Faith Maritime Co Ltd v Feoso (Singapore) Pte Ltd and another action
[2002] SGHC 229

Case Number : Adm in Per 32/2000, Adm in Rem 21/2000

Decision Date : 01 October 2002

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Richard Kuek and R Govintharasah (Gurbani & Co) for Faith Maritime Co Ltd; Ajaib Haridass And Thomas Tan (Haridass Ho & Partners) for Feoso (Singapore) Pte Ltd

Parties : Faith Maritime Co Ltd — Feoso (Singapore) Pte Ltd

Admiralty and Shipping – Bills of lading – Whether party not claiming any right under bill of lading can rely on s 2(1) – s 2(1) Bills of Lading Act (Cap 384, 1994 Ed)

Admiralty and Shipping – Carriage of goods by sea – Demurrage – Whether vessel an "arrived ship" – Period of demurrage claimable

Admiralty and Shipping – Carriage of goods by sea – Lien – Entitlement to lien – Nature of lien

Tort – Conversion – Essence of conversion – Whether party has locus standi to sue for conversion

action to date of judgment) in Admiralty in Personam No. 32 of 2000,

(1) The cargo was not fuel oil and Feoso had always known that (see 53).

(2) Feoso had no contractual claim under B/L No. 2, 3 and 4; Feoso's counsel had conceded that they were not binding on Faith as they had been issued without Faith's authority (see 61).

(3) Feoso had no contractual claim under B/L No. 1 as Feoso was not claiming any right under B/L No. 1 (see 69).

(4) Faith had acted reasonably and did not convert the cargo (see 113 and 115).

(5) The lien provision in the head charter party had been incorporated into B/L No. 1 (see 131). Faith was entitled to assert a lien as it had not relinquished possession of the cargo (see 134).

Case(s) referred to

Bristol & West of England Bank v Midland Railway Co

[1891] 2 QB 653

Steelmet Pte Ltd v APL Co Pte Ltd

Suit No. 1736 of 1999

The Cherry and Others

[2002] 3 SLR 431

The Miramar

[1983] 2 Lloyds Law Rep 319

The Trade Resolve

[1999] 4 SLR 424

Wah Yuen Petroleum Marine Pte Ltd v Hai Yin Diesel Trading Pte Ltd

Suit No. 2010 of 1997

Legislation referred to

Bills of Lading Act (Cap 384) s 2(1)

Judgment

Cur Adv Vult

GROUNDS OF DECISION

Introduction

1. There are two actions before me. In Admiralty In Personam No 32 of 2000, Faith Maritime Company Ltd ('Faith') is the plaintiff and Feoso (Singapore) Private Limited ('Feoso') is the defendant. Faith is a company registered in Malta. Faith was at all material times the owner of the vessel 'Daphne L' ('the Vessel'). Feoso is a company incorporated in Singapore. I would add that Feoso is a renowned oil trader (NE 709) and has substantial experience in buying oil from the Middle East (Fung Tze Tat's 3rd affidavit, para 4).

2. In Admiralty in Rem No 21 of 2000, Feoso is the plaintiff and the owner of the vessel 'Daphne L' i.e Faith is the defendant.

Background facts and findings

3. In view of the numerous allegations made by and against each party, I will set out the background facts in some detail.

4. On 8 September 1999, Feoso entered into a contract with a company in Hong Kong called Ever Bright Energy Co Ltd ('Ever Bright'). The contract was for Feoso to buy from Ever Bright a cargo described as heavy crude oil (off-specification). The detailed specifications were set out in Attachment 1 to the contract. The cargo's country of origin was Iran and the port of discharge was Huangpu, China. The quantity was between 21,000 to 30,000 metric tonnes.

5. On the same date, Feoso entered into a contract with a company in Singapore called Titan Oil Pte Ltd ('Titan') to sell the same cargo to Titan. However the cargo was described in this contract as 380 CST Fuel Oil, although the detailed specifications set out in the attachment to this contract were the same as those set out in Feoso's contract with Ever Bright.

6. On 13 October 1999, Faith entered into a Tanker Voyage Charter Party ('the Head CP') on the Asbatankvoy form with Persing Energy Corp of Panama ('Persing'). The Head CP stated the load port as Kharg Island, Iran, and the discharging port was Huangpu, China. The cargo was described as 'Crude and/or Dirty Petroleum Product'.

7. The Head CP was negotiated between the respective brokers:

(a) DLP Maritime SA ('DLP Maritime') for Faith

(b) Meridian Brokerage Inc ('Meridian') for Persing

Faith's manager of the Vessel was Seaworld Management & Trading Inc ('Seaworld').

8. On the same date, Persing entered into a voyage charter party ('the Sub CP') with Nordic Long Term Lease Limited ('Nordic') of Hong Kong for the Vessel also to load cargo at Kharg Island and to discharge the cargo at Huangpu. The cargo in the Sub CP was described as crude oil slops. Unlike the Head CP, the Sub CP contained a term that new bills of lading would be issued in Singapore describing the cargo as fuel oil off-specification. Nordic is a related company of Ever Bright who sold the cargo to Feoso.

9. As many parties, including solicitors, were involved, there is attached to my judgment a list of the various parties and, where applicable, their solicitors. The reference in my judgment to 'CB' is to Core Bundles prepared by the parties after the trial. The Core Bundles were actually supposed to be a comprehensive set of documents in chronological order. However, as they were not comprehensive, I have also in my judgment referred to other bundles used in the trial.

10. The loading operations at Kharg Island stretched from 16 October 1999 to 20 November 1999. On 21 November 1999, the Master issued a Bill of Lading KHA-001 ('B/L No 1'). The shipper's description of goods was crude oil slops. The net weight and the gross weight of the cargo were included in B/L No 1.

11. All the other relevant documents also described the cargo as crude oil slops, for example:

(a) SGS (Iran) Ltd, Sample Report

(b) Saybolt-Van Duyn BV, Bunker Report

(c) Saybolt-Van Duyn BV, Sample Receipt

(d) National Iranian Oil Company Ship's Ullage Report (the description of crude oil slops in this document is found in AB1 34 but not in AB1 140. Only the latter was used for the Core Bundle)

(e) the shipper's Certificate of Origin

(f) Cargo Manifest issued by the load port agents Sea Express Company Ltd

(g) Sabolt-Iran Ullage Report.

12. The Vessel departed Kharg Island with the cargo on 30 November 1999. En route to Huangpu, there were two developments, which were inter-related. The first was the diversion of the Vessel to Singapore before it proceeded to Huangpu. This was for the purpose of samples of the cargo to be taken. The other was in respect of the issue of a second set of bills of lading which were eventually issued as No KHA 002/003/004 ('B/L No 2, 3 and 4').

13. The taking of samples in Singapore on the instructions of Feoso was not simply to verify the nature of the cargo loaded on the Vessel. The motive was more dubious. The purpose was to obtain a survey report from SGS in Singapore which 'must show the name of cargo as "Fuel Oil (3.5S)" (see the fax dated 8 December 1999 from Feoso to a company in Singapore New Orient Petroleum Pte Ltd (CB 208)).

14. As regards the issuance of B/L No 2, 3 and 4, this was already anticipated as between Ever Bright and Feoso. Before the sale and purchase contract between them was entered into, Ever Bright had informed Feoso that the cargo description in their contract had to be heavy crude oil as that was the cargo description in Ever Bright's contract with its vendor. However, Feoso wanted documents to describe the cargo as fuel oil instead. For this reason, Ever Bright had informed Feoso that it had obtained confirmation from the ship chartering company nominated by their supplier that they would provide documents describing the cargo as fuel oil off-specification to enable the cargo to be discharged in China. These facts can be ascertained from Ever Bright's fax to Feoso dated 31 August 1999 (CB 17). This alleged confirmation was not from Faith. As will be recalled, the Sub CP included a term for new bills to be issued to describe the cargo as fuel oil off-specification but not the Head CP.

15. One reason why Feoso wanted documents showing the cargo as fuel oil off-specification was because if they had told their buyer

Titan that the cargo was heavy crude oil (off-specification), Titan would not have bought the cargo. Indeed, Feoso's Mr Fung Tze Tat, also known as William Fung, admitted this (NE 702). However, he subsequently denied the admission. Then, when Mr Ajaib Haridass, Counsel for Feoso, confirmed that evidence, Mr Fung said he wanted to change his evidence to, '… I don't know as I am not an employee of Titan' (NE 722 to 723). I should add that the sale to Titan was eventually terminated although it is not necessary for me to elaborate on the reason(s) for the termination.

