Sun Technosystems Pte Ltd v Federal Express Services (M) Sdn Bhd [2006] SGCA 40

Case Number : CA 58/2006

Decision Date : 08 November 2006

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Lee Seiu Kin J; Andrew Phang Boon Leong JA

Counsel Name(s) : Goh Kok Leong, Quah I-Lin Anna and Gho Sze Kee (Ang & Partners) for the appellant; Lok Vi Ming SC, Ajinderpal Singh, Lee Sien Liang Joseph and Seah Wei Hsien Mark Jerome (Rodyk & Davidson) for the respondent

Parties : Sun Technosystems Pte Ltd — Federal Express Services (M) Sdn Bhd

Bailment – Bailees – Duties – Duty of bailee in respect of goods that were hijacked – Whether bailee required to establish precisely how loss or damage occurring – Whether sufficient for bailee to prove on balance of probability that reasonable care taken to prevent loss – Whether bailee entitled to rely on "events beyond our control" clause in contract of carriage between itself and bailor – Whether doctrine of fundamental breach applicable

8 November 2006

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Background

1 This is an appeal from the decision of the High Court in *Smart Modular Technologies Sdn Bhd v Federal Express Services (M) Sdn Bhd* [2006] 2 SLR 797 (hereafter referred to as "GD"). In the main action, the appellant, Sun Technosystems Pte Ltd ("Sun Tech"), brought an action against the respondent, Federal Express Services (M) Sdn Bhd ("FedEx (M)"), for breach of duty as carrier and/or bailee to recover the costs of the goods that the latter was to deliver to its premises in Singapore. The present appeal centred on the finding of the trial judge ("the Judge") that there was a hijack and hence that the respondent had discharged its burden of proof as bailee to establish that the loss occurred without its negligence or default. We dismissed the appeal and now give the detailed grounds for our decision.

Factual matrix

2 Sun Tech is a Singapore-incorporated company which manufactures and supplies computer hardware systems. It purchases memory modules from Smart Modular Technologies Sdn Bhd ("Smart"), a Malaysian company, which manufactures them in its factory in Penang. When a shipment is ready, Smart, at the request of Sun Tech, contacts FedEx (M)'s Penang office and requests for transportation of the shipment to Singapore.

3 In July 2000, Sun Tech ordered 1,000 memory chips from Smart. The cost of the goods was $860,000. They were ready for shipment on 28 August 2000. On that morning, Smart contacted FedEx (M) to ask for the goods to be delivered to Sun Tech. At 11.30am, FedEx (M)'s courier from its Penang office, Mr Turairaj ("Turairaj"), arrived at Smart's premises to pick the goods up for delivery. He issued an airway bill to Smart's employees upon collecting the goods. It is not disputed that this airway bill constituted the contract of carriage between FedEx (M) and Sun Tech as the owner of the goods (it was acknowledged that Smart was the agent for Sun Tech in this regard). On the back of the airway bill was a clause excluding liability for loss occasioned by events beyond the control of

FedEx (M) ("events beyond our control" clause) as well as a limitation clause which applied in specific circumstances.

4 Upon receiving the goods, Turairaj transported the goods in a FedEx (M) vehicle, headed for the shuttle exchange point ("shuttle point"), from where they would be taken to the air cargo terminal for storage before being delivered to Singapore. Along the way, he stopped at the premises of Acer Technologies Sdn Bhd ("Acer premises") to make a final delivery. According to Turairaj – and this is disputed by the appellant – when he was en route to the shuttle point from the Acer premises, he was forced by four men in a car (a Proton) to stop his van along Jalan Jelawat, Seberang Jaya. Turairaj was hit on the head with a metal rod and lost consciousness. Turairaj said that when he regained consciousness, he discovered that the goods were missing from the vehicle and proceeded to make a police report at a nearby police station.

5 Turairaj was warded for severe head injuries and given 14 days of medical leave. Subsequently, the Malaysian police detained Turairaj and seven others for a period of 28 days to assist in their investigations into the hijack. Turairaj was not charged with any involvement in the incident. In fact, Turairaj continued to work in FedEx (M)'s Penang office until recently, when he was suspended from duty in connection with an unrelated matter.

