Smart Modular Technologies Sdn Bhd and Another v Federal Express Services (M) Sdn Bhd and Another
[2006] SGHC 66

Case Number : Suit 259/2002

Decision Date : 20 April 2006

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Goh Kok Leong, Anna Quah and Gho Sze Kee (Ang & Partners) for the second plaintiff; Lok Vi Ming SC, Ajinderpal Singh and Mark Seah (Rodyk & Davidson) for the first defendant

Parties : Smart Modular Technologies Sdn Bhd; Sun Technosystems Pte Ltd — Federal Express Services (M) Sdn Bhd; Federal Express Corporation

Bailment – Bailees – Duties – Goods in bailment hijacked en route to destination – Whether bailee's negligence contributing to loss of goods

Carriage of Goods by Air and Land – Carriage of goods by road – Contracts of carriage – Contract containing clause excluding liability of carrier for loss caused beyond carrier's control – Goods hijacked en route to destination – Whether hijacking beyond carrier's control

20 April 2006 *Judgment reserved.*

Judith Prakash J:

Introduction

1 There are two plaintiffs and two defendants named in the title of this action but by the time the hearing started, it was clear that the fight was between the second plaintiff, Sun Technosystems Pte Ltd ("Sun Tech") and the first defendant, Federal Express Services (M) Sdn Bhd ("FedEx M"). The second defendant, Federal Express Corporation, was not served with the writ and played no part in the suit at all. The first plaintiff, Smart Modular Technologies Sdn Bhd ("Smart"), discontinued its action at a relatively early stage since it had no real interest in the claim.

2 Sun Tech is a company incorporated in Singapore which manufactures and supplies computer hardware systems. It purchases memory modules, essential components of such systems, from Smart, a Malaysian company, which manufactures the modules in its factory in Penang. These purchases are made on free on board (FOB) terms. Once a shipment is ready, Smart, at the request of Sun Tech, will contact FedEx M and ask it to transport the shipment to Singapore. FedEx M is a member of the Federal Express group of companies that carry on business worldwide as carriers of goods by land and sea. It has offices in Kuala Lumpur and Penang. Its Penang office, usually referred to as the Penang station, had a relationship with Smart in relation to the carriage of Smart's goods.

3 In July 2000, Sun Tech ordered 1,000 memory chips from Smart. The goods cost US$860,000. They were ready for shipment on 28 August 2000. That morning, Smart contacted FedEx M and a few hours later, a courier from the Penang station, one Mr Turairaj a/l Thigarajan, picked up the goods from Smart's premises. He then transported them in a FedEx M vehicle intending to deliver them to a colleague at a shuttle exchange point ("the shuttle point") from where they would be taken to the Penang station's air cargo terminal for storage prior to being transported by air to Singapore. Whilst Mr Turairaj was en route to the shuttle point, he was forced by robbers to stop his van. Subsequently, the van was hijacked and the goods were stolen. They have not been recovered.

4 This is an action for breach of duty as carrier and/or as bailees. Sun Tech seeks to recover the US$860,000 that it had paid Smart for the goods. FedEx M takes the position that it is not responsible for the loss as the same was due to circumstances beyond its control. Sun Tech's riposte is that FedEx M was negligent and did not apply proper security methods for the care of the goods and that was what led to their loss.

5 This suit is not the only action that arose out of the loss of the goods. In Suit No 260 of 2002 ("Suit 260/2002"), Sun Tech, taking the position that the contract of carriage was between it and Federal Express (S) Pte Ltd ("FedEx S"), sued that company to recover its loss. On 29 June 2004, I dismissed Sun Tech's claim in Suit 260/2002 on the ground that Sun Tech did not have a contract of carriage with FedEx S. I found in that action that FedEx M had been acting as principal and as carrier when it accepted the goods and agreed to transport them from Smart's premises to Sun Tech. I further found that FedEx S's role would have been to act as FedEx M's agent in Singapore to clear and deliver the goods on their arrival here. I then found that Smart had been acting as agent for Sun Tech when it asked FedEx M to transport the goods and, therefore, that the contract of carriage was between Sun Tech and FedEx M.

6 From the closing submissions in this case, it is clear that FedEx M accepts that the contract of carriage was between itself as carrier and Sun Tech as the owner of the goods. It is common ground that this contract was contained in or evidenced by the airway bill that Mr Turairaj issued to Smart's employees when he picked up the goods. Secondly, FedEx M does not dispute that Sun Tech has title to sue on the contract of carriage. Thirdly, FedEx M does not dispute that the two cartons that Mr Turairaj picked up from Smart's factory contained 1,000 pieces of PC 133/512 MB memory modules.

The issues

7 The parties have formulated the issues that I have to decide in rather different ways. These issues fall into different categories. The first category relates to the cause of the loss. As far as Sun Tech is concerned, the issue to be decided in this category is whether FedEx M breached the contract of carriage by failing to take reasonable care of the cargo. On the other hand, FedEx M says the issue to be decided here is whether the loss was caused by events beyond its control. The second category concerns quantum and the amount that FedEx M would be liable for and this involves the validity of the limitation of liability clause in the airway bill. In this category, the main questions are whether Singapore law or Malaysian law governed the contract of carriage and whether the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA") applies so that the limitation clause would only be valid to the extent that FedEx M can establish its reasonableness. If UCTA applies, the issue is whether the limitation clause is reasonable. If it does not apply, the issue is whether the limitation clause may be invalid.

Cause of the loss

8 At the time the goods were lost, they were in FedEx M's possession and FedEx M was transporting them for reward. Thus, FedEx M was in the position of a bailee. A bailee of goods has certain well-established duties in relation to their care. Sun Tech submitted that as the bailee and carrier of the goods, FedEx M owed Sun Tech a duty to take and use reasonable care to carry the goods safely and to refrain from acting in any way which was inconsistent with the bailment of the goods. Further, since the goods were lost whilst in FedEx M's custody, the burden of proof was on FedEx M to show that the loss occurred without negligence or misconduct on the part of itself or its employees. This is the well-known proposition established by *Port Swettenham Authority v T W Wu*

and Co (M) Sdn Bhd [1979] AC 580.

9 FedEx M while not challenging the general position argued that in this case, its duty had been modified by contractual agreement. It cited the clause on the back of the airway bill that provided:

> *We* [*ie*, FedEx M] *will not be liable for loss*, damage, delay, shortage, misdelivery, nondelivery, misinformation, or failure to provide information in connection with your shipment *caused by events we cannot control*, including but not limited to acts of God, perils of the air, weather conditions, mechanical delays, acts of public enemies, war, strikes, civil commotions, or acts or omissions of public authorities (including customs and health officials) with actual or apparent authority. [emphasis added]

It contended, therefore, that as long as the loss had been caused by an event it could not control, it could not be responsible to Sun Tech. In this case, the loss had been caused by the hijack of the FedEx M truck by unknown persons. This hijacking was an event beyond FedEx M's control and FedEx M could not do anything to prevent its truck from being hijacked. Sun Tech disputed that assertion and said that if FedEx M had taken reasonable security precautions, the robbery could have been averted.

10 Under the general law, a bailee's duty of care towards goods in his custody is a heavy one. A carrier-bailee must deliver the goods in the same condition and quantity as he received them in. If the goods are lost or damaged while in his care, he must show that such loss or damage took place without any breach of duty on his part or that of his employees or agents. That is a heavy onus. In relying on the cited clause from the airway bill, what FedEx M is saying, in essence, is that its common law duty has been modified by the clause so that as long as FedEx M is able to show that the hijacking caused the loss and that it could not have done anything to prevent the hijack, it would not be liable for the loss even if it acted negligently in relation to the care of the goods. It argued that it would only be responsible for the loss where it was its negligence rather than the hijacking that was the operative cause of the loss. Even if both the hijacking and the negligence of FedEx M were equally dominant causes of the loss, then FedEx M would still not be liable because, by virtue of the clause, one of the causes of the loss (that is the hijack) was a matter for which FedEx M could not be held responsible.