16. On 15 December 1999, the Master received the following discharge instructions, which had been apparently sent by Persing or its broker to Seaworld Management who in turn sent it to the Master (see PB1A 261 to 263). The discharge instructions said, inter alia:

> 'A) VSL TO PROCEED WITH MAXIMUM SAFE SPEED, NAVIGATION/WEATHER PERMITTING AND DIRECTLY TO HUANGPU, CHINA TO DISCHARGE HER ENTIRE CARGO VIA STS [meaning: ship to ship] OPERATION. SURVEY WILL BE LIKELY MADE JOINTLY BY SGS AND SAYBOLT.
>
> PRIOR TO ARRIVAL THE STS POSITION, MASTER TO CONTACT AGENTS FOR STS INSTRUCTIONS.
>
> B) UPON RECEIVING THIS TLX, MASTER TO ALSO SEND ETA NOTICES TO AGENTS
>
> C) UPON ARRIVAL AT THE CUSTOMARY ANCHORAGE AND WHEN SHE IS IN ALL RESPECTS READY TO DISCHARGE HER CARGO, MASTER TO TENDER N.O.R. TO CHARTERERS VIA BROKERS, RECEIVERS VIA AGENTS AND PACIFIC ANDES HONG KONG TLX 89124 ANDPS HX.
>
> …..'

The instructions also specified the load port agents to be China Ocean Shipping Agency Guangzhou (Penavico) (see CB 221).

17. By a fax dated 15 December 1999, Nordic wrote to its broker Discovery Chartering Ltd ('Discovery') requesting owners to authorise Nordic to sign and issue B/L No 2, 3 and 4 and forwarded drafts thereof (Thanos' AEIC p 321). Discovery was also requested to confirm that the Master of the Vessel would be instructed to change the cargo description in the cargo manifest to fuel oil 3.5S. The draft bills showed, inter alia, the shippers' description of the cargo to be fuel oil 3.5S, and not even fuel oil off-specification as stipulated in the Sub CP. The drafts also had other differences when compared with B/L No 1 and these differences were raised by Faith when it responded, as I shall elaborate later.

18. There was an exchange of telexes between Discovery (Nordic's brokers) and Meridian (Persing's brokers) between 15 and 16 December 1999 in which Meridian stated that owners were not prepared to agree to the issue of B/L No 2, 3 and 4 unless monies owing to them were paid (see Thanos' AEIC p 332). However, according to Mr Thanos, the reference to the owners meant Persing (see NE 23 line 7, NE 25 to 26).

19. As for Faith, it too had taken the opportunity to obtain a survey report while the Vessel was in Singapore. This was to ascertain the nature of the cargo. The report was by ALS Technichem (S) Pte Ltd ('ALS'). It was dated 16 December 1999 and appeared to suggest that the cargo was fuel oil.

20. In the light of this, when the request for the issuance of B/L No 2, 3 and 4 was made known to Faith, Faith was prepared in principle to agree to the issuance of such bills provided:

> (a) the three sets of B/L No 1 were returned for cancellation
>
> (b) B/L No 2, 3 and 4 would refer to the date of the Head CP

(c) the gross and net quantities of the cargo were stated in B/L No 2, 3 and 4.

They also raised two concerns:

(i) the date on B/L No 2, 3 and 4 should be the last date of loading i.e 20 November 1999 instead of 30 November 1999

(ii) Ever Bright should be named as shipper on the new bills. In B/L No 1, the shipper was Al Warqaa.

21. In the meantime, Nordic sent an urgent fax to Discovery dated 16 December 1999 which was copied to Meridian (CB 225). It stated:

'RE: M.T. 'DAPHNE L'

PLS RUSH OWNERS TO CONFIRM NAME OF AGENTS IN HUANGPU.

WE HAVE ALREADY ADVISED THAT OWNERS/MASTER SHOULD DECLARE THIS CARGO AS 'FUEL OIL (3.5S) NOT CRUDE OIL SLOPS. THE FUEL OIL GRADE HAS BEEN ATTESTED BY BOTH SGS AND SAYBOLT IN IRAN AND NEW CERTIFICATES OF QUALITY SHOWN AS 'FUEL OIL (3.5S) HAVE BEEN DULY ISSUED.

PLS ENSURE THAT MASTER DO NOT DISCLOSE OR PRESENT ANY LOADPORT DOCUMENT WITH DESCRIPTION AS CRUDE OIL SLOPS. MASTER SHOULD PREPARE A NEW CARGO MANIFEST FOR 'FUEL OIL (3.5S)' AND FAX A COPY TO US. COPIES OF THE NEW BILLS OF LADING NO. KHA002/003/004 WILL BE SENT TO MASTER AFTER OWNERS' AUTHORISATION AND APPROVAL.

AS YOU KNOW THAT CHINA PROHIBITS IMPORT OF CRUDE OIL, WE WOULD REMIND OWNERS/MASTER TO ABIDE BY THIS INSTRUCTION OTHERWISE OWNERS/MASTER WILL BE FULLY RESPONSIBLE FOR ALL CONSEQUENCES THAT MAY ARISE TO THE VESSEL AND THE CARGO.

PLS TREAT THIS AS AN IMPORTANT INSTRUCTION AND CONFIRM OWNERS/MASTER'S COMPLIANCE.

BEST REGARDS

MRS CHIANG'

[Emphasis added.]

22. Nordic's request for B/L No 2, 3 and 4 to be issued and for the Master to amend the cargo manifest was passed on to Seaworld by Meridian on 16 December 1999 (PB1A 275). Meridian's fax included the following instruction:

'VERY IMPORTANT

WE UNDERSTAND THAT MASTER HAS ALREADY INFORMED AGENTS THAT CARGO IS CRUDE OIL. PLEASE REQUEST MASTER TO IMMEDIATELY SEND AGENTS CORRECTION ADVISING THEM THAT CARGO ON BOARD IS FUEL OIL 3.5S.

PLEASE CONFIRM.'

23. On the same date, Meridian also sent another fax to DLP Maritime (PB1A 286 and 279) stating, inter alia:

> 'IN THE MEANTIME AGENTS HAVE KEPT MASTER'S CORRESPONDENCE WHICH WAS SENT IN ERROR AND WILL (*sic*) HANDED TO OUR CHRS REPS. MWHILE PLEASE ENSURE MASTER WILL ONLY NAME CARGO AS FUEL OIL. ALSO PLEASE REQUEST MASTER TO AMEND CARGO MANIFEST READ 'FUEL OIL 3.5S' AND SENT A COPY TO US.'

24. On 17 December 1999, Meridian sent a fax dated 17 December 1999 to Nordic to respond to the request for B/L No 2, 3 and 4 to be issued. The fax stated that upon receipt of confirmation and evidence of payment of outstanding amounts, Nordic 'shall be duly authorized to issue and sign new set(s) of Bs/L …' (Thanos' AEIC p 379).

25. In response, Nordic replied by fax on the same day to forward a copy of a remittance advice to prove that outstanding amounts had been paid and forwarded copies of B/L No 2, 3 and 4 issued by Nordic. These bills showed:

(a) the place and date of issue as Hong Kong 30-Nov-99

(b) the shipper's description of goods to be fuel oil 3.5S

(c) only the net weight

(d) the shipper as being Ever Bright.

In the same fax, Nordic also forwarded a letter of indemnity dated 17 December 1999 on its letterhead and addressed to both Faith and to Persing (Thanos' AEIC p 380 to 386).

26. Up to this stage, Faith had not yet approved the issuance of B/L No 2, 3 and 4. Nordic had assumed from Meridian's fax dated 17 December 1999 (see para 24 above), that so long as the outstanding payments were made, Faith had authorised Nordic to issue and sign these bills of lading. However Meridian was the broker of Persing and not of Faith. Neither had Faith approved the terms of the letter of indemnity.

27. On 20 December 1999, the Master of the Vessel sent a telex to Meridian to seek confirmation that B/L No 1 had been cancelled and a new bill of lading had been issued to reflect the exact quality of the cargo (CB 267). However, this must be considered in the context that he was merely responding to what he was being told by Meridian at that time.

28. In any event, on 21 December 1999, Faith sent a fax to Meridian to object to B/L No 2, 3 and 4 (CB 280 and 281). A similar message was sent, also on the same date, by Seaworld Management to the load port agents Penavico (CB 282 and 283).

29. On the same date, i.e 21 December 1999, the Vessel arrived at Gui Shan anchorage, off Huangpu. It was not disputed that this was the customary place of anchorage, pending notice of arrival being given to the relevant authorities. The Master tendered Notice of Readiness at about 1237 hours of 21 December 1999 but did not notify the Chinese authorities of the Vessel's arrival which was supposed to be given within 24 hours of arrival.

30. On the same date, Nordic gave written instructions to Meridian which were in turn forwarded by Meridian to DLP Maritime (CB 276 and 277) that said,

> 'Prior to releasing of cargo and commencing discharge, please instruct Master to <u>forbid</u> any person to go aboard the vessel <u>to inspect</u> and/or take cargo sampling.'
>
> [Emphasis added.]