Issues that arose on appeal

6 There were only two legal issues raised by the appellant in the present appeal, as follows:

(a) Whether the evidence regarding the place of the alleged hijack supports the trial judge's finding that there was indeed a hijack. (This was the only point addressed at the appeal, although the skeletal arguments referred to both the time and place of the incident.)

(b) Whether the respondent had discharged its burden of proof as bailee in relation to the loss of goods, and was therefore entitled to rely on the "events beyond our control" clause in the airway bill.

Whether a hijack took place

The parties' arguments

7 The crux of the appellant's case in the present proceedings comprised a single argument: that the hijack never took place in the first instance. In particular, counsel for the appellant, Mr Goh Kok Leong, argued that based on the evidence of Turairaj, the hijack, which was alleged to have taken place 400m from the Acer premises, could not have taken place as Turairaj had testified that he had been driving for more than five minutes. Mr Goh argued that if this were true, Turairaj ought to have travelled slightly over four kilometres from the Acer premises, which was more than ten times the distance that was alleged to have been traversed.

8 Counsel for the respondent, Mr Lok Vi Ming, argued, on the other hand, that the argument that a hijack had never taken place could not possibly arise. He pointed, *inter alia*, to the injuries suffered by Turairaj as well as to the thorough investigation conducted by the Malaysian police (when Turairaj, together with seven other suspects, had (it will be recalled) been detained for 28 days). Mr Lok also pointed out that at no point had the investigation been impugned by the appellant.

Our decision

9 We agree with Mr Lok. In the first instance, although the point canvassed by Mr Goh (at [7] above) was in fact part of the appellant's closing submissions in the court below, it was *not* intended to prove (as it was not part of the appellant's case) that the hijack never took place but, rather, that it was part of the appellant's attempt to impugn the *credibility* of Turairaj's testimony in relation to the alleged *complicity* of Turairaj in the hijack. As we shall see (at [11] below), the Judge accepted the credibility of Turairaj's testimony.

10 Further, it was clear to us that the Judge had, in any event, considered all the relevant evidence (including that canvassed in the present appeal). The Judge did in fact address the issues of both the place as well as time of the hijack. This is evident from the following portion of the GD (at [60] and [61]):

> 60 First, in relation to the place of the hijack, Mr Turairaj had stated that after picking up the goods from Smart, he had gone to Acer's premises. From there, he proceeded towards the shuttle point and en route, at about 12.25pm when he was driving along Jalan Jelawat, his van was hijacked. According to Mr Turairaj, it would normally have taken him ten to 15 minutes to get from Acer's premises to the shuttle point. After the incident, however, Kevin Teoh had visited the place of the attack and had given evidence in Suit 260/2002 that it took about 20 or 25 minutes to drive from the place of the incident to the shuttle point. Sun Tech submitted that there was an obvious inconsistency between the evidence of Mr Turairaj and that of Kevin Teoh. Further, Mr Turairaj had also testified that the distance between Acer and the shuttle point was about 12 or 13 kilometres whilst Kevin Teoh considered it to be a distance of 16 kilometres. This disagreement, Sun Tech said, showed the lack of credibility of Mr Turairaj as a witness.
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> 61 As for the time of the hijack, Sun Tech undertook an elaborate analysis of Mr Turairaj's evidence to show that he could not have been at the place of the attack at 12.25pm (the time he said the attack had taken place). It argued that based on his own evidence as to his movements and the time it took to get from one point to another, at 12.25pm, Mr Turairaj should still have been at Acer's premises and not at Jalan Jelawat. Alternatively, Sun Tech submitted, Mr Turairaj could actually have reached Jalan Jelawat well before 12.25pm, in fact, at about noon and only remained there till 12.25pm because he was waiting for the "hijackers". Sun Tech pointed out that when, in cross-examination, it had taken Mr Ng through the various stages of Mr Turairaj's journey on the fateful day, Mr Ng agreed that by the time Mr Turairaj left Acer, it would have been between 12.15pm and 12.30pm. Since the cut-off time for arriving at the shuttle point was 1.00pm and the time required to get there was between ten and 15 minutes, then Mr Turairaj was not telling the truth when he said he needed to rush out of Acer as he was late for the rendezvous. Mr Ng had conceded that Mr Turairaj had enough time to enable him to reach the shuttle point at 1.00pm. As such, Sun Tech submitted the irresistible inference was that Mr Turairaj was not telling the truth when he said that he had rushed out of the Acer factory in order to get to the shuttle point. Actually, it argued, he had to rush out of the Acer factory earlier to ensure that he reached the place of attack on time to meet his accomplices and thereafter carry out the alleged robbery.