11 I agree that because of the contractual provision FedEx M cannot be held responsible for the loss if it can show that the loss was caused by an event beyond its control. As I read the clause, however, and bearing in mind that it is a standard form clause drafted by FedEx M for its own protection, I would read it as meaning that the carrier/bailee would not be responsible for a loss caused solely by an event that was beyond its control. If negligence on the part of FedEx M contributed to the loss, then the cause of the loss would not fall within the clause. I do not accept the argument that if there were two equally dominant causes of the loss, one of them being negligence, FedEx M would not bear any liability. It is for FedEx M to show that the hijacking was an external event over which it had no control and which it could not have prevented by the exercise of reasonable care. An event would only be beyond the control of a party if reasonable steps taken by that party could not prevent that event from occurring.

12 I should say a few words about the burden of proof. In this case, Sun Tech, as the plaintiff seeking to recover for a breach of contract, had to prove that it has suffered loss due to a breach of contract on the part of FedEx M as the other contracting party. Since it was not disputed that the goods that FedEx M contracted to carry were never delivered, from the outset Sun Tech had established that it had suffered loss. As for the second element, since this was a contract of

bailment, once loss was established, the onus shifted to FedEx M to show why it should not be made responsible for the loss. That burden remained on FedEx M throughout the case.

Events leading to the loss

13 Before I go on to consider the submissions relating to negligence, I should give a brief account of how the goods were lost. This account is based on the affidavit evidence-in-chief of Mr Turairaj.

14 He stated that on 28 August 2000, he reported to the office in the morning as usual and received instructions on the items to be picked up that day. He then proceeded on his rounds. At about mid-morning, he received a message from the Penang station's despatch clerk informing him that Smart had asked for a shipment to be picked up. He was then instructed to make an additional stop at Smart's factory.

15 Mr Turairaj arrived at Smart's premises at about 11.30am and, according to Smart's factory gate logbook, he left around 11.45am after picking up the shipment in question. Mr Turairaj went from Smart's premises to the nearby premises of a company called Acer Technologies Sdn Bhd ("Acer") to make a final delivery. He then headed back to the shuttle point near the Penang bridge to drop off all shipments picked up.

16 At about 12.25pm, Mr Turairaj was driving along Jalan Jelawat, Seberang Jaya, when a Proton car overtook him and stopped in front of him. As the road was narrow he could not drive around the car and had to stop. He did not think of reversing the vehicle because it was a one-way street and he was not sure of what was happening. There were four people in the Proton. One of the passengers, a Malay man, rushed down and opened the door of the van, turned off the van's engine, pulled out the keys and told Mr Turairaj in Malay: "Lorry *kena tarik*." The Malay man then asked Mr Turairaj to unlock the door on the passenger's side. When he did so, there was another Malay man standing outside. He pulled open the door and Mr Turairaj saw that he was holding a long metal rod. He hit Mr Turairaj on the head with the rod three times and he lost consciousness.

17 When Mr Turairaj regained consciousness, he noticed that the van had been moved to what appeared to be a heavily-forested area. The man who had grabbed his keys then said he had a knife and told Mr Turairaj: "Don't create trouble. Sit down." They then tied his hands together and covered his head with a black jacket. He could hear the van being unloaded. He then felt the van being moved again. When it stopped the man told him to keep still and wait where he was for a few minutes before moving. After some time Mr Turairaj realised that the man had left and he then managed to free himself. He got out of the cab and checked the goods compartment and found that it had been emptied out. His hand phone, pager and a tracking device had also been taken but the robbers had overlooked another hand phone in a concealed glove compartment. Mr Turairaj contacted the Penang station and they told him to make a police report. He then went to the nearest police station and was later treated in hospital for his head injury.

The submissions on negligence

The expert

18 Sun Tech submitted that Fedex M could not run away from liability as various failings in FedEx M's security system had led to the loss of the cargo. To substantiate that submission, Sun Tech relied on the evidence of one Denis Austin Milford Phipps. Mr Phipps is a partner in a company called ASGARD Security Management Services, an independent consultancy service

specialising in security management. His experience in security matters was derived from 18 years in the Corps of Royal Military Police, 11 years as security manager and eventually head of security of British Airways, and 16 years as an independent security consultant. Mr Phipps is the author of a book entitled *The Management of Aviation Security* (Pitman, 1991). In his evidence, Mr Phipps often cited and relied on rules contained in the International Air Transport Association Airport Handling Manual ("AHM"), which he called the standard aviation industry source of information for worldwide use established in liaison with the International Air Transport Association ("IATA") and other organisations with similar aims. This manual contains a number of sections that Mr Phipps referred to, in particular, sections 330 and 350.

19 According to Mr Phipps, the AHM is applicable from the point and time at which the carrier issuing the airway bill accepts the goods listed in the airway bill. AHM 350 (the section dealing with handling and protection of valuable cargo) specifically states in cl 1.1 that the security measures are to be adopted during, *inter alia*, ground transportation. Mr Phipps confirmed that this included ground transportation outside the airport. Sun Tech also submitted that whilst certain measures in the AHM were applicable when goods were inside the airport, the risks faced by goods outside of the airport were of a different nature due to public access to public roads and therefore the security measures to be implemented in respect of cargo on public roads should be of a higher standard than those implemented in respect of cargo within the airport compound. In any event, Sun Tech submitted that FedEx M had committed multiple breaches of the minimum standard of care required by the aviation industry as set out in the AHM.

20 FedEx M questioned Mr Phipps' credentials as an expert. It submitted that he had no experience in respect of security on roads. His experience related mainly to airport security. He had some degree of familiarity with the AHMs since those related to airport operations but could not make any attempt to claim any expertise in respect of security on Malaysian roads or knowledge of the local state of crime in Penang. All he knew about crime in Penang was gleaned from four newspaper reports, the affidavits he had seen and the copy of the minutes of the meeting of freight forwarders in Penang during which they had expressed some concerns. Mr Phipps had not even consulted with the Malaysian police on the state of crime in Penang in the year 2000.

21 I do not think that all the above criticisms are well-founded. Mr Phipps had more than adequate qualifications as an expert on security measures generally in relation to the transport of goods although his particular specialisation related to the security of air cargo. There was sufficient information in the newspaper reports he read for him to be aware that there was substantial loss of goods by theft from electronics factories in Penang between 1999 and 2000 but the applicability of some of his assertions was limited by his lack of familiarity with local conditions. It should also be noted that FedEx M's own witnesses were aware that at the relevant time there had been instances in Malaysia of the hijacking of vehicles travelling along the highways. This was not an unknown and completely unanticipated problem. I do accept, however, that Mr Phipps' reliance on the AHMs was, in the circumstances of this case, where the loss took place while the goods were on a public highway en route to the airport, misplaced. The AHMs are aimed at indicating the appropriate security measures to be taken to protect goods that are within the airport premises. They do not deal with the measures required to protect goods travelling on a public highway. Having said that, that does not mean that some of those security measures would not be appropriate to the case at hand or that all Mr Phipps had to say was not relevant. The court is entitled to consider the views of a person with specialist knowledge of security.

The assertions of negligence

22 During the first part of the trial, the parties had been proceeding on the basis that the

operations manual used by FedEx M in its Penang station was a document called the "Go Express Station Operations Manual" ("Station Manual"). It was Mr Phipps' opinion that the Station Manual was deficient when it came to security procedures and he included criticisms of the Station Manual in his report. On the 12th day of the trial, one of FedEx M's witnesses, Kevin Teoh Soon Ghee ("Kevin Teoh"), revealed that the Penang station had used different manuals, the Go International Manuals instead of the Station Manual. After examining the Go International Manuals, Mr Phipps was of the opinion that they too were deficient when it came to specifying security procedures.