31. On 23 December 1999, Nordic sent a fax to Meridian to say that B/L No 2, 3 and 4 had already been released to the buyer, meaning Feoso, and asked for the name of a party to whom B/L No 1 should be returned for cancellation. They were provided with the name of A. Bilbrough & Co.

32. On 24 December 1999, Ince & Co, acting for Nordic, sent a fax to A. Bilbrough & Co, to inform them that Ever Bright had surrendered the original set of three bills of lading relating to B/L No 1 and that they would be surrendered to A. Bilbrough & Co in return for the Letter of Indemnity addressed to Faith and Persing.

33. I should point out that according to the evidence of Mr Fung Tze Tat of Feoso, he only received B/L No 2, 3 and 4 on 25 December 1999. This was after one Mr Dedopoulos, who claimed to represent Seaworld, had told him on 23 and on 24 December 1999 that these bills had not been issued with the authority of the shipowners i.e Faith. Mr Fung said that he had asked for written confirmation but none was received (see his AEIC paras 36 to 39). He also asserted that Ever Bright had given him a copy of the authorisation fax of 17 December 1999 from Meridian, which I have cited in para 24 above, together with the B/L No 2, 3 and 4 on 25 December 1999 and it was at the meeting with Ever Bright on that day that he first learned of the sub-chartering relationship between Nordic and Persing. He also said in his AEIC (para 40) that on 18 December 1999, seven days earlier, he was told by Holman Fenwick & Willan, Hong Kong ('Holman'), who were Feoso's solicitors, that Persing were the head charterers. Mr Fung went on to say in his AEIC that he preferred Ever Bright's assurances/ explanation to the allegation of Mr Dedopoulos whom he hardly knew.

34. In cross-examination, Mr Fung added that on 18 December 1999, Holman had also told him that there was a suit between Daphne L and Persing (NE 789). By then, if not before, he should have known that Nordic could not be the head-charterers. When this was pointed out to him in cross-examination, he recanted and said that he was not saying that there was a suit between Daphne L and Persing (NE 790). He also sought to correct para 40 of his AEIC to delete any reference to Persing being the 'head' charterers.

35. Secondly, in cross-examination, he admitted that even if Mr Dedopoulos had given a written confirmation about the lack of authority regarding the issuance of B/L No 2, 3 and 4, Feoso would nonetheless proceed to collect these bills (NE 793 line 11). Indeed, this was reinforced by a fax dated 24 December 1999 from Holman to Stephenson Harwood & Co (who were acting for Ever Bright) that regardless of the message from Mr Dedopoulos, whom they described as 'the vessel interests', they would recommend Feoso to collect B/L No 2, 3 and 4 from Ever Bright, and present them for delivery of the cargo (CB 303).

36. Thirdly, the evidence showed that on 21 December 1999, Seaworld had already sent a fax to Penavico that B/L No 2, 3 and 4 had not been issued with the authority of the shipowners i.e Faith. I have already mentioned this in para 28 above. Penavico in turn sent that fax (and another fax) to Feoso Singapore on 24 December 1999, at 1902 hours. Contrary to Mr Fung's assertion, Feoso had received written notice that these bills of lading were issued without authority. It may be that Mr Fung had not read the written notice then or on 25 December 1999 but he and Feoso must have been aware of it soon thereafter. For example, soon thereafter, Feoso itself sent copies of Seaworld's fax and Penavico's fax to Ever Bright which in turn forwarded them to Nordic (see CB 318).

37. While Nordic and its solicitors Ince & Co were taking the position that Nordic's issuance of B/L No 2, 3 and 4 was with the owners' authority, it was obvious to Feoso that the owners were disputing this. Even Persing, from whom Nordic sub-chartered the Vessel, had sent a fax on 27 December 1999 direct to Feoso Hong Kong and to Feoso (the Singapore company) to inform them that they had never authorised the issuance of B/L No 2, 3 and 4 which did not include both the gross and net weight of the cargo (see CB 314).

38. Feoso and Faith then sought to resolve the impasse about B/L No 2, 3 and 4. This was done through meetings between their representatives and through exchange of faxes between their respective solicitors. In the course of the negotiations, Feoso was represented by Holman and Faith was represented by Sinclair Roche & Temperly ('Sinclair'). In the exchange of faxes, Sinclair had stressed that:

> (a) Faith had never agreed to the issuance of these bills (as their concerns regarding these bills had not been addressed).
>
> (b) Meridian was Persing's broker and that Persing had confirmed that no authority was given for the issuance of these bills. Indeed, Sinclair went to the extent of obtaining written confirmation of these two facts from Clyde & Co, acting for Persing, and forwarding it to Holman (CB 396, 402, 415).

39. Notwithstanding the documentary evidence, Holman insisted that B/L No 2, 3 and 4 had been issued with Faith's authority. While I accept that the Meridian fax of 17 December 1999 could be interpreted to mean that authority was given for the issuance of these bills, it must have been obvious by then to both Feoso and Holman that, at most, the authority came from Persing, and not Faith, as Meridian was

Persing's broker. I infer that the insistent stand taken by Holman was based on the intransigent attitude of Feoso.

40. It is obvious to me that Feoso relied, and wanted to rely, on B/L No 2, 3 and 4 primarily, but not only, because these bills contained the description of the cargo which they wanted i.e 'Fuel Oil (3.5S)' instead of 'crude oil slops'. The other main reason was that these bills contained only the net weight and not both the gross weight and net weight of the cargo. This might have given the impression that there were no impurities in the cargo and might have fortified a claim by Feoso for contamination of the cargo.

41. The reasons given by Mr Fung about his lack of knowledge of the sub-charter, the reliance on Ever Bright's assurances and the absence of written confirmation from the owners about the lack of authority (for the issuance of B/L No 2, 3 and 4) were all false.

42. I would add that when a dispute with Feoso started, Faith obtained advice from BMT Murray Fenton, marine consultants in London, on ALS' report. The advice dated 4 January 2000 was that the cargo was fuel oil slops or off-specification fuel oil (CB 374 and 375).

43. In any event, notwithstanding many proposals made by Sinclair, the impasse was not resolved. Accordingly, Faith ordered the Vessel to sail from Huangpu on 13 January 2000 to Singapore. The Vessel reached the Outer Port Limits of Singapore on or about 18 January 2000 and came in on 26 January 2000 (see para 223 of Feoso's submission, and note the different date given in para 8 of Feoso's Amended Statement of Claim). In the meantime, Feoso and Faith were unable to reach an interim solution. Eventually, Faith obtained an order on 1 March 2000 from the High Court of Singapore for the cargo to be appraised and sold by the Sheriff. The cargo was eventually sold to Kary International Limited, a company in Hong Kong for US$1,607,638.12. Kary in turn sold the cargo to Qingdao Import and Export Corp of the People's Republic of Singapore. The cargo was then brought to China by another vessel 'LMZ Dimitra'.

44. Many issues were raised in the two actions before me but before I deal with them, I should state my views on the cargo.

The cargo

45. According to Mr Fung's evidence, there are three broad categories of oil: fuel oil, crude oil and other oil (see his evidence at NE 717, 766). Fuel oil is refined oil and other oil is oil of a poorer quality than refined oil but is not crude oil.

46. There are three broad sub-categories of refined oil which fall into 180, 280 and 380 CST fuel oil with 180 being the highest grade and 380 being the lowest grade (NE 687 and 688). According to the evidence of Faith's expert, Mr John Tudor Williams, CST is the standard of viscosity. It means centistrokes at 50 degrees C. As much reference was made also to fuel oil 3.5S, I would mention that this refers to refined fuel oil with a sulphur content of 3.5.

47. Although the detailed specifications in the attachment of the contract between Feoso and Titan were similar to those in the attachment of the contract between Ever Bright and Feoso, the cargo description in each contract was different as I have said above i.e 380 CST Fuel Oil as contrasted with heavy crude oil (off-specification). According to Mr Williams, the specifications did not fall within the international standards for fuel oil 380 CST, either marine or industrial, because the maximum of 4% for water and sediment allowed in the specifications was too high. Likewise, the specifications did not fall within the international standard for 280 or 180 CST (NE 257 to 259 Verbatim). In addition, based on analysis data from load port documents, Mr Williams was of the view that the cargo loaded from Kharg Island was a 'grossly contaminated dirty petroleum product' (NE 259 Verbatim). This was because of the high water and sediment content and the ash content as well (NE 268 Verbatim). Mr Haridass had sought to suggest that the water content could be removed quite easily but, in my view, that is not the point. The issue was the nature of the cargo as loaded onto the Vessel and not after it has undergone some process.