11 Most importantly, this was the Judge's finding (including the finding with respect to the credibility of Turairaj's testimony) (see GD at [82]):

> 82 I accept the submissions that FedEx M made as to the speculative nature of Sun Tech's submissions in relation to the alleged involvement of Mr Turairaj in the incident. Mr Turairaj underwent extensive investigation at the hands of the police. No charges were preferred against him. He continued to work with FedEx M without any difficulty until it was discovered that he had previously been suspected of robbery. In that case too no charges were preferred against him.

Mr Turairaj has not ever been charged with any theft let alone convicted of such an offence. There were discrepancies in his evidence but I am satisfied that these were minor and did not undermine the basic truth of his story. At times Sun Tech went overboard in its submissions, for example, when it accused Mr Turairaj of living with his mistress and hatching a plot to solve his financial difficulties when such matters were never put to Mr Turairaj and Mr Ng's investigations showed that by the time of the incident, Mr Turairaj was back with his wife. There were other areas in which Sun Tech's submissions stretched the evidence to a breaking point and could not be accepted.

The duty of the bailee in relation to the discharge of its burden of proof

Introduction

12 Neither party controverted the general principle to the effect that where goods on bailment are lost or destroyed, the onus is on the bailee to prove, on a balance of probabilities, that it had taken reasonable care of those goods: see the decision of this court in *Seah Ting Soon t/a Sing Meng Co Wooden Cases Factory v Indonesian Tractors Co Pte Ltd* [2001] 1 SLR 521 at [24] and applied, *inter alia*, in the Singapore High Court decision of *Techking Enterprise Ltd v JFE Consolidators Pte Ltd* [2005] 2 SLR 744 at [9] (reference may also be made to the decision of this court in *Hong Realty (Pte) Ltd v Chua Keng Mong* [1994] 3 SLR 819 as well as the oft-cited Malaysian Privy Council decision of *Port Swettenham Authority v TW Wu and Co (M) Sdn Bhd* [1979] AC 580).

The appellant's argument based on Levison v Patent Steam Carpet Cleaning Co Ltd

13 However, whilst accepting the general principle set out in the preceding paragraph, a more specific argument proffered by the appellant before this court was this: Mr Goh argued that the bailee is under a duty to establish *precisely how* the loss or damage occurred, and that the respondent had not discharged this burden of proof. He relied, in particular, on the following observations by Lord Denning MR in the English Court of Appeal decision of *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69 ("*Levison*"), as follows (at 82):

> I am clearly of opinion that, in a contract of bailment, *when a bailee seeks to escape liability on the ground that he was not negligent or that he was excused by an exception or limitation clause*, then he must show what happened to the goods. He must prove all the circumstances known to him in which the loss or damage occurred. If it appears that the goods were lost or damaged without any negligence on his part, then, of course, he is not liable.[emphasis added]

14 This is, in fact, an argument of significant import in so far as the law of bailment is concerned and it would therefore be appropriate to deal with it in some detail.

What was actually decided in Levison

15 It would conduce towards clarity to state our conclusion on this argument first. We are of the view that Mr Goh's argument goes too far. Indeed, we are of the view that this was not, in any event, what the learned Master of the Rolls in fact said; in particular, Lord Denning MR stated (see [13] above) that the bailee "must prove all the circumstances *known to him* in which the loss or damage occurred" [emphasis added]. The italicised words are significant. A bailee can only be reasonably expected to prove facts and circumstances that are *known to him*.

