant to prompt SIA to want to assign a special staff to the Cargo Centre. Fifthly, there was a need to tighten the exits from the warehouse which would mean that the Cargo Centre should have employed more staff and assigned them to man the exits. Sixthly, no investigation would be carried out upon discovery of a loss (unless it related to a sensitive cargo) though a search would be conducted to locate the lost item. This was what happened in relation to the seventh package.

There was no evidence before the court below as to how the rate of loss/damage at Subang Airport compares with those of other airports` cargo centres. Mr Phipps said the rate was high. For the present purpose, we will assume that the rate of loss/damage at the MAS Cargo Centre is higher than the rates prevailing at other airports. What then does this indicate? That there was recklessness? We doubt it. Putting it at the highest, it can suggest no more than that the Cargo Centre management had their own priorities and were not in a position to further upgrade the security system in place at the warehouse. This could at most amount to a lack of care. But we doubt this would constitute recklessness and unless recklessness is proven the first condition prescribed in arts 25/25A(3) would not have been satisfied to deprive MAS (and thus SIA) of the protection afforded by art 22 as to limitation of liability.

As regards the second condition (ie on knowledge) one must not necessarily infer from recklessness (assuming there was recklessness in the present case) that there was in fact knowledge that damage would probably result. The two requirements are distinct and separate. With respect, we think this is where the trial judge erred. The claimant must prove such knowledge or prove objective facts upon which the court could reasonably infer that the carrier or its agent knew that damage would probably be caused: see **Caswell v Powell Duffryn Associated Collieries Ltd** [1940] AC 152 at p 169 per Lord Wright.

Turning to the evidence, we do not think there is anything upon which we could infer such knowledge of probable loss/damage to the seventh package. The evidence shows that the Cargo Centre handled some 1,000 consignments of 14,000 pieces of air cargo a day. Out of that volume of cargo handled, only 6-10 CMRs were raised per day. Taking the highest figure in that range, 10, percentage-wise, the rate for loss/damage amounted to no more than 0.0714% (10 divided by 14,000). We do not see how from that percentage one could infer that the management of the Cargo Centre knew that damage/loss would ***probably*** result to that package.

Here, it is critical to differentiate between `probable` and `possible`. On the facts, while one could justifiably say that the Cargo Centre knew in a general sort of way that some packages would probably be lost/damaged, having regard to the fact that 6-10 CMRs were put up each day, one can hardly say that the Cargo Centre knew that any particular package would probably be lost. It must be borne in mind that actual knowledge of probable damage is not established by proving knowledge that damage would probably result if a particular risk materialised.

We have noted the submission of the respondents in these terms:

> *The picture that emerged was of a warehouse plagued with recurring problems. It was a warehouse that was congested and poorly managed. With congestion, bad housekeeping and inadequate security measures, the warehouse was fertile ground for loss and damage to cargoes.*

But we have also noted that the respondents recognised that with space and manpower constraints, and while waiting for the new airport at Sepang to complete, MAS was `fire fighting`. The Cargo Centre staff were striving to cope. In the circumstances we think it is an exaggeration to suggest that the management and staff of the Cargo Centre knew that a loss of the seventh package would probably result. The fact that there were 6-10 CMRs a day is a statistic that does not go to prove actual knowledge. It could not be the basis to find that there was knowledge of the probable loss of that package.

The present case is different from that in ***SS Pharmaceutical*** where Qantas called no evidence to explain the way the cargo was handled, not even the `leading hand tarmac` who was in charge of the cargo in question. It must, however, be borne in mind that there the cartons were each marked with a stencilled umbrella to denote that the goods therein would be damaged if exposed to water. Yet, it was left in the open tarmac in Sydney exposed to torrential rain and wind for some eight hours during transhipment. Furthermore, that was not the first such shipment where the cargo was similarly damaged. The cargo handling supervisor of Qantas admitted to `deplorably bad handling`. In the absence of any witness from Qantas explaining why the cartons were left in the open when there were clear signs on the cartons indicating that they must not be exposed to rain, and the forecast for that day was rain, the court was entitled to infer that the person in charge was reckless and knew that damage would result and he plainly could not care. In our present case, one cannot reasonably say that any staff member, or the management, knew that the seventh package would probably be lost.

We accept that there can be `recklessness` and `knowledge` not only on the part of an individual but also a corporation. ***Chitty on Contracts*** , Vol 2 (28th Ed) Specific Contracts, states at [para] 35-039:

> *Article 25 ... also embraces the acts or omission of the carrier itself at corporate level. If therefore the carrier has a reckless system say, with regard to the operation of procedures to ensure the safety of passenger or if he has failed to modify his system in light of painful experience, this may lead to the application of art 25.*

Of course, a corporation can only act through an individual. In each instance the crucial question is, whose act (or knowledge, or state of mind) is for this purpose intended to count as the act of the company? In the words of Lord Hoffman in **Meridian Global Funds Management Asia Ltd v Securities Commission** [1995] 2 AC 500 at 507 `one finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its contents and policy.`