48. Mr Sirous Alishapour, the then tanker division manager of Sea Express Co Ltd, the loadport agent, also gave evidence. He was present at Kharg Island throughout the period when the Vessel was loaded between October to 21 November 1999. According to his AEIC, Kharg Island is one of the largest crude oil terminals in the Persian Gulf and has a large number of storage tanks holding crude oil. The cargo loaded on the Vessel originated from a large pit into which residue which built up overtime in the crude oil storage tanks would drain. Only slops from the crude oil storage tanks are drained into the pit. The pit was not covered and was exposed to the elements. The cargo from the pit was pumped into smaller vessels which then transferred the cargo to the Vessel. He confirmed in oral testimony that he had signed a cargo manifest dated 21 November 1999 describing the cargo as 'Crude Oil Slops As Per Commercial Invoice'. He was shown a copy of another cargo manifest dated 30 November 1999, found in Mr Fung's third affidavit p 69, referring to B/L No 2, 3 and 4 and describing the cargo as

fuel oil 3.5S, with what appeared to be his signature, he said the document exhibited in Mr Fung's third affidavit was a forgery. There was also evidence from Mr Ali Gahaffari whose AEIC was admitted without objection. His evidence was that there are no refineries on Kharg Island and, for many years, only crude oil was exported from the oil terminals there.

49. Mr Haridass submitted that when the cargo was shipped on the LMZ Dimitra, the Chinese authorities had inspected and found the cargo to be fuel oil. He was suggesting that the cargo was in fact fuel oil. He relied on a certificate from the authorities dated 18 May 2000 (see para 26 of his closing submission). The English translation is found in CB 527 (and also in Mdm Yu Li's AEIC p 32). The representative from Qingdao, Mdm Yu Li, clarified that the words 'moisture content' in the English translation should refer to 'water content'.

50. I do not accept Mr Haridass' submission for various reasons. First, although the description of the cargo in the certificate is fuel oil, the test results from the inspection, as reflected in the certificate, showed the water content to vary from 13.56% to 23.45%. During cross-examination, Mdm Yu Li said that the test results showed that the cargo was not homogenous. She also said that if the water content was 13.5% (which was the minimum water content from the test results) the cargo should be described as fuel oil off-specification and not fuel oil (NE 857 to 859). She also went on to say that fuel oil 3.5S was a very stable and homogenous product (NE 859 to 860).

51. Besides the evidence from Mr Williams, Mr Alishapour, Mr Gahaffari and Mdm Yu Li, I took into account the fact that there was no reason for Ever Bright's vendor to describe the cargo as heavy crude oil if in fact it was fuel oil. Furthermore, documents from Feoso referred to the cargo as crude oil slops eg in a fax dated 7 December 1999 from Feoso's Mr Fung to Ever Bright, Mr Fung stated, '… we still want to ship the cargo of Crude Oil Slops …' (CB 203/DB 953). When this was pointed out to him, he had the audacity to say that in all his past correspondence with Ever Bright, he had used 'crude oil slops' but there was no special meaning to it and that he knew that he was buying fuel oil (NE 772).

52. I also found it strange that Mr Fung should assert in paras 8 and 9 of his third affidavit that the specifications attached to the sale contract with Feoso were for fuel oil 280 CST but the contract price represented the market price of 380 CST plus a premium, instead of just the market price for 280 CST. In any event, during cross-examination, he was unable to establish that the price Feoso had paid was with reference to the market price of 380 CST, let alone a premium thereon. He then said that he was not involved in the negotiations for the price at the relevant time, contradicting paras 9 and 10 of his third affidavit (NE 688 to 695, 705, 710, 723 to 726, 739 to 742).

53. In my view, the cargo was not fuel oil and Feoso had known this all along.

Does Feoso have locus standi to sue Faith in respect of the cargo?

54. Feoso's claim against Faith, as pleaded, is based primarily on B/L No 2, 3 and 4 and alternatively on B/L No 1. Feoso has pleaded B/L No 2, 3 and 4 and, alternatively, B/L No 1, as containing a contract or evidencing a contract for the carriage of the cargo (see paragraphs 3 and 4 and sub-paragraphs 5(a) and (b) of Feoso's Amended Statement of Claim).

55. Sub-sub-paragraphs 5(b)(i) and (ii) of Feoso's Amended Statement of Claim plead that Feoso was the holder of B/L No 2, 3 and 4 and that as regards B/L No 1, this was held at all material times by the solicitors of Nordic as agents and/or trustees of Feoso.

56. Paragraph 7 of Feoso's Amended Statement of Claim alleges a breach of contract by Faith and/or a breach of their duty as bailees and/or negligence in Faith's failure to deliver the cargo to Feoso at Huangpu or to discharge the cargo into shore tanks at Gui Shan or Huangpu. Paragraph 14 also refers to, inter alia, Faith's breach of duty and/or negligence. However, this alleged breach of duty by Faith as a bailee and/or negligence was not pursued in Feoso's closing submission and the question of discharging the cargo into shore tanks was raised by Feoso in the context of Faith's failure to mitigate its damages (see para 227 of Feoso's closing submission).

57. Paragraph 9 of Feoso's Amended Statement of Claim alleges a conversion and 'wrongful deprivation' of the cargo. I assume the latter is part of the claim for conversion.

58. Paragraph 10 alleges an unjustifiable deviation but does not specify whether the cause of action is contract or otherwise. In any event, it was not pursued as a separate cause of action.

59. Therefore the two claims of Feoso are really for breach of contract and for conversion.

60. In the course of the trial, Mr Haridass had confirmed that Feoso was not claiming any right under B/L No 1. Yet in Mr Haridass' closing submission, he submitted that Faith had never specifically asked Feoso to take delivery of the cargo under B/L No 1. Mr Haridass had sought to tie this fact with a concern expressed by Sinclair to Faith's Chinese lawyers, Henry & Co, about a possible cargo claim by Feoso for misdescription of the cargo in B/L No 1 if Feoso should present B/L No 1 for delivery. Mr Haridass had sought to persuade me that Faith's concern all along was only in respect of a cargo claim and not a possible detention of the cargo and the Vessel by Chinese authorities. In my view, the fact remained that Feoso did not seek to take delivery of the cargo against B/L No 1, even though it might have changed its mind subsequently. Furthermore, a concern about a possible cargo claim does not exclude other concerns like the risk of detention of the cargo and of the Vessel by Chinese authorities, which I shall elaborate on later.

61. As for B/L No 2, 3 and 4, Feoso had placed much reliance on them at the material time in December 1999 and January 2000, and in its pleading and during the trial. It had also stressed that the Sub CP as well as the Head CP had provided for the issuance of substitute bills although it was only the Sub CP which included the term about changing the description of the cargo in the substitute bills. However, when the crunch came, Mr Haridass accepted, in his closing submission, that B/L No 2, 3 and 4 had been issued without Faith's authority and were not binding on Faith (para 76 of his submission).

62. Under s 2(1) of the Bills of Lading Act (Cap 384), a person who becomes the lawful holder of a bill of lading shall 'have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract'. As Feoso was no longer claiming any right under B/L No 2, 3 and 4 or B/L No 1, it could not rely on s 2(1) to mount its claim against Faith for breach of contract.

63. As regards the question whether Feoso had a sufficient interest to sue for conversion, Mr Haridass submitted that Feoso's claim was not on the basis that B/L No 2, 3 and 4 were binding on Faith, but on the basis that Faith knew that Feoso were the owners of the cargo and B/L No 1 had ceased to have any effect because Ince & Co, Nordic's solicitors, and Nordic were not the lawful holders of B/L No 1. In other words, he was submitting that Feoso need not rely on B/L No 1, which was no longer effective, to establish that it had the right to immediate possession of the cargo and hence have locus standi to sue Faith for conversion.

64. In my view, this submission was a turnaround by Feoso. As I have said, Feoso's Amended Statement of Claim pleads that B/L No 1 was at all material times held by the solicitors of Nordic as agents and/or trustees of Feoso. It is one thing to assert that B/L No 1 had been superceded by B/L No 2, 3 and 4 and, alternatively, that B/L No 1 is the effective bill of lading. It is another to assert that even though B/L No 2, 3 and 4 are invalid for want of authority, B/L No 1 was nevertheless ineffective. That latter assertion is not pleaded specifically.

65. I am aware that in sub-sub-paragraph 5(b)(iii) and (iv) of Feoso's Amended Statement of Claim, it is asserted, as an alternative plea, that Feoso was entitled to immediate possession of the cargo as owners of the cargo. However, these sub-sub-paragraphs come under sub-paragraph 5(b) which relies solely on B/L No 1 and the contract thereunder. I am of the view that Feoso is not entitled to make the submission that B/L No 1 was no longer effective if B/L No 2, 3 and 4 are invalid.