16 More importantly, we should not lose sight of the main issue – which is *whether or not the bailee can prove that it was not negligent and had, instead, taken reasonable care of the goods in*

question. Looked at in this light, proof of circumstances under which the loss or damage occurred is *only one factor, albeit an important one*. Indeed, if the bailee can prove what *precisely* took place in order to demonstrate that it had not been negligent, that would obviously serve to advance its case. *But the converse does not necessarily follow*. This is because the inquiry is a holistic one; it is also (potentially, at least) a multidimensional one. In other words, the bailee has, at its disposal, a myriad of *other* reasons to demonstrate that it had not been negligent. For example, and this is a point that arose in the present proceedings (see [28] below), the bailee could also demonstrate that it had adopted *an appropriate standing operating procedure* to prevent loss or damage in place, and had adhered to it scrupulously. Then again, the court must have regard to the *precise terms of the contract* itself in order to ascertain how the parties intended to deal with the situation which arose in fact.

The context of Levison – bailment and the doctrine of fundamental breach

1 7 Even if we accept the appellant's interpretation of Lord Denning MR's statement in *Levison* (see [13] above), we must nevertheless have regard to the *context* in which the statement was made.The Master of the Rolls was clearly focusing on the issue of *exception clauses*. This is evident from the italicised words in the statement quoted above (at [13]). More to the point, Lord Denning MR was of the view that, in the context of that case, the burden of proof was on the bailee *to prove that it had not been guilty of a fundamental breach* (see *Levison* ([13] *supra*) at 81). *This* was why the bailee in *Levison* was said to have been under an obligation to prove all the circumstances known to it in which the loss or damage to the goods concerned (a carpet) had occurred. That the bailee was placed under such an obligation to begin with is somewhat startling. In order to understand why the Master of the Rolls adopted such an approach, an understanding of the *general legal climate* under which *Levison* was decided is imperative.

18 In relation to the *relevant legal context* at the time *Levison* was decided, the English Court of Appeal (primarily through the efforts of Lord Denning MR) was waging a "legal war" against the perceived oppressive effects of exception clauses (particularly in the context of consumer contracts) by utilising (principally, at least) the doctrine of fundamental breach as a "rule of law". This conception of the doctrine of fundamental breach is to be distinguished from another – that of the doctrine as a "rule of construction". This distinction was not merely theoretical; it had intense practical consequences as well. The distinction was expressed in the Singapore High Court decision of *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd (Direct Services (HK) Ltd, Third Party)* [2006] 2 SLR 268 ("*Emjay Enterprises*"), as follows (at [14]):

> The legal effect of [the decision of the House of Lords in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827] is to allow the courts the flexibility to give effect to exception clauses at common law even where a fundamental breach of contract has occurred. In other words, a fundamental breach of contract does *not necessarily and automatically* destroy the efficacy of an exception clause because, whilst the primary obligations come to an end, the secondary obligation (to pay damages) remains and an exception clause might cover this last-mentioned liability. Whether or not the exception clause in question does in fact cover such liability is not an automatic rule of law as such but, rather, a matter of *construction of the contract*. In other words, the court's task is to *construe* the exception clause concerned in the context of the contract as a whole in order to ascertain whether the contracting parties *intended* that the exception clause cover the events that have actually happened. If they did, then the exception clause would be given effect to by the court, notwithstanding the fact that a fundamental breach has occurred. This is because, to re-emphasise a crucial point, the *intention* of the parties is the touchstone. [emphasis in original]

19 In other words, the doctrine of fundamental breach as a "rule of construction" (as opposed to the doctrine as a "rule of law") ensures that whether or not a particular exception clause is valid or not depends on the *construction* of that exception clause in the context of the contract as a whole in order to ascertain whether or not the contracting parties intended the clause to cover the events that have actually happened – even if these events give rise to a fundamental breach. This doctrine (of fundamental breach as a "rule of construction") underscores the importance of the concept of freedom of contract and is consonant with modern trade and commerce and was in fact confirmed by the House of Lords decision in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 ("*Photo Production*"). The protection of the consumer is now mitigated by the (statutory) presence of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) (see also *per* Lord Wilberforce and Lord Diplock in *Photo Production* at 843 and 851 respectively). This particular Act operates, of course, in addition to the traditional common law doctrines and safeguards (see also *Emjay Enterprises* ([18] *supra*) at [15]). There is thus much less (or even no) need for the more draconian doctrine of fundamental breach as a "rule of law".