23 In summary, the reasons why Sun Tech contended that FedEx M was unable to show that the loss of the goods occurred without negligence or default on its part were that:

(a) The Go International Manuals were deficient from the point of view of security.

(b) FedEx M had failed or neglected to train or educate its employees in the necessary security procedures to be adopted and observed at all times.

(c) FedEx M or its employees had failed or neglected to ensure that the vehicle in which the goods were transported was locked and/or guarded and/or secured at all times including but not limited to ensuring that all doors were locked and all windows were wound up at all times.

(d) Sun Tech's cargo was valuable cargo and therefore FedEx M should have ensured that there was armed security at all times during the transportation of the cargo.

(e) FedEx M failed or neglected to ensure that there would be no stopping of the vehicle along the roadside and no transfers or diversions in the course of the transportation.

(f) FedEx M had failed to show that Mr Turairaj, the driver concerned, was not involved in causing the loss.

The security procedures practised by FedEx M

24 Mr Ng Chong Kuan who worked as a senior security specialist for the Federal Express group of companies in the Pacific testified that a distinction had to be made between a courier company and a security transport company. The function of a courier company was to deliver letters and parcels safely and expeditiously from one point to another. In contrast, security transport services like Brinks and Cisco provide secured movement with the aid of armoured trucks and armed or unarmed guards. As a pure courier service, FedEx M did not possess armoured trucks and only used delivery vans. It had a policy of not engaging armed escorts for its deliveries. Its policy was to ensure that its employees' safety was paramount. Its couriers were advised that if they were faced with any situation that was potentially dangerous, they should not attempt anything that might compromise their safety.

25 The evidence given by Mr Muhd Firdaus Azharuddin ("Mr Firdaus") who was the station manager of the Penang station from 1997 to May 2000 was that the Penang station followed various security practices. Some of these were standard requirements and some of them were practices that had been tailored according to local requirements. He explained that when a person was employed as a courier, FedEx M would send his particulars to the police in order to obtain confirmation that the person had no criminal record. Persons with criminal records would not be employed.

26 All of FedEx M's vehicles were equipped with either a two-way radio or a cell phone. The vehicles would be locked (both cab doors and cargo compartment doors) with the windows closed at

all times when the vehicles were not in actual use.

27 When a courier carried out a pick-up, he was instructed to ensure that each package was individually and properly labelled and that the packaging met FedEx M's standards with regard to package resistance to damage. The shipment would be weighed upon pick-up. High-value shipments would, if possible, be individually bagged and a numbered security seal would be attached to each bag. There would be positive handover (scanning, piece count, physical package inspection, security seal integrity check) at each stage of the handling process.

28 When FedEx M was notified that the shipment was a high-value one, the pick-up or drop-off for that shipment would be the last pick-up or first drop-off for delivery with multiple vehicles used for pick-up or delivery, if possible. The courier was instructed not to stop after pick-up or delivery except when there was an emergency or he was legally required to do so. A courier had to follow pre-determined routes and use alternative pre-determined routes where possible.

29 In court, Mr Firdaus also referred to a meeting held in Penang in September 1999 that was attended by representatives from various freight forwarding companies and a representative from Smart. At this meeting, Smart told the freight forwarders about its expectations regarding security and its concerns regarding the potential security risks while its goods were in transit. Various security measures were discussed. In court, Mr Firdaus confirmed that a number of these procedures were standard procedures followed by FedEx M. These included instructing the drivers that they should not stop their vehicles along the roadside and that they should wind up the windows and lock the driver's door and the passenger door when the vehicle was stationary. However, when the vehicle was in motion, the driver's door should not be locked.

30 In relation to the incident in question, FedEx M submitted that the necessary security measures had been followed by Mr Turairaj. The shortest route from Smart's premises to the shuttle point had been taken. The route had been pre-planned by the Penang station and Mr Turairaj followed it. The driver was just about to turn from the access road onto a major highway and it was on that slip road leading into the highway that the hijacking unexpectedly took place. The despatch was carried out in broad daylight. On the morning of the hijack, Mr Turairaj would not have known that he was picking up a consignment from Smart until he was paged while he was undertaking his scheduled deliveries and pick-ups. At that stage he had no knowledge of the value of the Smart consignment. Since Smart used FedEx M's services to ship both documents and high-value cargo, Mr Turairaj could not have known in advance that the package he was going to collect contained high-value cargo rather than documents. It was only when he went to Smart's premises after the call and saw the airway bill that he could have learnt the value of the goods was US$860,000.

The specific allegations of negligence

The manuals

31 I now turn to the specific assertions of negligence that Sun Tech made. The first of these related to the deficiencies of the Go International Manuals. Whilst these manuals each contained two pages relating to security, Sun Tech did not consider that they were sufficient to educate FedEx M's employees on the security procedures to be followed to ensure that their customers' goods were kept safe whilst they were on public roads. The first major deficiency with the manuals was that there was no adequate method of disseminating the information they contained. The manuals were kept in a common area of the office of the Penang station but it was left to the initiative of the individual couriers to familiarise themselves with their contents. Further, the manuals were voluminous and even if a courier looked at it, it was unlikely that he would be inclined to peruse the whole document,

locate the pages relevant to security and read the material. Also, the manuals were in English and this was not the native language of the couriers in Penang. Sun Tech also submitted that this deficiency was evidenced by Mr Turairaj's ignorance of the manuals and the fact that he was more comfortable in Tamil than in English.

32 The second deficiency in the manuals was that they did not set out any criteria directing local management when it would be necessary to promulgate appropriate station security to deal with the local criminal threat. The manuals were meant for use in all countries outside the United States and Kevin Teoh, formerly FedEx M's Penang station operations manager, acknowledged that they would not deal with every security concern specific to Malaysia. As a result of this deficiency, Sun Tech said, there was no evidence of any additional guidelines promulgated by FedEx M to deal with the specific security concerns arising from local conditions in Penang in 2000. In Sun Tech's view, the local conditions included a clear risk of theft on roads since there had been at least two media reports on hijacking of valuable cargo on Malaysian roads in 1999. Further, whilst Mr Ng of FedEx M had stated that since 1994 he had only been called upon to investigate two incidents of hijacking of cargo in Malaysia, one of which was the present incident, since Mr Ng was not the only person who conducted such investigations in Malaysia, it would be fair to infer that there had been other incidents besides these two. Also, the first incident investigated by Mr Ng involved a hijacking of cargo in Kuala Lumpur where the circumstances were very similar to that of the present case since what had happened was that another vehicle had overtaken the FedEx M's courier's van while the latter was on a public road. Both Mr Ng and Mr Firdaus also confirmed that prior to the incident in this case, they were already aware of other incidents of highway robbery in Malaysia. Mr Firdaus also acknowledged that the presence of electronic factories in Penang manufacturing high-value goods would attract thieves. Yet, FedEx M did not appreciate the risks that its customers' goods would face while being carried on Malaysian roads and did not implement any measures to counteract the potential risks in Penang.

33 The position taken by FedEx M was that at the time, based on the information available to it, it considered that there was no imminent threat of hijacking of goods carried by its vans in Penang. Mr Firdaus said that in 1999, he had heard about hijackings that occurred along the highway but these were concentrated on highways located in the central or southern areas and the goods targeted were on their way to the Kuala Lumpur International Airport or to Singapore. The *modus operandi* of the hijackers was to hijack the trucks when they were parked in rest areas along the highway and not at the popular rest stops. Thus, the Penang station considered that those robberies were not relevant to its operations. Secondly, lessons had been learnt after the KL hijack, and Mr Ng had sent out notices to all the managers of FedEx M and told them that their vans should not deviate from the prescribed route along the major thoroughfares. In case a van was attacked and the driver considered that there was no possible escape route, he should not resist the robbery but remember the description of the robbers, listen to their conversation and attempt to note the registration numbers of the getaway vehicles. When the driver felt it safe to do so, he should notify the police. This notification was sent out before the Smart hijacking took place.