66. In any event, I am of the view that B/L No 1 had not ceased to be effective. It had been validly issued. True, all the three bills of B/L No 1 were held by Ince & Co and Nordic had no intention of claiming the cargo. The intention was to surrender B/L No 1 to A. Bilbrough & Co but it was never surrendered. Depending on the turn of events, Feoso or someone else to whom B/L No 1 had been endorsed might subsequently have decided to present B/L No 1 to claim the cargo.

67. I now come to the decision of Justice Judith Prakash in Suit No 1736 of 1999 in *Steelmet Pte Ltd v APL Co Pte Ltd*. That case involved a claim by the seller of goods against the carrier for, inter alia, conversion of the goods. The seller asserted that the carrier had released the goods to a third party without production of the original bills of lading and alleged that the carriers had wrongfully converted the goods. Prakash J pointed out that for the seller to sue for conversion, it was not enough for the seller to be the owner of the goods at the time the suit is commenced. It must also be the person who had the right to possess the goods at the time they were converted or misdelivered. In that case, the seller had endorsed the bills of lading in favour of various banks. However, the seller argued that it still had property in the goods and was entitled to possession because the sale of the bills to the banks had been 'with recourse'. Prakash J held that the plaintiff had at the most, retained general property rights which were subject to the special property rights of the bank but such general property rights would not be sufficient to confer upon the seller the right to sue the carrier in tort for conversion of the goods because the person who had the

immediate right to possession of the goods at the time of conversion would have been the banks and not the seller.

68. However, in *The Cherry & Ors* [2002] 3 SLR 431, Justice Kan Ting Chiu said that while it was generally accepted that a person who wanted to sue in conversion must have actual possession or the immediate right to possession at the time of conversion, the rule was not inflexible. Relying on *Bristol & West of England Bank v Midland Railway Co* [1891] 2 QB 653, he decided that the title to sue may be transferred from a preceding party to the plaintiff after the act of conversion. I understand that his decision is on appeal to the Court of Appeal.

69. In any event, in the case before me, Feoso is no longer claiming any right under B/L No 1. In my view, Feoso has no locus standi to sue for conversion. I am also of the view that there was no conversion by Faith and I shall elaborate on this later.

Faith's claim for demurrage: Was the Vessel an arrived ship?

70. Faith's main claim is for demurrage. It was not disputed that Faith is entitled to claim demurrage if the Vessel was an arrived ship and was ready in all respects to discharge the cargo. Feoso's position was that the Vessel was not ready to discharge the cargo because Faith had not arranged for the joint inspection for the Vessel. It was not disputed that the relevant Chinese law or regulation required such joint inspection to be undertaken before the cargo could be discharged.

71. It was also not disputed that there is case-law authority that if a step is a mere formality, then a vessel may still be ready to discharge her cargo even if that step has not been complied with yet. Some time was spent by the expert on Chinese law from each side as to whether the joint inspection was a formality or not.

72. It is not necessary for me to decide whether the joint inspection was only a formality because I accept Faith's argument that Feoso is estopped from alleging that the Vessel was not an arrived ship by reason of the fact that there had not been a joint inspection. I also accept that in the circumstances of the case, it was not reasonable to expect Faith to have arranged for joint inspection. My reasons are:

> (a) the instructions dated 16 December 1999 that the Master was not to disclose that the cargo was crude oil (see para 21 to 23 above),
>
> (b) the instructions dated 21 December 1999 that the Master was not to allow any inspection of the cargo (see para 30 above).

Those instructions were given because at that time Feoso preferred to rely on B/L No 2, 3 and 4 (and not B/L No 1), which they have since conceded were issued without the authority of Faith. Although the instructions were given by Nordic and not Feoso, I find that they must have been at Feoso's behest or with Feoso's concurrence.

73. Had the Master of the Vessel proceeded to give notice of the arrival of the Vessel with a view to clearing joint inspection, the loadport documents including B/L No 1 would have had to be disclosed and these documents had described the cargo as crude oil slops. This was to be avoided at all costs as stressed by the instructions of 16 December 1999.

Did Faith act reasonably in the circumstances and did Faith convert the cargo?

74. As I have mentioned, the question whether Faith had acted reasonably during the negotiations and in sailing the Vessel away appears to arise in the context of whether Faith had mitigated its damage. Mr Haridass submitted that Faith had not acted reasonably for various reasons, which I will attempt to summarise.

75. First, Mr Haridass submitted that Faith itself was prepared to issue another set of bills of lading ('the 3rd set') describing the cargo as 'Fuel Oil 3.5S Off Spec'. This demonstrated that Faith had believed from an analysis of the sample of the cargo, done on its own instructions when the Vessel was in Singapore while en route to Huangpu, that the cargo was not crude oil slops but fuel oil, although of a quality inferior to 3.5S. Mr Haridass argued that Faith's conduct at the material time must be seen in this context and not on the basis that subsequently its expert concluded that the cargo was crude oil slops. I am of the view that while this may be so, Feoso had, in any event, never agreed to

accept the 3rd set of bills describing the cargo as 'Fuel Oil 3.5S Off Spec'. Feoso was insisting on delivery against B/L No 2, 3 and 4.

76. Secondly, Mr Haridass submitted that Faith was being unreasonable in insisting that the 3rd set of bills expressly incorporate a London arbitration clause, as required in its solicitor's (Sinclair's) fax of 7 January 2000 (CB 413 and 414). However I note that in Sinclair's subsequent fax dated 12 January 2000 (CB 444 and 445), they no longer insisted on express incorporation of a London arbitration clause.

77. Thirdly, Mr Haridass submitted that it was unreasonable of Faith to insist through Sinclair, on a condition that any cargo claim which Feoso might bring will be by reference to the description 'crude oil slops' as appeared in B/L No 1 (see Sinclair's fax dated 7 January 200 at CB 413 and 414, Sinclair's fax dated 10 January 2000 at CB 425 and 426). He submitted that this was Faith's unreasonable way of trying to secure an agreement from Feoso that the cargo was crude oil slops when at the material time during negotiations Faith no longer believed that the cargo was crude oil slops because of the analysis done on its instructions when the Vessel was in Singapore.

78. On the other hand, Mr Richard Kuek, Counsel for Faith, submitted that this condition was not an attempt to tie Feoso to the position that the cargo was crude oil slops but instead that any claim should proceed on the footing that the initial B/L No 1 described the cargo as crude oil slops.

79. I am of the view that it is not open to Feoso to complain about this condition for the reasons stated below. First, its solicitors Holman had never sought clarification from Sinclair about what this condition meant.

80. Secondly, Holman did not even ask Sinclair to drop this condition. The entire proposal initially made on 7 January 2000, and reiterated on 10 January 2000, was rejected outright by Holman on 10 January 2000 (CB 428).

81. Thirdly, this condition was not pursued in cross-examination by Mr Haridass except to establish that the condition reflected Faith's concern about a cargo claim (NE 40). I do not see anything unreasonable about Faith being concerned about a cargo claim. Indeed, their concern is borne out by the fact that Feoso did initially make a claim for contamination of the cargo in the proceedings before me, only to withdraw that claim during the trial. I also note that at no time during cross-examination did Mr Haridass suggest that the condition was an unreasonable one. Neither did he suggest that it was the only or main reason why Holman had rejected the proposal outright. It is obvious to me that this argument was a belated excuse to try and justify the allegation that Faith had not acted reasonably.

82. Next, Mr Haridass submitted that Faith could have discharged the cargo while reserving its rights. This was proposed in a fax by Holman dated 4 January 2000 (CB 367 and 368). I do not think that that proposal was reasonable because it was premised on the delivery being made against B/L No 2, 3 and 4 which described the cargo as 'Fuel Oil 3.5S'. Also, B/L No 1 had still not been surrendered. Furthermore, what was Faith going to declare the cargo to be? If it was making delivery against B/L No 2, 3 and 4, then, to be consistent, the Vessel would have to declare the cargo to be fuel oil 3.5S. However, even though Faith was uncertain whether the cargo was crude oil slops, fuel oil off-specification 3.5S or fuel oil slops (CB 342), it did not take the view that the cargo was fuel oil 3.5S.

83. Mr Haridass also submitted that instead of giving instructions to the Vessel to sail to Singapore, Faith should have discharged the cargo into bonded storage tanks on-shore at Huangpu and explained any discrepancy in the documentation between crude oil slops and fuel oil slops to the relevant authorities, as advised by its own Chinese lawyers Henry & Co, in their advice dated 30 December 1999 (CB 344 and 345).

84. However, this submission had only looked at part of that advice from Henry & Co in isolation. Henry & Co had also advised that if there was a discrepancy between the cargo description in the cargo manifest and/or bill of lading (i.e B/L No 1), and a previous cargo declaration, the Chinese customs may consider the case to be one of oil smuggling.