20 Although there is some apparent authority to the contrary (see, in particular, the Singapore Privy Council decision of *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576; [1959] MLJ 200 ("*Sze Hai Tong Bank*")), the preponderance of more modern Singapore authority supports the doctrine of fundamental breach as a "rule of construction": see the Singapore High Court decisions of *Metro (Pte) Ltd v Wormald Security (SEA) Pte Ltd* [1980–1981] SLR 539, *AA Valibhoy & Sons (1907) Pte Ltd v Banque Nationale de Paris* [1994] 2 SLR 772 and *Emjay Enterprises*; as well as the Singapore Court of Appeal decision of *Parker Distributors (Singapore) Pte Ltd v A/S D/S Svenborg* [1982–1983] SLR 153 ("*Parker Distributors*"). In the last-mentioned case, however, this court did not deal expressly with *Sze Hai Tong Bank*. However, *Sze Hai Tong Bank* was decided during a time when the law had not settled in its more modern and established form as embodied in *Photo Production* (see also *Emjay Enterprises* at [15]). More importantly, the doctrine of fundamental breach as a "rule of construction" embodied in *Photo Production* is both principled and logical, as pointed out in the preceding paragraph, and we take the opportunity to affirm its application in the Singapore context. The English common law in this particular regard, as received via s 3(1) of the Application of English Law Act (Cap 7A, 1994 Rev Ed), requires no modification pursuant to s 3(2) of the same Act. As this court is presently the final appellate court, the Privy Council decision in *Sze Hai Tong Bank* is not binding on it. It may be regarded, at best, a decision of a court of co-ordinate jurisdiction and, if necessary, may be departed from by this court pursuant to this court's *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689. However, it is not, in our view, necessary to even go so far. As we have seen, this court in *Parker Distributors* had already endorsed the doctrine of fundamental breach as a "rule of construction" as embodied in *Photo Production*. We endorse *Parker Distributors*, together with the elaboration set out above.

21 Indeed, in *Levison* itself, Lord Denning MR was prepared to go much further than invoking the already powerful "weapon" of fundamental breach as a "rule of law"; the Master of the Rolls was of the view that if an exception clause were *unreasonable*, this would, in and of itself, be sufficient legal ground for not giving effect to it (see *Levison* ([13] *supra*) at 79). Whilst the Master of the Rolls was referring, *inter alia*, to the then UK Unfair Contract Terms Bill, even the Act itself (when ultimately enacted as the Unfair Contract Terms Act 1977 (c 50)) did not, it should be noted, go as far. Such was the judicial hostility towards exception clauses in the context of consumer contracts, although the other two members of the court in *Levison* did not venture to go as far as Lord Denning MR did.

22 So much by way of the background to *Levison*. Put simply, a close perusal of the judgment of Lord Denning MR in *Levison* suggests that, on one interpretation at least, there was a clear leaning towards the finding of a fundamental breach in order that the more draconian doctrine of fundamental breach as a "rule of *law*" could apply in order to *automatically destroy* the efficacy of the exception

clause concerned – all in the name of consumer protection. This may, in turn, have led (as already alluded to above) to an overstatement, by Lord Denning MR, of the legal requirements with respect to the duty of the bailee – leading, in effect, to the (arguably, overly) *strict* proposition to the effect that the bailee is under a duty to establish *precisely how* the loss or damage occurred. In fairness, however, it should be pointed out that the other two judges in *Levison* did not go so far. This is probably why the House of Lords in *Photo Production*, which endorsed the doctrine of fundamental breach as a "rule of *construction*", was able to interpret *Levison* as being premised on a construction of the contract (see *Photo Production* ([19] *supra*) at 845–846).

23 In our view, therefore, the observations by Lord Denning MR in *Levison* (reproduced at [13] above) with respect to the duty of the bailee were, with respect, probably *overstated* in the light of the *context* of the need to locate a fundamental breach in order that the doctrine of fundamental breach as a "rule of law" could be applied in order to negate the exception clause in *Levison* itself.