34 The third way in which the manuals were allegedly deficient was that they did not contain any procedure for the security of drivers and vehicles while they were moving from point to point on a public road.

35 It cannot be gainsaid that the operations manuals did not set out many security procedures and did not deal in particular with the security procedures to be followed whilst the courier vehicles were on public highways. Additionally, whilst the documents may have been physically accessible to all couriers, it is not likely that many of them would have of their own accord, chosen to spend time familiarising themselves with the contents of the same. Whilst the criticisms made of the manuals may

be well-founded, that cannot be the end of the story. In my opinion, what was more important from the security viewpoint, would be the policies and training in force in the Penang station of FedEx M at the material time.

Training of couriers

36 It should be noted that the evidence in [30] above is also of relevance to the second main allegation made by Sun Tech, *ie*, that FedEx M did not sufficiently educate or train its employees in the necessary security precautions. In relation to this allegation, Sun Tech referred to the evidence given by Mr Turairaj that when he joined FedEx Malaysia he had to join an international hire courier course where he was trained on how to pick up courier shipments and on security precautions. Sun Tech pointed out that FedEx M did not give any evidence as to the specific contents of the course or of the work briefings allegedly conducted by FedEx M. The courier company had also not stated exactly what safety precautions their drivers were supposed to adopt to avoid or deal with a hijack crisis. Mr Phipps noted that the manuals had no instructions on how to handle a hijack situation and that there was no evidence of any training given to the drivers as to how to implement the security measures. In Mr Phipps's view, the drivers should have been trained to observe the following anti-hijacking measures:

(a) to report immediately by means of radio or phone if the vehicle was stopped or held up for any reason;

(b) to remain in the cab with the doors locked;

(c) to switch off the vehicle's engine; and

(d) to switch on the audible alarm that the vehicle should have been fitted with.

I shall hereafter refer to these particular security measures as the "ABCD steps". Further, there was no evidence indicating that FedEx M had supervised its employees sufficiently to ensure implementation of the security measures.

37 On the contrary, Sun Tech asserted that Mr Turairaj gave evidence that showed that he had been trained to allow hijackers to freely take the cargo that he carried. In substantiation, Sun Tech quoted the following passages of the cross-examination of Mr Turairaj:

Q: These precautionary methods – did they include what you should do when you are stopped in the middle of the road by people who wish to rob you?

A: Yes.

Q: What was taught?

A: I was taught to come down and say 'Don't do anything to me. Take whatever you want.'

Sun Tech also pointed out that Mr Turairaj could not remember whether the instructors had made him aware that couriers faced the risk of being robbed on the road. Nor could he recall having been instructed to alert the police in the event that he saw danger to himself on the road from robbers. In Sun Tech's submission, the lack of adequate training was apparent from the fact that Mr Turairaj clearly did not know how to react when the vehicle he was driving was overtaken and forced to stop and the robbers started to approach his vehicle. Had Mr Turairaj been properly trained in the steps

that he should take to secure himself and the vehicle as well as to alert the authorities and/or FedEx M, it was likely, Sun Tech submitted, that the hijack would not have taken place.

38 In response to these allegations, FedEx M reiterated that all its couriers including Mr Turairaj, had received security training that included what should be done in the event of a hijack. It disagreed with the interpretation given to Mr Turairaj's evidence, *ie*, that he had been taught to simply hand over goods to the robbers. In FedEx M's view, that evidence had to be seen in its proper context: although FedEx M trained its employees to treat all goods with care, it nevertheless recognised that the courier's safety was of paramount importance and that the courier was not supposed to aggravate the robbers by resisting them, thereby putting himself at greater risk. Mr Phipps had himself agreed with this policy that the couriers were not required to sacrifice their lives for their customers' goods.

39 FedEx M also attacked the criticisms of the efficacy of its training methods by focusing on the concessions that Mr Phipps himself had made in cross-examination. It considered that he had conceded in court that training procedures would not be able to replicate the threat to the employee's life in a real-life emergency situation. This submission was based on Mr Phipps' agreement that in a real-life hijack situation there was an element of a surprise attack which would be absent from the training sessions and that in an actual situation the driver would have a reasonable fear of being harmed which fear would not exist when he was simply attending a training session. Ultimately, it said the driver would be the one best placed to make his own judgment as what should be done in a particular situation. It would be dangerous to insist that an employee should resist the hijack by locking his doors. FedEx M's policy that the driver's safety was paramount was the best and safest policy. Mr Phipps himself had agreed that the advice to be given to the driver would be that in the event of a hijack happening, he should follow the ABCD steps but that his safety was paramount and that in determining whether his safety would be compromised by following the ABCD steps, the driver would be the best judge of the circumstances.

40 Finally, cross-examination had shown that training would not be effective in a hijack situation. On the contrary, any training that advocated the diminished perception of an employee of a threat to his life or personal safety in a hijack or emergency situation, was both dangerous as well as contrary to the norms of expectable security policies for companies and their employees.

Securing of vehicles

41 The third assertion made by Sun Tech was that FedEx M had failed to ensure that, at all times, all doors of the vehicle were locked and that all windows were wound up. Mr Phipps considered that Mr Turairaj's failure to lock the door was one of the circumstances that led to the loss. Kevin Teoh had testified that one of the security procedures in place in the Penang station was that all vehicles had to be locked and all windows closed whenever a vehicle was parked. Mr Turairaj had also testified that he was trained that the back door of the van must be locked at all times and that the passenger door must also be locked. The driver's door was to be locked when the vehicle was not in motion. FedEx M had no requirement for the driver's door to be locked while the van was moving. Mr Turairaj confirmed that there was no such security measure.

42 In the view of Sun Tech, the total absence of such procedures explained the apparent ease with which the van that Mr Turairaj was driving was taken over by the hijackers. At the time of the hijack, the driver's door of that van was not locked. One of the alleged hijackers was able to open the driver's door from the outside. Mr Turairaj admitted that the reason why the robber could open his door was that he had not locked it. Mr Turairaj further admitted that if the driver's door had been locked, the robber would not have been able to open his door, turn off the engine and pull out the

keys. Mr Ng also conceded that if the doors had been locked, Mr Turairaj would have remained safely inside the vehicle. Had the van been better secured, the hijackers would not have been able to injure Mr Turairaj, and take over control of the van, resulting in the loss of the cargo. When the robber approached the van, it was still open to Mr Turairaj to secure himself in the vehicle by locking his door. Had he done so, Sun Tech argued, it was unlikely that the Malay man would have been able to gain access to the van and the cargo within.

43 FedEx M responded to these submissions by making strong criticisms of Mr Phipps in relation to the ABCD steps. It pointed out that the ABCD steps had not been included in Mr Phipps' original report and considered that it was an acknowledgement by Mr Phipps as to the shortcomings of his report that he felt it necessary to include the ABCD steps as an additional security recommendation when he was on the stand. In FedEx M's view, the ABCD steps were an afterthought since up to the time of hearing in these proceedings (including the evidence that he gave in Suit 260/2002), Mr Phipps had said nothing about the steps. It also pointed out that when Mr Phipps had been asked in court whether he agreed that even if the driver had adopted all four steps, the hijack could not have been prevented, his reply was: "I cannot say that it would have been prevented."