85. To counter this point, Mr Haridass stressed that Henry & Co had assumed, wrongly, that a previous declaration of the cargo had been made to the Chinese authorities and that the previous declaration had to be corrected. Accordingly, Henry & Co's fear about a customs investigation, and consequent detention, of the cargo and the Vessel, was based on the wrong premise.

86. I am of the view that while it is true that there was no prior declaration of the cargo to the Chinese authorities, the fact remains that the documents like B/L No 1 and the cargo manifest had described the cargo as crude oil slops whereas Faith was thinking of declaring the

cargo as fuel oil 3.5S off-specification or fuel oil slops. To make matters worse, Feoso (the cargo receivers) was bent on declaring or claiming the cargo on the basis that it was fuel oil 3.5S. There would be three different descriptions.

87. Much time was spent by the Chinese expert on each side as to whether there was a risk of an investigation and consequent detention of the cargo and the Vessel by the Chinese authorities in the circumstances. In summary, Faith's expert Professor Si Yuzhou said that there was a risk of this in the light of Chinese concerns over oil smuggling. Also, if Faith were to declare the cargo as crude oil slops and no one claimed such a cargo, it was likely that Chinese customs would intervene (see paras 44 to 60 of his first AEIC). On the other hand, Feoso's expert Professor Wu Huanning said that there was no risk of detention. She saw the problem as a simple one involving discrepancy in documentation only (see paras 6 and 7 of her second AEIC).

88. Mr Haridass also sought to neutralise press reports on Chinese concerns over oil smuggling and the instances cited by Faith's expert on investigations by the relevant Chinese authorities, as well as the detention of the vessel in some instances, as being cases not directly on point. I am of the view that the absence of a case directly on point does not mean that there was no risk of an investigation and detention.

89. I am of the view that this was not a case of a typographical error or a mere misdescription in the bill of lading or other load port documents. As I have said, there would have been three different descriptions of the cargo, i.e the description of crude oil slops in B/L No 1, the description of fuel oil off-specification (or fuel oil slops) by Faith in its declaration to the Chinese authorities, based on its belief from the sample taken in Singapore, and Feoso's description of the cargo as fuel oil 3.5S.

90. Even if Feoso were to remain silent and Faith was to attempt to discharge the cargo into bonded warehouses in Huangpu without relying on any cooperation from Faith, there would still have been a risk of an investigation or detention.

91. First, even if Faith was not to use any other description and were to stick to the description in B/L No 1 i.e crude oil slops, this would have caused problems because there was no receiver with a licence to import such a cargo. Indeed, on 29 December 1999, Penavico had warned that to declare the cargo as crude oil without the requisite licence would put both the Vessel and the cargo at risk of detention (CB 329). Feoso had known all along that such a licence was required (see NE 707 and the fax dated 16 December 1999 which I have cited in para 21 above). It may be that if Feoso had insisted on delivery of the cargo against B/L No 1, Faith would have had no choice but to proceed to declare the cargo as crude oil slops even though Feoso did not have a licence to import such a cargo. However, Feoso did not require delivery against B/L No 1.

92. Secondly, if Faith sought to declare the cargo as fuel oil off-specification (or fuel oil slops), it could not run away from the fact that B/L No 1 had already described the cargo as crude oil slops. In my view, any attempt by Faith to try and explain the discrepancy would have invited an investigation and detention, as asserted by Faith's expert Professor Si Yuzhou in para 56 of his AEIC. I note that even Penavico, the loadport agents, had advised that Faith should not approach the Chinese authorities to seek their assistance on such a discrepancy as that would make the matter more complex (CB 569).

93. Mr Haridass sought to persuade me that there was no risk of investigation or detention because the cargo was eventually successfully brought into China when it was subsequently shipped on the LMZ Dimitra in May 2000. I am of the view that this submission does not assist him. In respect of the LMZ Dimitra, the bill of lading had described the cargo as fuel oil off-specification and not crude oil slops. Secondly, there was no evidence that the cargo receiver was insisting on claiming the cargo as fuel oil.

94. In addition, notice of the Vessel's arrival was to have been given to the Chinese authorities within 24 hours of its arrival. This was not done for reasons I have mentioned and I do not think it is right for Feoso to suggest that Faith should be blamed for the omission. This omission made the situation more difficult. I do not agree with Mr Haridass' suggestion that allowing Faith to take this factor into account would in turn suggest that it was acceptable for the Vessel to have omitted to give the notice of arrival and breach Chinese law or regulations. The breach of Chinese law or regulations is not in dispute. However, it is a factor that Faith is entitled to take into account in deciding what to do in the circumstances.

95. Furthermore, there was also a dead-line for the cargo receivers, Feoso, to declare the cargo to the Chinese authorities, i.e. within 14 days from its arrival. This dead-line had expired on 4 January 2000 while parties were still negotiating.

96. Even Feoso's own expert Professor Wu was of the view that the failure to declare the Vessel to the Chinese authorities upon its arrival and the fact that the Vessel was sitting in Chinese waters for so long in violation of Chinese law might have given rise to suspicions of smuggling (see para 14 of her second AEIC).

97. In my view, it was unrealistic for Professor Wu to say that there was no risk of an investigation and detention. There was clearly a risk of such an investigation and detention.

98. However, Mr Haridass also submitted that there was no evidence about the length of any possible detention. On the other hand, Mr Kuek referred me to a Singapore case *Wah Yuen Petroleum Marine Pte Ltd v Hai Yin Diesel Trading Pte Ltd* in Suit No 2010 of 1997, a decision by Justice Warren Khoo. In that case, the vessel in question was detained by the Chinese authorities for four months although the Chinese authorities eventually concluded that the shipowners were innocent of any attempt at smuggling.

99. In my view, no one can say for certain how long the Chinese authorities would have detained the Vessel, if at all. Even Feoso's expert witness Professor Wu had to accept that. At NE 890 and 891, she said:

> 'Q Put: When Customs suspects smuggling, there is no time limit for them to detain a vessel to conduct an investigation as to whether there is smuggling.
>
> A You can put it that way. Some smuggling cases may be complicated.
>
> Q Professor Si's AEIC para 49. Are you aware of such cases?
>
> A Yes. I have read them in newspapers.
>
> Q Do you agree with Professor Si that the cargoes and/or vessels were detained for several months while investigation was continuing?
>
> A Sometimes.'

100. In order to resolve the impasse, Faith had made various offers through Seaworld or Sinclair.

101. By a fax dated 28 December 1999, Seaworld suggested that B/L No 1 be claused with the words 'Sediment and water content by volume 13.5%' or 'Fuel Oil 3.5S Off Spec' (CB 321). This was repeated in a fax dated 30 December 1999 from Sinclair (CB 337 and 338) except that Sinclair suggested the issuance of a 3rd set of bills.

102. The second offer was dated 6 January 2000 from Sinclair (CB 405 and 407). It was to issue the 3rd set of bills describing the cargo as 'said to be fuel oil (3.5S) possibly not of homogeneous quality with the other specifications of the cargo stated herein upon loading at Kharg Island on board the 'Daphne L' said to be as per the attached Saybolt report of 14 December 1999 and the Saybolt Summary Report of 4 December 1999.'

103. The third offer was dated 7 January 2000 from Sinclair (CB 413 to 414). It was to describe the cargo as 'said by consignees to be fuel oil 3.5S' in the 3rd set of bills. This was reiterated on 10 January 2000 (CB 425 to 426) and again on 12 January 2000 (CB 444 and 445), the last time without any reference to an arbitration provision.

104. Indeed, Mr Dedopoulos, the Managing Director of Seaworld, said of the 10 January 2000 offer that it was 'a very generous, and to my opinion, even dangerous for us, to offer to Feoso ….'. I agree. Any offer by Faith to issue the 3rd set of bills with a description of the cargo different from that in the other load port documents would not avoid the risk of an investigation and detention. Worse still, such a discrepancy would leave Feoso at risk to accusations of deceiving the Chinese authorities and conspiracy with Feoso. I do not accept Mr Haridass' submission that such an offer demonstrated that there was no genuine concern on Faith's part about detention. In my view, it demonstrated how far Faith was prepared to go to resolve the impasse, but without success. In any event, none of the offers from Faith were

accepted by Feoso.

105. Coming now to another point, Mr Fung in his third affidavit (at para 64) alleged that had Feoso been given prior notice that the Vessel would sail from Huangpu, it might have considered giving a letter of indemnity to Faith to resolve the impasse. I do not accept Mr Fung's evidence on this point. In an earlier fax dated 4 January 2000, Holman had mentioned that they were given to understand that the Vessel might sail away (CB 371). This possibility was again raised by Feoso's new solicitors Huang & Yang Maritime Law Office when they sent a fax dated 12 January 2000 to Sinclair to warn them that the Vessel should not sail away (CB 458). While it is true that Faith were at the same time contemplating the discharge of the cargo at Huangpu, it was also contemplating leaving Chinese waters as an alternative. Feoso knew this before the Vessel sailed away on 13 January 2000.