Conduct of Munusamy

In the respondents` case they have also referred to the conduct of Munusamy upon discovery of the loss. Munusamy did not refer the loss to the Security department for investigation though requested

by the respondents. The respondents submitted that had an investigation been carried out, the package could perhaps have been recovered. However, Munusamy handled the case in the same way as he would ordinarily have handled other general cargo that was not available at collection. Munusamy said he did not know that the package contained sensitive cargo; neither did anyone from the respondents contact him personally to impress upon him the special nature of the cargo, other than the written request of 22 April 1996 and a reminder on 8 May 1996. He thought it was just general cargo, no point in investigating. He might be wrong. One must, in this regard, bear in mind the large number of packages the warehouse handled in a day. One could perhaps criticise Munusamy for exercising less than due diligence with regard to the request. That, at the highest, is no more than mere negligence. In any case, even if one could reasonably construe that as constituting recklessness, which we do not think is warranted, there is still the second condition to be satisfied, namely, that Munusamy knew that by not referring the request from the respondent to the Security Department he would have, by that omission, caused the loss of the package. There is certainly nothing to indicate that Munusamy had such knowledge; nor is there anything upon which it may be inferred that Munusamy had such knowledge. With respect, we think the allegation, that had Munusamy forwarded the request to the Security Department to investigate, the missing seventh package could have been found, is wholly speculative.

The scheme of things under the amended Convention is quite clear. Consignors of goods of special interest or value are required to make the special declaration as provided in art 22 and pay the additional charges (if any). The respondents in this case had failed to do that. Now, in spite of their own failings, they are seeking to shift the responsibility to a cargo supervisor who had thousands of other packages to deal with in a day and say that because that supervisor failed to cause an investigation to be carried out as requested, he, therefore, knew that such a failure would probably cause the loss of that package.

Bailment

The final point which we would like to touch on briefly is bailment. It is raised by the respondents. In the present proceedings, besides suing the carrier, SIA, MAS is also being sued as a bailee. The respondents submit that the burden rests on a bailee to explain how he lost the goods. In this case, as MAS had received the seven packages into its custody, it must explain what happened to the missing seventh package. The burden was on MAS to prove, on the balance of probabilities, that it had used all reasonable care in relation to the missing package. This, MAS had failed to do. The respondents further contend that an action against a carrier`s agent based on common law causes of action was sanctioned in **Seagate Technology International v Changi International Airport Services Pte Ltd** [1997] 3 SLR 1 .

It is necessary to see what was determined in ***Seagate Technology*** . There, the High Court held that the liabilities of a carrier and its agents were exhaustively set out in arts 17, 18 and 19 of the Amended Convention and as the claimant had failed to refer to any of these articles, it had consequently failed to disclose of any cause of action and dismissed the suit. On appeal, the only issue was whether the appellant was obliged to plead art 18 or whether it could simply plead the common law causes of action of negligence, bailment and conversion, as the basis of the respondent`s liability for a lost cargo. In that action, the respondent conceded that it was not seeking to shelter behind the limits of liability prescribed in the amended Convention. This concession was given because there was evidence that the loss was caused by an act which was reckless and with knowledge by the wrongdoer that loss would probably result.

On appeal, this court noted that there was no mention in those articles (ie 17, 18 and 19) of the

carrier`s agents or servants. The articles do not impose any liabilities on the carrier`s agents. It held that the liability of the carrier`s agents was not founded on arts 17, 18 and 19. Thus, the appellant there was entitled to plead its claim against the respondent for the loss of the cargo at common law. But this court did recognise that `art 25A was introduced by the Hague Protocol of 1955 to make available to the carrier`s agents and servants the limits of liability under art 22.` So what was decided in ***Seagate Technology*** was on a point of pleading and did not concern the operative effect of art 25A.

Article 25A(1) clearly provides that an agent shall be entitled to avail himself of the limits of liability under art 22 provided he proves that he acted within the scope of his employment. Here, the evidence is incontrovertible that MAS received the seven packages into its care as an agent for SIA. Having established that, MAS is entitled to avail itself of the limits of liability under art 22. If a claimant says that MAS is not so entitled, then the burden of proving that the conditions specified in art 25A(3) are satisfied falls on him. We would reiterate that this case is governed by art 25A, which has been incorporated as part of our law, and not by the general law on bailment. We have already considered above that the respondents have failed to prove `recklessness and with knowledge that damage would probably result` on the part of MAS or its employees.

Judgment

In the result we find that the respondents have not proven that the two conditions prescribed in arts 25/25A(3) had been satisfied to deprive MAS (and thus SIA) of the protection of limited liability afforded by art 22. The respondents could have made a special declaration of interest at the time of shipment but failed to do so. They have to bear the loss in excess of the prescribed sum laid down in art 22 due to their own failure. We would, therefore, allow the appeal.

As requested by counsel for the appellants, parties are required to submit their arguments on costs within 7 days of the date hereof.

Outcome:

Appeal allowed.