44 FedEx M also submitted that it became clear in the course of cross-examination that the ABCD steps were based entirely on Mr Phipps' conjectures as to what FedEx M's driver could have done or should have done. Mr Phipps agreed that the safety of the driver was of primary importance. He also agreed that even if the driver had remained in the cab, he was only speculating if he said that the driver would not have been harmed. He then agreed that he could not say whether by not remaining in the cab the driver was doing the right thing or the wrong thing. He accepted that if the driver had taken that course, there was a possibility that the attackers would have turned aggressive, smashed the window and harmed the driver. When Mr Phipps was asked whether he agreed that there was at least an equal chance that the robbers in this case would either have harmed the driver or that they would have gone away, his answer was that: "Yes, it's heads or tails." I should note here that after this answer, Mr Phipps was quick to add that in his personal opinion, given of course with hindsight, the robbers may well have decided that they had better go away. He did also agree, however, that at that time of the incident, there was no way that the driver could make an assessment as to whether the gang was armed with firearms.

45 FedEx M also picked up on Mr Phipps' evidence that in determining whether his safety would be compromised, the driver would be the best judge of the circumstances. It said that in this case, a hijacker from the car rushed at Mr Turairaj, opened the door, turned off the engine and forced him to unlock the passenger door. Another hijacker hit him on the head with a three-foot long metal rod until he passed out. What more could Mr Turairaj have done, it asked.

46 It also submitted that Mr Phipps' suggestion that the driver should lock the doors and stay in the vehicle was clearly premised upon the fact that within the airport, there would be, as Mr Phipps put it "a rapid response" from security personnel. Mr Phipps agreed in cross-examination that the first step, staying in the vehicle, was premised on the assumption that help could be summoned from airport police guards on a very urgent basis in the event of an attack. He also said that assuming help could be summoned, the safest place for the driver would be inside the cab. He agreed that it was reasonable for a driver within the airport premises to believe that help could be summoned on an urgent basis. Whilst he agreed it was possible that the life of the driver might be in danger if the response was delayed, Mr Phipps said that that was not necessarily the case. He was asked whether he agreed that a driver who operated a vehicle on a one-way road 15 miles away from the airport was operating within an entirely different environment from that found within the airport premises. Mr Phipps gave the rather careful answer, "It is a different environment, yes". He was then asked if he agreed that in that environment the rapid response regime present in most airport premises would

be absent. His response was an equally careful, "I cannot say – it depends on the local situation and conditions". On being pressed, he said that he did not know what the attitude of the local police commandants would be as to the type of response they would have on a motor highway. FedEx M thought it very telling that Mr Phipps did not know what sort of response the local police would have and yet expected the driver to know and stake his life on it. It considered that the ABCD steps were textbook recommendations and what Mr Turairaj could or should have done without any sense of the environment within which the latter had to operate.

47 Finally, FedEx M said Mr Phipps himself had downgraded the status of his ABCD steps to the status of a personal opinion. It also emerged during cross-examination that this personal opinion was not reflected in any form of industry practice or documents. He conceded that the first step, *ie*, that the driver should remain in his cab and call on his mobile phone was not provided in any AHM. He agreed he was not aware of this policy being implemented by any of the courier companies in Penang and also that he could not refer to any documents in the proceedings to show that there was a basis for this policy.

Armed escorts

48 The next allegation made by Sun Tech was that because its cargo was valuable cargo, FedEx M should have ensured that there was armed security at all times during transportation of the goods. It noted that Mr Turairaj had testified that he was aware that the contents of the packages collected from Smart were modules and that their value was US$860,000. It surmised he must, therefore, have known that the cargo was valuable and since he was the sole designated courier for the zone in which Smart's factory was located, he should have been trained in steps to safeguard that cargo. Not only was he not given adequate training, Sun Tech contended, but FedEx M failed to ensure that the vehicle in which the goods were transported was an armoured vehicle or one armed with security devices to prevent unauthorised access.

49 In this respect, Sun Tech relied on AHM 953 that sets out the vehicle design specification required to ensure the security of cargo transported in such vehicle. These specifications include insuring that the driver's cabin is bullet-proof all round, the access to the driver's cabin is through a door which can only be opened by a special key which is also used for starting the engine, there is no door handle on the outside of this door, the access to the cargo compartment is through a side opening on the driver's side which can be closed by a roller shutter and which is locked in the same way as the driver's cabin, and that the vehicle is equipped with a two-way radio and has an optical and audible alarm system which can either be triggered by the driver or from the cargo compartment. Mr Phipps stated in his report that the purpose of the aforesaid specifications is, in the event of an attempt to interfere with the operations of the van from outside, to enable the driver to remain securely in the cab, to summon assistance and to activate a visible and audible alarm. Sun Tech criticised FedEx M for not providing such a vehicle. It was obvious from the evidence that the access to the driver's cabin of the van driven by Mr Turairaj was not as secure as required in the specifications. There must have been a handle on the outside of the driver's door as the Malay man was able to open the door himself from the outside. Also, the door was not locked hence inviting easy access. Further, access to the vehicle's cargo compartment was not as secure as required. All the robbers needed to do to obtain access to the cargo compartment was to take the key from Mr Turairaj. Sun Tech pointed out that after the incident, FedEx M started using armoured vehicles in order to provide its customers with better security. Sun Tech also noted that there was no evidence that the van had a two-way radio which would have allowed Mr Turairaj to send a distress call when his path was blocked and the robbers were approaching the van. There was not even evidence that the van had any kind of alarm system which Mr Turairaj had triggered at that time. Had the van been so equipped, Sun Tech submitted, Mr Turairaj could have either alerted the police authorities or the

Penang station and asked for help. Furthermore, if there had been an audible and visible alarm, this may have deterred the hijackers from taking over the van and its cargo.

50 Sun Tech also submitted that FedEx M had a duty to ensure that there was armed security at all times during the transportation of the cargo. In this regard, it relied on the reports of Mr Phipps who said that the nature of the consignment and the method of transportation and routing clearly indicated a need for the presence of an escort and possibly an armed escort if local laws and regulations permitted this. Sun Tech referred, in this connection, to the meeting in September 1999 between Smart and the freight forwarders' representatives and Smart's emphasis that all freight forwarders should have tight security, including, *inter alia*, having an armoured truck and armed security. Yet despite the importance of this provision having been highlighted to it, FedEx M had failed to provide for any such escort to accompany the goods collected from Smart. Had there been armed security escort accompanying the goods said Sun Tech, it was very likely that the hijack would have been avoided.

51 In this connection, Sun Tech also relied on Mr Phipps' opinion that in the event that the shipper refused to appoint an armed escort, it would be prudent for Smart not to carry the goods at all. More importantly, it said, it was the responsibility of FedEx M to ask its customers whether they required an armed escort for the transportation of valuable goods. As FedEx M was aware that Sun Tech's goods were valuable it had an obligation to inform the latter that such escort would be necessary to ensure the safety of its goods. The failure to do this by FedEx M was a breach of its duty to take reasonable care of the cargo.