24 We are, in fact, heartened that our analysis of *Levison* is consistent with the views expressed by Prof Brian Coote in "Exception Clauses, Deliberate Acts and the Onus of Proof in Bailment Cases" (1997) 12 JCL 169 at 181–182. Prof Coote is, of course, the leading scholar on exception clauses in the Commonwealth, being the author of not only the seminal work on exception clauses (entitled *Exception Clauses* (Sweet & Maxwell, 1964)) but also of many articles and comments since (including the one just cited). In this particular article, Prof Coote observed thus (at 181–182):

> *Levison v Patent Steam Carpet Cleaning Co Ltd* which placed the onus of disproving fundamental breach on the bailee, was presided over by Lord Denning and was also a product of the fundamental breach movement. With the subsequent demise of the doctrine as a result of *Photo Production Ltd v Securicor Transport Ltd*, the credibility of the *Levison* ruling has to be suspect.

Reference may also be made, in this regard, to *Chitty on Contracts*, vol 1 (Sweet & Maxwell, 29th Ed, 2004) at para 14-019.

25 Further, Prof N E Palmer points out, in the leading work in the area of bailment, *Bailment* (Law Book Company, 2nd Ed, 1991) ("*Palmer*"), that the observations by Lord Denning MR in *Levison* are "ambiguous on this point" (see p 786, n 73). Whilst this is a plausible reading of these observations cited above (at [13]), we would be prepared to go so far as to state that there is in fact no ambiguity inasmuch as those observations are in fact inconsistent with Prof Palmer's own views on this particular issue, as follows (see *Palmer* at pp 785–786):

> On one point the authorities are virtually unanimous. The bailee, confronted by proof of damage or loss, *is not bound to establish precisely how those phenomena occurred. Proof of reasonable care or of the irrelevance of its lack will be sufficient; he need not go further (although it may often be helpful for him to do so) and demonstrate the cause of the injury in question*.[emphasis added]

26 Indeed, *Levison* is one of three decisions cited by Prof Palmer as appearing to stand for the proposition (contrary to that expressed by the learned author himself in the above quotation) to the effect that the bailee *is* bound to establish precisely how the loss or damage occurred (see *Palmer* at p 786, n 73; see also *Palmer* at p 1555). Of the remaining two decisions, the first is that of the English Court of Appeal in *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1977] 1 WLR 625; [1977] 3 All ER 641. Prof Palmer points out that the observation by Megaw LJ ([1977] 3 All ER 641 at 650), in so far as it appears to suggest the proposition just mentioned, is "probably a misprint" (see *Palmer* at p 786, n 73). In so far as the second decision is concerned, that of the English High Court in *Swiss Bank Corporation v Brink's MAT Ltd* [1986] QB 853 at 857; [1986] 2 Lloyd's Rep 99 at 100, Prof Palmer

refers to the observation in his own commentary in [1986] All ER Rev 18 at 21 to the effect that "[t]oo much should not be made of the point" and that "it remains the case that a bailor is not conventionally required to adduce positive evidence on the part of his bailee in order to succeed in proceedings against him: the bailor need only establish the bailment itself and the fact of loss or damage, whereupon the bailee becomes obliged to demonstrate either that he exercised the appropriate degree of care of the goods or that any want of care on his part was causally unrelated to the ensuing misadventure". Indeed, Mr Goh also referred to the main decision (reported at [1986] QB 853; [1986] 2 Lloyd's Rep 79). However, we did not see how this particular decision assisted the appellant. On the contrary, the court in fact also considered, *inter alia*, the standard operating procedure adopted by the bailee (and see [16] above).

27 We should take the opportunity, however, to state that we make no pronouncement in these proceedings on the issue of the burden of proof with respect to fundamental breach in the context of exception clauses. This was the broader issue that arose in *Levison*, and which, despite engendering some controversy (see, for example, *Palmer* at pp 1552–1557), appears to have been accepted as good law in England (see, for example, G H Trietel, *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003), especially at p 241; but *cf* the Supreme Court of New South Wales decision of *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd (The "Antwerpen")* [1994] 1 Lloyd's Rep 213 at 238).