106. Furthermore, on 14 January 2000, Sinclair had sent a fax to Stephenson, which was copied to Feoso's new solicitors Huang & Yang Maritime Law Office, stating that Faith had no alternative but to mitigate its losses by ordering the Vessel to Singapore (CB 501 and 502). In response, Huang & Yang Maritime Law Office did not come up with any new suggestion, let alone a letter of indemnity, and merely invited Faith to discharge the cargo at Huangpu and threatened Faith that the sailing of the Vessel away was 'an act of conversion and possibly theft of the cargo' (CB 505).

107. It is all very well for Feoso to now take the position that Faith should have discharged the cargo and explain the different descriptions pertaining to the cargo to the relevant Chinese authorities and for Faith's expert to say now that there was no risk of the cargo and the Vessel being detained for investigation. Yet Feoso had never agreed to provide a third party guarantee to Faith in the event that the Vessel was detained (see CB 368). I have no doubt that had Faith attempted to discharge the cargo and if the cargo and Vessel had been detained, Feoso would have been singing a different song. I do not accept Mr Haridass' submission that the only reason why the Vessel sailed away from Huangpu was because of Faith's fear of a cargo claim.

108. There was also the secondary question of whether there was adequate storage space on shore in Huangpu for the cargo. Although Henry & Co initially advised on 11 January 2000 (CB 454) that there was such storage space, they corrected their opinion on 13 January 2000 (CB 490 and 491). Indeed the loadport agent Penavico had informed Faith that there was no storage space for the particular cargo at the material time.

109. On the other hand, Mr Fung asserted in para 65 of his third affidavit that such storage space was available and that Feoso had concluded a storage agreement with Guangdong (Panyu) Petrochemical Storage and Transportation Ltd in anticipation of the cargo being delivered on 17 December 1999. However, the documentation he exhibited was not the right one and he had to embark on a convoluted explanation and produce some more documents to try and establish this assertion (see NE 817 to 820, 822 to 829). It is not necessary for me to set out his evidence on this point during cross-examination. Suffice it for me to say that I find his initial evidence in para 65 of his third affidavit to be untrue and his convoluted explanation to be unconvincing. In addition, Mr Haridass dropped Feoso's claim for wasted storage costs near the end of the cross-examination on this point (NE 829).

110. There was yet another secondary issue as to whether cargo being imported into China could be stored in bonded warehouses. On this issue, both the experts disagreed. However it is not necessary for me to make a finding on it, in the light of my other findings. The question of storage space was material only if Faith had taken the risk of declaring the Vessel's arrival and attempted to clear port formalities after lying in Chinese waters for over 21 days. I have decided that, in the circumstances, it had acted reasonably in not doing so.

111. Mr Haridass also criticised Faith for causing the Vessel to sail to Singapore when at the relevant time, Faith knew that there was no storage facility on shore in Singapore to store this cargo. However Faith has satisfied me from its documentary evidence that it had made many attempts to find such storage facility outside China and was unsuccessful. Indeed, the evidence showed that Sinclair had sought advice from solicitors in Vietnam, Taiwan, Jakarta and Manila, both as to the existence of storage space and whether there was any legal impediment to bringing in the cargo. The responses were not favourable for one reason or another. Faith's reason for sailing the Vessel to Singapore was that there was a better chance that the relevant storage facility in Singapore would be available sooner as 'Singapore is the place with the largest facilities available for this purpose in all Asia ….' (NE 608 Verbatim). Furthermore, while Mr Haridass was criticising Faith for causing the Vessel to sail to Singapore, he did not suggest any other alternative destination outside of China.

112. Mr Haridass also made a bare submission that Faith had not proved that it had acted reasonably in allowing the cargo to remain on

board the Vessel for four months after it arrived in Singapore, instead of discharging it into shore tanks. However, Feoso has not pleaded failure to mitigate as regards these four months. Furthermore, I am satisfied from Mr Kuek's detailed reply submission (para 163 to 164) that Faith had acted reasonably after the Vessel arrived in Singapore.

113. In the circumstances, I am of the view that, as between Faith and Feoso, Faith had acted reasonably in sailing the Vessel away to Singapore and in not discharging the cargo into shore tanks in Singapore. For avoidance of doubt, I am also of the view that there was no negligence on the part of Faith.

114. As for conversion, Clerk and Lindsell on Torts, Eighteenth Edition, 2000, states at para 14-03 that, 'The essence of conversion lies in the unlawful appropriation of another's chattel, whether for the defendant's own benefit or that of a third party". Paragraph 14-25 states that, 'Mere unpermitted possession … is not a conversion …. But there will be conversion if there is some detention consciously adverse to the rights of the owner, such as assertion of a lien that does not exist'. Naturally, the possession or retention must be wrongful before there can be conversion.

115. Paragraph 9 of Feoso's Amended Statement of Claim states that, '… by failing and or refusing to proceed to Huangpu or to enter Chinese waters to discharge the Cargo, the Defendants have converted the Cargo for their own use and have wrongfully deprived the Plaintiffs thereof'. For the various reasons I have stated, including the fact that Feoso did not seek the delivery of the cargo against production of B/L No 1, I am of the view that there was no act of conversion by Faith.

Quantum of Faith's demurrage claim and alternative claim as gratuitous bailee

116. The Master gave Notice of Readiness about 1237 hours on 21 December 1999. Under Part II Clause 6 of the Head CP, laytime commences six hours later i.e at 1837 hours of 21 December 1999. Faith claims demurrage up to 2100 hours on 29 April 2000, even though the cargo was completely discharged in Singapore only on 2 May 2000. The demurrage is US$15,000 a day.

117. However, the laytime is 96 hours i.e four days. The demurrage should therefore start only from 1837 hours on 25 December 1999. As for the last date for demurrage, I have learned from Mdm Yu Li's testimony that the discharge of the cargo from the Vessel to the LMZ Dimitra was supposed to start on 25 or 26 April 2000 but the boiler of the Vessel was out of order. It took three days to repair it (NE 851). On the other hand, the cargo was completely discharged only on 2 May 2000, as mentioned above. In the circumstances, I am of the view that Faith is entitled to claim demurrage up to 2100 hours of 29 April 2000 as claimed i.e 126.1 days at US$15,000 a day = US$1,890,000. However, the sale proceeds from the Sheriff's sale is US$1,607,638.12 only.

118. Accordingly, Faith is making a personal claim against Feoso as stated in para 19 of its Amended Statement of Claim:

> 'Further or alternatively, <u>if</u> (contrary to the above) the Plaintiff was not entitled to a lien for demurrage and costs, it was a gratuitous bailee of the goods and/or preserved the cargo for the benefit of its owner …'
>
> [Emphasis added.]

119. The alleged costs of preserving the cargo includes costs of using the Vessel for storage, agency fees at Huangpu, costs of bunkers for sailing from Huangpu to Singapore, port dues, pilotage fees, agency fees and sundries, transportation and communication in respect of the Vessel's call at Singapore, airfare, board and lodging, and legal costs of various solicitors incurred in respect of the negotiations and when the Vessel was in Singapore from January 2000. Details are set out in para 18 of Faith's Amended Statement of Claim. Since I have concluded that Faith is entitled to claim for demurrage up to 29 April 2000, the question of Faith being a gratuitous bailee no longer arises. Even though that claim was couched as a further or alternative claim, it was really an alternative claim.

120. Besides, in order for Faith to claim as a gratuitous bailee, it is incumbent on Faith to state when the contractual bailment ended or when the gratuitous bailment commenced. This is not asserted in its Amended Statement of Claim. In addition, the evidence demonstrated that Faith had never terminated the Head CP or acted on the basis that the Head CP was terminated prior to 29 April 2000. Instead, it was seeking to perform the Head CP although in a different manner in view of the difficult circumstances facing it. Hence, its primary claim was for

demurrage which is consistent with the continuation of the Head CP and not its termination.

121. In para 210 of Mr Kuek's closing submission, he submitted that Faith's claim as a gratuitous bailee was on the basis that it was an involuntary bailee of the cargo from the time the Vessel arrived in Huangpu to discharge the cargo but found that there was a risk that the cargo and the Vessel might be detained by the Chinese authorities. I do not accept that Faith was an involuntary bailee then. Faith had been warned on 29 December 1999 by Penavico (CB 329) and on 30 December 1999 by Henry & Co (CB 344 and 345) about the risk of detention. Yet, it was still making proposals to discharge the cargo at Huangpu until the Vessel sailed away. I have also considered whether Faith could have become a gratuitous bailee when the Vessel sailed from Huangpu to Singapore but that was not the basis of Faith's claim as gratuitous bailee. Neither its pleadings, nor its evidence nor its closing submission presented its claim on that basis.