52 In response to these submissions, FedEx M contended that whether or not it had been negligent could not be assessed against the standard set out in the AHMs. This was because it was clear from Mr Phipps' own evidence that the IATA AHMs did not form the standard for the carriage of goods by land. Most major courier companies were not members of IATA, as Mr Phipps himself agreed, and therefore were not bound to the AHMs. FedEx M itself was not a member of IATA nor were DHL or UPS. Secondly, the IATA AHMs applied only to airport operations. Whilst Sun Tech had alleged in its submissions that it was "accepted practice" that the AHM was applicable from the point in time at which the carrier issued the airway bill or the carrier's agents accepted the goods listed in the airway bill, the only evidence cited in support of this practice was Mr Phipps' own testimony. Moreover, it was plain from a reading of the "Introduction" to the AHM that it referred only to airport operations. AHM 953 which requires vehicles to meet certain specifications itself by para 1.2 states that the vehicle concerned is the one to be used between the cargo terminal and the aircraft, *ie*, within the airport premises. Mr Phipps on cross-examination agreed that this was the case. He maintained, however, that the cargo terminal would sometimes be outside the premises of the airport but FedEx M submitted that in this case the cargo terminal was located inside the Penang airport and the hijack took place miles away from the airport's boundary. In any event, Mr Phipps had agreed that it was not mandatory even for members of IATA to provide a vehicle that complied with AHM 953. He had also agreed that in his report he had not been suggesting that FedEx M had been required to provide a van that complied with AHM 953. Mr Phipps explained that as part of his duty to the court, he had set out the industry security standards in his report so as to enable the court to decide the relevance that such standards had to the standards applied by FedEx M.

53 In relation to Mr Phipps' assertion that FedEx M should have provided security escort, the rebuttal submission was that in the circumstances of this case, that assertion was fallacious. FedEx M stressed that it was a courier company, not a security company, and that in Malaysia, courier companies did not provide armed security. Only licensed security companies were allowed to do that. There was, also, no contractual term requiring FedEx M to provide security escort. Mr Phipps conceded too that failure to provide an armed escort would not by itself constitute a breach of any

IATA guidelines. Further, FedEx M's witnesses testified that it was not industry practice for courier companies to do the job of security companies by providing armed escorts. Mr Phipps had agreed that there was a big difference between the services rendered by security companies and courier companies and that the latter did not practise, as part of their services, the provision of armoured cars and armed escorts.

54 FedEx M also relied on evidence that it said showed that Smart had been informed that FedEx M did not provide security escorts and that Smart should obtain its own escort if it wanted one. First, it was clear from the minutes of the meeting of 24 September 1999 that when Smart had made a request to have an armoured and armed security, Mr Firdaus had refused to provide the same. In the minutes he was stated as having said that FedEx M was "well controlled with all security controls and … [did] not need any additional controls". Secondly, under cross-examination, Mr Firdaus had testified that FedEx M's customers who were high-end electronics manufacturers had asked FedEx M about precautions against theft and robbery. Sometimes these queries had been as to whether FedEx M provided security escorts. Mr Firdaus' standard advice to the customers had been that FedEx M did not provide security escorts and customers who required the service should arrange it themselves. He added that security escort service was a very expensive service and manufacturers had always tried to pass the cost of such a service onto the buyer or the transport company. So it was routine for them to find out whether FedEx M would provide the service within what he called "the realm of freight cost". If that service was not covered by the freight, the manufacturers would have to engage their own escorts at their expense. Usually they did not choose to do so because of the cost. FedEx M submitted that Sun Tech had not been able to refute the position that Smart had been told to engage its own escort and had declined to do so. FedEx M also submitted that Smart would or ought to have had the same level of knowledge as FedEx M had as to how safe it was to transport the goods by road in Penang in 2000. Since Smart had not chosen to provide an armed escort for the transport of cargo at that time, Sun Tech could not now assert that FedEx M ought to have declined to transport the goods without such an escort. Smart, with the local knowledge that it had, had been prepared to take the risk involved in transporting the goods without such an escort.

55 FedEx M considered it telling that up to the time of the trial, Smart had continued to engage its services for the transportation of its goods. It was even more significant that immediately after the incident, Sun Tech had engaged its own armed security escorts for the FedEx M vans and that that practice had continued thereafter. FedEx M submitted that this practice accorded with its own position that it did not provide such escorts but clients who required the same were free to engage them on their own. It also pointed out that Mr Ng's evidence was that even after the incident took place, FedEx M continued to operate using its normal vans and did not change to armoured vehicles.

56 FedEx M also took issue, strenuously, with the suggestion made by Mr Phipps in court that FedEx M should have declined to carry Sun Tech's valuable goods. It noted that it had never been pleaded that it was a breach of duty on part of FedEx M to carry the goods in the first place. Also, this assertion had not been made in Mr Phipps' report, his affidavit of evidence-in-chief, or his evidence during the hearing of Suit 260/2002. In any case, Mr Phipps had categorised the assertion as a personal opinion. FedEx M submitted that Mr Phipps had given this opinion after it became clear that there was no basis on which he could say that FedEx M had a duty to provide an armed escort. When he was asked to agree that the carrier was under no obligation to provide an armed escort particularly if the shipper had not even asked for it, Mr Phipps disagreed because he considered that the carrier still had the responsibility for deciding whether or not to carry a consignment of this nature without an armed escort. Prudence, he said, might direct that the carrier declined to carry the shipment. He also said that personally he would exercise prudence and decline to carry a shipment when, in his view, there was an unacceptable risk if the goods were carried without an armed escort. FedEx M submitted that this evidence was clearly an afterthought.

57 FedEx M further submitted that Mr Phipps had not been able to substantiate any suggestion that there had been, at the material time, an unacceptable risk in it carrying Sun Tech's goods. Under cross-examination, Mr Phipps agreed that in order to assess whether or not a risk is acceptable, one needed to have knowledge of the local security threat at Penang. It was put to him that since he did not have such knowledge, he was in no position to assess whether or not there had been an unacceptable risk for FedEx M to carry the goods without an armed escort. Mr Phipps had then agreed that he was not able to tell the court whether or not there had been such an unacceptable risk. It also pointed to evidence from Mr Phipps under cross-examination that at the time he made this report he had no knowledge of the extent of the threat in Penang as opposed to the general threat of hijacking in West Malaysia nor did he assess whether the threat of hijacking disclosed by certain media reports on incidents in other parts of Malaysia was a threat that was uniform throughout West Malaysia. Mr Phipps also admitted that the media reports that he had definitely read when preparing his own report for this suit did not contain even a single mention of a hijacking in Penang. Nor had any of them specifically mentioned the threat of lorry hijacking in Penang.

Stoppage of vehicle

58 The next allegation made by Sun Tech was that FedEx M had failed to ensure that its van would not stop along the route or make diversions or transfers in the course of the transportation. Kevin Teoh of FedEx M had testified that couriers were instructed not to stop after pick-up or delivery except for emergency purposes or where legally required to do so. Furthermore, according to Kevin Teoh, where the Penang station was pre-notified that a shipment was going to be of high value, the courier would be instructed to perform a last stop pick-up, *ie*, that package would be the last one to be picked up before going to the shuttle point. In this case, however, Mr Turairaj had made a stop by going to Acer's factory to make a delivery when, as Mr Ng admitted, strictly speaking, he should not have stopped anywhere. Sun Tech submitted that by failing to go straight to the shuttle point after picking up the goods from Smart, Mr Turairaj had exposed them to the risk of theft. Further, had he not stopped, the hijack may have been avoided all together as he would not have been at the spot along Jalan Jelawat at the time of the hijack. It appears to me that this suggestion is speculative. Further, Sun Tech did not suggest a reasonable method whereby FedEx M having given its couriers instructions on the last-stop procedure, could have ensured that at all times these instructions were followed to the letter by the couriers.

Mr Turairaj's alleged involvement

59 The next allegation was that FedEx M had failed to show that Mr Turairaj was not involved in causing the loss. Sun Tech asserted, and I agree, that since FedEx M had pleaded that the hijack was the cause of the loss, it had to prove that the hijack had in fact taken place. Sun Tech's position was that FedEx M had not discharged its onus of proof on this point. Whilst some evidence supporting the allegation of hijack had been given, in Sun Tech's view, that evidence was fraught with inconsistencies. These inconsistencies related to place of the hijack, the time of the hijack, inconsistencies between various reports, inconsistencies in Mr Turairaj's evidence, inconsistencies in Mr Ng's evidence and Mr Turairaj's recent suspension from duties by FedEx M.