The applicable law

28 We would, in fact, endorse the view of Prof Palmer quote above (at [25]), and proceed to apply it to the facts of the present proceedings. Before proceeding to do so, however, we note that this view is in fact presently embodied within a recent English Court of Appeal decision (where, *inter alia*, *Palmer* is in fact cited). In *Coopers Payen Limited v Southampton Container Terminal Limited* [2003] EWCA Civ 1223; [2004] 1 Lloyd's Rep 331, Clarke LJ (with whom Lightman and Schiemann LJ agreed in so far as this particular point was concerned) observed thus (at [28]–[29]):

> 28. In my opinion she [the trial judge] was right in that regard. Indeed it seems to me to have been an important part of the exercise upon which the court was engaged, namely to decide whether the damage was caused by a failure on the part of SCT to exercise reasonable care. Mr. Buckingham correctly submits, (as the Judge observed) that it is not necessary in order to avoid liability for breach of duty for a bailee to show what caused the loss or damage: see e.g. Palmer on Bailment and *Bullen v. The Swan Electric Engraving Company* [1887] 23 T.L.R. 258. He must simply show (as the Judge correctly put it) either that he took reasonable care of the goods or that his failure to do so did not contribute to the damage.
>
> 29. While it is not necessary as a matter of law for the bailee to show what the cause of the damage was the identification of the cause may be a significant pointer as to whether or not the bailee exercised reasonable care. The cause of the loss is in most cases far from irrelevant.

Our decision

29 In the present proceedings, for instance, the respondent, whilst not being able to prove the precise cause of the damage or loss, was nevertheless able to prove that it had taken reasonable care by way of its standard operating procedure. These were, in fact, the Judge's findings, which (significantly, in our view) were not challenged on appeal; in the Judge's own words (see GD at [80]–[81]):

> 80 In my judgment, the security procedures practised by FedEx M were suitable for the

type of business that it undertook and the crime situation that existed in Penang at the material time. It is important that FedEx M was a general courier and not a specialist company providing high security transport services for valuable goods. Customers like Smart were aware of the type of services offered by FedEx M and it was clear from the minutes of the September 1999 meeting that FedEx M would not offer armed escorts and it was up to its customers to provide these should they think that the security situation required them. Secondly, the local situation in Penang at the time was such that whilst the Penang station [FedEx (M)'s Penang office] should have been (and I consider was) aware that hijacking of vehicles on the road could occur, there was no reason to think that there was an imminent danger of such an incident happening in Penang to the extent that enhanced security measures had to be adopted or FedEx M should refuse to carry valuable cargo. In addition, it was not a standard of the industry to require the use of armoured vehicles or those outfitted in the way suggested by Sun Tech and the AHMs [the International Air Transport Association Airport Handling Manual] did not set that standard for transportation by road from a manufacturer's factory to the airport. In any case, the AHMs were, in my judgment, not the right standard against which the security measures adopted by FedEx M had to be measured.

81 I am satisfied that FedEx M had implemented a reasonable security system in relation to the goods that it carried and to the level of risk that it could reasonably anticipate it was facing. The couriers were trained to follow specific routes and to handle the vehicles and the goods in a certain manner. They were equipped with hand phones. I had some doubts about the rule that the driver's door of the vehicles should not be locked while the same were in motion but on further consideration, I accept the submission that this rule was made for the protection of the driver so that he would be able to escape from the vehicle should it be involved in an accident. One of the governing rules of the security procedures adopted was that the courier's safety was paramount. That is a wholly reasonable rule. Mr Turairaj testified that he had been given training to deal with an attempted robbery. Basically he was told not to be a hero. I cannot quarrel with that. The drivers employed by FedEx M were ordinary citizens not former security officers and were not chosen because of their James Bond-like qualities. There was no rule or standard in the industry that required courier companies to only employ trained security personnel as their drivers.

30 It bears reiterating a point made above (at [16]) to the effect that the entire inquiry is a holistic one. No mechanistic formula can – or ought to – be laid down. The very nature of the inquiry itself depends on the precise factual matrix in question. It was clear, however, that, on the facts of the present proceedings, the respondent had discharged the requisite burden of proof, as evidenced by the Judge's findings just quoted.

31 More importantly and specifically, regard must also be had to the actual terms of the contract between the parties themselves. To recapitulate, the respondent would not be liable for any circumstances that were beyond its control. Hence, in so far as the present proceedings are concerned, the respondent had the burden of proving that the hijack took place. As we have seen, the thrust of the appellant's case in the present appeal centred on the argument that the hijack did not in fact take place – an argument that we have already rejected above.

Conclusion

32 In the premises, we dismissed the appeal with costs.

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