122. Accordingly, it is not necessary for me to decide whether Faith is entitled to claim as gratuitous bailee against Feoso as bailor for the costs of keeping the cargo on board the Vessel, and the other costs enumerated in para 18 of Faith's Amended Statement of Claim, in circumstances where there was no previous contractual relationship between Faith and Feoso. It is also not necessary for me to decide whether such a claim, if allowed, should be restricted to the value of the cargo.

Is Faith entitled to a lien for demurrage and other costs and what is the effect of the lien?

123. It is not sufficient for Faith to establish a claim for demurrage as there is no contractual relationship between Faith and Feoso. Accordingly, Faith claims that it is entitled to a lien for demurrage, as well as for other costs.

124. The Head CP provides:

> 'H. Total Laytime in Running Hours: 96 hours total load/discharge.
>
> I. Demurrage per Day: U.S. Dollars 15,000 per day or prorata.'

125. Clause 6 of Part II of the Head CP states:

> '6. NOTICE OF READINESS. Upon arrival at customary anchorage at each port of loading or discharge, the Master or his agent shall give the Charterer or his agent notice by letter, telegraph, wireless or telephone that the vessel is ready to load or discharge cargo, berth or no berth, and laytime, as hereinafter provided shall commence on the expiration of six (6) hours after receipt of such notice …..'

126. Clause 21 of Part II of the Head CP states:

> '21. LIEN. The Owner shall have an absolute lien on the cargo for all freight, deadfreight, demurrage and costs, including attorney fees, of recovering the same, which lien shall continue after delivery of the cargo into the possession of the Charterer, or of the holders of any Bills of Lading covering the same or of any storageman.'
>
> [Emphasis added.]

127. Clause 1 of the Conditions of Carriage on B/L No 1 (obverse side) provides:

> 'All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, are herewith incorporated …..'
>
> [Emphasis added.]

The front side of B/L No 1 referred to a Charterparty dated 13 October 1999 but no other description. This was the date of the Head CP as well as the Sub CP.

128. Mr Kuek submitted that the words in clause 1 were wide enough to incorporate the lien provision in the Head CP on the authority of Mr Justice Mustill's judgment in *The Miramar* [1983] 2 LLR 319 and Judicial Commissioner Chan Seng Onn's judgment in *The Trade Resolve* [1999] 4 SLR 424. Mr Haridass did not dispute this. He also accepted that where two or more charterparties of the same date could be incorporated, the case-law authorities suggest it is the head charter-party that is incorporated.

129. However, para 11 of Feoso's Re-Amended Defence asserts that even if the terms of the Head CP were incorporated into B/L No 1, Faith would still not be able to claim demurrage because of additional clause 4 of the Head CP as the Vessel did not proceed to Huangpu to discharge the cargo by reason of Faith's failure to arrange for a joint inspection of the vessel which is a mandatory requirement under Chinese law and/or regulation or a custom of Chinese ports, and which, when passed, would enable the vessel to enter the port limits of Huangpu and become an arrived ship.

130. I do not think the additional Clause 4 adds anything. It states:

> '4. LAYTIME & N.O.R.
>
> In the event Laytime has expired, Charterer shall be allowed the benefits of Clauses 6 and 7 of Part II at each port of loading or discharge before demurrage shall be incurred.
>
> Notice of Readiness given pursuant to Part II Clause 6, shall not be deemed to be received by Charterer or charterer's Agent prior to the date stipulated in Part I (B) for commencing laydays except with charterer's sanction.'

I have already cited the material part of Clause 6 of Part II. As for the omitted part, it refers to the vessel arriving at a berth but this is irrelevant (as conceded by para 38 of Feoso's closing submission) because the cargo was to be unloaded by ship-to-ship transfer. As for Clause 7 of Part II, this is also irrelevant as it pertains to the hours of loading and discharging which is not in issue.

131. Accordingly, I am of the view that the reference to a charterparty dated 13 October 1999 was to the Head CP and that the lien provision for demurrage and costs was incorporated into B/L No 1.

132. However, Mr Haridass submitted that as there was no contract between Faith and Feoso and as Feoso is not the holder of B/L No 1, Faith cannot rely on the contractual lien as against Feoso. At best, Faith can only exercise a lien at common law and at common law, there is no lien for demurrage but only for general average and costs and expenses of preserving goods and freight. Such costs and expenses do not include the cost of keeping the cargo on board the Vessel in the meantime (paras 14 to 16 of his closing submission). This submission assumes that Feoso can claim the cargo from Faith without relying on B/L No 1, and hence avoid the lien provision, just because it is the owner of the cargo. I would add that it is not disputed that Feoso is the owner of the cargo (see, for example, CB 320 and 502 and NE 62).

133. I am of the view that although Feoso is the owner of the cargo, this does not mean that vis--vis Faith, it is entitled to delivery of the cargo without more. Faith's obligation, as the owner of the Vessel, is to deliver the cargo against production of the relevant bill of lading i.e B/L No 1 (see Scrutton on Charterparties and Bills of Lading, Twentieth Edition 1996, p 295). Unless Feoso produces B/L No 1, it is not entitled to take delivery of the cargo. The fact that it is the owner of the cargo does not alter its position vis--vis Faith. However, if, for example, Ever Bright had presented B/L No 1 and obtained the cargo, it would then be open to Feoso, as the owner of the cargo (who had paid for the cargo) to claim it from Ever Bright. Naturally, should Feoso base its claim to take delivery of the cargo from Faith under B/L No 1, it would then be caught by the lien provision. Accordingly, the fact that the lien provision does not per se extend to Feoso does not mean that Feoso is entitled to take delivery of the cargo from Faith free of the lien.

134. Mr Haridass also submitted that Faith had not claimed a lien for demurrage earlier, although Faith had made claims for demurrage. In my view, the validity of the lien does not depend on an earlier assertion of the lien. So long as Faith has not released its possession of the cargo, it is entitled to assert its lien. As I have mentioned, the cargo was eventually sold pursuant to a court order, but under the order, all rights of lien were transferred to the proceeds of sale.

135. In the circumstances, Faith is entitled to a lien on the cargo. However, the nature of a lien is a passive right to retain the cargo until

payment is made. It is a right of defence and is not a right of action in itself (Halsbury's Laws of England 4th Ed, Reissue, Vol 28, para 745 and 719). Therefore, it does not necessarily follow that just because Faith is entitled to a lien, Faith is entitled to the cargo or the proceeds of sale of the cargo.

136. In the *Miramar*, the parties had reached an interim agreement to resolve a deadlock. The interim agreement was contained in a letter dated 11 July 1980 under which the consignee of the cargo agreed to pay, up to a maximum sum, any sums in respect of which the carrier was entitled to exercise a lien and in exchange the carrier agreed to lift its lien.

137. In *The Trade Resolve*, the court concluded at para 77, 'As the blended oil cargo on board the vessel was ordered to be sold and the proceeds of sale paid into court, I accordingly declared that the defendants were entitled to the lien on the cargo, and hence the sale proceeds, for their unpaid demurrage and costs but not including the detention charges' (emphasis added). This appears to equate a lien on cargo with an entitlement to cargo but it may be that the point was not argued before the court.

138. In the present case before me, there was likewise no argument that even if Faith is entitled to a lien for demurrage and Feoso's claim to the cargo is subject to the lien, Faith is nevertheless still not entitled to the cargo or the sale proceeds. There was no argument that in such a situation, the sale proceeds would have to simply remain where they are. Indeed, para 30 of Feoso's Re-Amended Defence accepts that if Faith is entitled to a lien, it can recover the sale proceeds of the cargo but no more. In the circumstances, I will not deny Faith the sale proceeds of the cargo.

139. In so far as Faith has claimed a lien for demurrage and other costs under clause 21 of Part II of the Head CP, the details of such other costs are set out in para 18 of Faith's Amended Statement of Claim. As the demurrage I have allowed exceeds the quantum of the sale proceeds, the items claimed as other costs are academic and it is not necessary for me to decide whether each of such items should be allowed.

Orders

140. In respect of Admiralty in Personam No 32 of 2000, I declare that Faith is entitled to exercise a lien for US$1,890,000 with interest thereon at the rate of 6% per annum from the date of Faith's action to date of judgment. I order that the sale proceeds of the cargo and any interest thereon be released to Faith in part settlement of the lien.

141. In respect of Admiralty in Rem No 21 of 2000, I dismiss Feoso's claims against the Owner of the Vessel.

142. I will hear the parties on costs.

Sgd:

WOO BIH LI

JUDICIAL COMMISSIONER

SINGAPORE

ADMIRALTY IN PERSONAM NO 32 OF 2000

ADMIRALTY IN REM NO 21 OF 2000

ANNEXURE TO JUDGMENT OF WOO BIH LI JC DATED 1 OCTOBER 2002

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