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.

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.

62 Sun Tech then pointed to the inconsistencies that it considered existed between the police report made by Mr Turairaj about two hours after the incident and the contemporaneous reports made by Kevin Teoh and Mr Ng who had both interviewed Mr Turairaj shortly after the incident. These were as follows:

(a) In his police report, Mr Turairaj said that he could not remember the licence number of the vehicle that had overtaken him. Also, he did not specify the colour of that vehicle. Subsequently, when interviewed by the FedEx M employees, Mr Turairaj identified the vehicle as a white Proton Iswara. In a subsequent interview, eight days after the incident, Mr Turairaj stated that the licence plate was a "W" plate indicating the car was registered in the Federal Territory.

(b) In his interview with Mr Ng, Mr Turairaj said he had fainted. He also stated in his affidavit of evidence-in-chief that he had lost consciousness. According to Kevin Teoh, however, Mr Turairaj had told him that he was conscious throughout the incident. In the police report, Mr Turairaj had not mentioned his lost of consciousness.

(c) In his interview with Kevin Teoh and in his affidavit, Mr Turairaj said two male Malays had alighted from the Proton but when Mr Ng interviewed Mr Turairaj, he only referred to two persons (race unspecified) alighting from the Proton. There was also the fact that in the police report, Mr Turairaj said that there were four Malay men inside the Proton whereas in the interview with Mr Ng he simply referred to four persons and when he spoke with Kevin Teoh, he reported only seeing two Malay males in total.

(d) Mr Turairaj told Mr Ng that he himself had opened the passenger door and recited this same story in his affidavit but according to Kevin Teoh's report on his interview with Mr Turairaj, the "suspect" opened the passenger door.

(e) Mr Turairaj told Kevin Teoh that the hijackers had left him with a black jacket covering his head. In his affidavit of evidence-in-chief, Mr Turairaj claimed that, in addition, the hijackers had tied his hands together. Neither of these items was mentioned in Mr Ng's report or in the police report.

(f) Mr Turairaj told Mr Ng that the hijackers moved the van once before stopping. In the affidavit, he said that the van had moved twice before the hijackers left him. There was no reference in Kevin Teoh's report or the police report to the moving of the van.

(g) Mr Turairaj told Mr Ng that he was told by the hijackers to remain in the van for half an hour. This was not mentioned in Kevin Teoh's report or in the police report.

(h) The number of Acer cartons stolen varied: Kevin Teoh said four, Mr Ng said one and the police report said two Acer cartons had been taken.

63 Sun Tech then went on to submit that there were many aspects of Mr Turairaj's evidence that suggested his involvement in the hijacking. At best the inconsistencies in his evidence revealed that his credibility was suspect. It submitted that his evidence should be disregarded or treated with caution. It made the following points as to why Mr Turairaj's involvement in the loss could not be ruled out:

(a) First, there was the issue of his timings because by those timings he would not have been at Jalan Jelawat at the time of the hijacking. Further, his alternative timings would have placed him at the scene of the crime well before the hijackers had arrived.

(b) Secondly, he was the only courier who was assigned to the zone where Smart's factory was located and generally, the shipments from Smart were worth about US$30,000. Thus, Mr Turairaj must have known that the shipment that he was only to collect on 28 August 2000 would be valuable. He also confirmed that he was aware on collection that the value of the modules was US$860,000.

(c) Mr Turairaj failed to react when the alleged hijacker approached his van. He attempted to justify this inaction by saying that when he was stopped the person who came to his door told him that the van was being repossessed. Sun Tech thought that this excuse was incredible as FedEx M as an international company was highly unlikely to default on its instalment payments and allow its van to be repossessed.

(d) Mr Turairaj's testimony that the road where he was overtaken was a one-way road could not be believed as such a road would not have been wide enough to enable a car to overtake the van.

(e) The fact that Mr Turairaj was not consistent as to whether he had lost consciousness or not strongly indicates the likelihood that he had actually been conscious throughout and had not succumbed to the hijackers as he wanted the court to believe.

(f) Mr Turairaj had told Mr Ng that one of the hijackers had hit him on the head three times using a metal rod. Under cross-examination, he admitted that he was not sure whether he was hit three times though he said he was sure he was hit once and could not remember how many other times he had been hit. Sun Tech argued this evidence made it very doubtful that Mr Turairaj was hit at all.

(g) The doubt was made greater by the fact that only one area on Mr Turairaj's head was injured. As Kevin Teoh had observed in his report, it was not believable that multiple hits could have landed on the same spot.

(h) Sun Tech also considered that the story of being hit three times was made more suspect by the fact that there were no injuries on Mr Turairaj's hands. If he had really been attacked, then after the first hit, he surely would have attempted to defend himself from subsequent blows.

(i) Mr Turairaj had claimed that he was in the vehicle at the time he was hit. Given the space constraints of the cab of the van, however, it was difficult to see how a person wielding a three-foot long metal rod could strike another, who was within the vehicle and protected by the frame of the door, three times on the head. Sun Tech suggested that Mr Turairaj was more likely to have been standing outside the van when he was hit.

(j) Sun Tech averred that during his oral testimony, Mr Turairaj was reluctant to admit to anything even when the evidence was clear which, it said, was a sign that he had a guilty conscience. For example, although he had definitely picked up the cargo from Smart's premises, when shown Smart's Shipment Release Permit, Mr Turairaj insisted that the signature appearing on the document under the word "FedEx" was not his.

(k) In Sun Tech's view, Mr Turairaj had tried to convince others that he had been severely injured by the hijackers in order to demonstrate that he was no involved in the hijack. He had claimed that his wound was bleeding profusely, that he was in a semi-conscious state and feeling giddy and reeling from shock. This was a false picture of his state said Sun Tech because Mr Turairaj was able to drive himself to the police station. He did not consider going for medical treatment but went straight to the police station. Furthermore, the medical report said there was no loss of consciousness, no active bleeding and no fracture. Thus, Mr Turairaj must have connived with the hijackers and arranged with them to injure him so as to give credence to his story that he had been attacked.

(l) Finally, it was highly suspicious that Mr Turairaj called the Penang station using his wife's new hand phone since it takes at least eight to ten hours to charge the battery of a new phone before it can be used.

64 Sun Tech suggested that what had in fact happened was different from the account given by Mr Turairaj. It relied on information obtained by Mr Ng when he made his investigation into Mr Turairaj's background to allege that at the time of the incident, Mr Turairaj was living beyond his means, had a mistress and was not performing satisfactorily at work. It conjectured that Mr Turairaj had planned the theft together with the hijackers in order to solve his financial problems. He was aware of the high value of the Smart goods and arrived at Jalan Jelawat well before 12.25pm. He then awaited the hijackers' arrival. When his accomplices arrived, Mr Turairaj alighted from his van and allowed the accomplices to strike with a metal rod. He was conscious throughout, he was not tied up. His accomplices drove him to the beach area and left. After a short while, Mr Turairaj contacted his office to report the hijack.

65 Moving to another area, Sun Tech pointed out that Mr Ng had been sceptical at the beginning as to whether there had been a genuine robbery. By the time of the hearing, however, he was satisfied that there was a genuine hijack and Mr Turairaj was not a party to it. Yet, when he was asked to explain his change of opinion, he gave an answer that Sun Tech considered to be woefully inadequate. He said: "I was playing the devil's advocate … I was thinking that no one would want to

suffer that kind of serious injuries to effect a robbery because it may take his life." His explanation therefore hinged on the fact that Mr Turairaj would not want to suffer head injuries. But, Sun Tech pointed out, he had been aware of the possibility that Mr Turairaj's head injury was not as serious as Mr Turairaj had said, as early as 9 September 2000. He expressed his doubts in an e-mail in which he said that if the wound was bleeding profusely as claimed by Mr Turairaj, he should have passed out owing to loss of blood rather than remaining conscious for another two hours. In view of this evidence, Sun Tech submitted that Mr Ng's sudden change of opinion in relation to the authenticity of the robbery was suspect and should be treated with caution.

66 Finally, in relation to this contention, Sun Tech seized on the notification given by counsel for FedEx M on 26 May 2005 during the third hearing that Mr Turairaj had been placed under investigation and suspended from duty. Mr Turairaj testified that this suspension had been imposed because FedEx M thought that he might have a previous criminal record. According to Mr Turairaj, this suspicion arose because FedEx M had found out that in 1990 or 1991, Mr Turairaj was involved in a police investigation when some property belonging to his previous employer was lost. On the basis of that evidence, Sun Tech submitted that FedEx M had not taken reasonable care to check Mr Turairaj's background before employing him. This explained why they had only lately discovered his previous criminal history. Sun Tech considered the decision to suspend Mr Turairaj as being very telling as it indicated that FedEx M was of the view that Mr Turairaj's character was suspect and therefore, pending further investigations, he should not be allowed to carry out duties which involved transporting high-value cargo.

67 While dealing at length with Sun Tech's allegations regarding Mr Turairaj, FedEx M first took the point that whether or not Mr Turairaj was involved in the hijack had no direct relevance based on Sun Tech's pleaded case since it had not pleaded that Mr Turairaj was involved. I note that point. In my view, however, since FedEx M had to show that the hijack was an event that was beyond its control, it had also to establish that none of its employees were involved in the hijack. If Mr Turairaj or any other member of its staff had participated in the robbery, then FedEx M would be liable for their actions. It was therefore not necessary for Sun Tech to plead that Mr Turairaj was involved – it was for FedEx M to show, on the balance of probabilities, that he was not.

68 In its submissions on this point, FedEx M relied on the evidence that Mr Turairaj was:

(a) remanded in police custody for 28 days;

(b) cleared by the police of any involvement in the robbery; and

(c) not charged with any offence either at that time or any time thereafter up to the date of his testimony in court.

It submitted that any argument by Sun Tech that Mr Turairaj was involved in the hijack was not backed by evidence but was speculative.

69 The Malaysian police conducted a full investigation. They detained eight suspects, including Mr Turairaj, to assist in the investigation. These suspects were all subsequently released as it was determined that they were not involved in the incident. In August 2002, the police informed FedEx M that investigation into the case was still ongoing and the company would be told if there was any further development. Up to the date of the trial, no charges had been laid against anyone. FedEx M pointed out that Mr Phipps was aware that Mr Turairaj had not been charged with any offence. He had conceded that he had no reason to doubt the competence of the Malaysian police or the integrity of their investigations. Mr Phipps also acknowledged that he had no reason to disbelieve that

Mr Turairaj had been detained for 28 days which he also stated was a lengthy investigation. He agreed that the police had not held the suspects longer than necessary for them to conduct proper investigations. Mr Phipps was asked what significant evidence existed that should have been considered to determine whether Mr Turairaj could have been involved in the crime. His reply was that the police should have considered the driver's account of what had happened, the medical report of the driver, the driver's account of his use of the new mobile phone, his account of his timing and his account of his actions from the time he picked up the goods in question. Under subsequent cross-examination, Mr Phipps admitted that he had no reason to believe that the police investigators had not properly considered any of these factors. Accordingly, FedEx M submitted, the court too should have no reason to doubt that the investigation was lengthy and thorough and considered all relevant evidence. Since Mr Turairaj was released after such a thorough investigation, the only possible conclusion that could be drawn was that he was not involved in the crime.

70 FedEx M also relied on a report given by Crawford & Company International Pte Ltd ("Crawford") to Sun Tech's underwriters. This company had been hired by the underwriters to investigate the circumstances of the loss of cargo. In Crawford's "Preliminary Report on Marine Cargo Loss", it was stated that Crawford had had lengthy discussions with the police investigating officers who were very suspicious about the involvement of Mr Turairaj. They intended arresting him and several suspected accomplices. According to Crawford, the police intended to interrogate these persons "with a view to forcing confessions". FedEx M submitted that this showed that the Malaysian police had taken a very aggressive stance in the investigation and yet there was insufficient evidence even to support the issuance of a charge against Mr Turairaj. This pointed inexorably to Mr Turairaj's innocence, particularly in the absence of any contrary evidence from Sun Tech. Sun Tech, or at least its underwriters, had had private investigators in the shape of Crawford looking into the loss but no evidence prejudicial to Mr Turairaj or FedEx M had come from their investigation.

71 FedEx M considered that in its submissions Sun Tech had minimised the injuries suffered by Mr Turairaj. It emphasised that his wound was five to six inches long and required ten stitches. He was also warded in hospital for observation and a CT Scan. Thereafter, he was given 14 days medical leave. In the view of FedEx M in the light of this evidence, any submission that the wound sustained by Mr Turairaj was superficial was an irresponsible one.

72 FedEx M poured scorn on Sun Tech's alternative version of how the hijack had taken place. It noted that that version of the facts had not been pleaded nor even put to Mr Turairaj or Mr Ng when these witnesses were on the stand. In its view, this version was entirely speculative and lacking an evidential basis. Also speculative was Sun Tech's submission that if Mr Turairaj had not stopped at Acer, he could have reached the shuttle point earlier and may not have been at the spot where the hijack took place, thereby avoiding the hijack altogether. FedEx M pointed out that there was no basis for this submission since no one knew what the hijackers were doing – they could very well have been tailing Mr Turairaj or waiting to ambush him: the possibilities were endless.

73 Faced with the fact that Mr Turairaj had not been charged, FedEx M considered that Sun Tech had to resort to highlighting minor inconsistencies in the various reports, some of which were not inconsistencies at all. This was because the police report covered only the main points and those were in line with what Mr Turairaj told Mr Ng and Kevin Teoh but since the latter, in particular Mr Ng, had asked probing questions to obtain information, additional information had come to light in the course of the interview. It was illogical for Sun Tech to submit that whatever was not included in the police report but was told to Kevin Teoh or Mr Ng was inconsistent with the police report. Further, minor inconsistencies did not establish that Mr Turairaj was involved in the hijack.

74 The alleged inconsistencies that Sun Tech saw in Mr Turairaj's evidence in court were,

FedEx M submitted, again largely based on speculation. For instance, it had claimed that it would be difficult to see how Mr Turairaj could be hit when he was inside the vehicle. Sun Tech had not, however, adduced any evidence that demonstrated that Mr Turairaj's account of being hit inside the vehicle could not be true. There was no re-enactment of the situation nor any report by an expert that such an attack could not have taken place. Similarly, Sun Tech alleged that it was suspicious that Mr Turairaj was able to use a new hand phone to contact the Penang station because it asserted that the hand phone would have to be charged for at least eight to ten hours before it could be used. There was neither evidence that it was not charged for that length of time nor any evidence that the particular model of hand phone used by Mr Turairaj needed charging for that length of time before it could be used for a short phone call.

75 As regards the allegation that Mr Ng's change of opinion was suspect, FedEx M submitted that Mr Ng was discharging his responsibilities by investigating the matter thoroughly and raising all suspicion and possibilities to the police. FedEx M said it was a reputable company with well-established clients and had no reason to want to risk any damage to its reputation by protecting Mr Turairaj. Having thoroughly investigated Mr Turairaj, Mr Ng was able to come to the conclusion that he was not involved in the hijack.

76 As regards the allegation that Mr Turairaj could not have been overtaken because he was travelling on a narrow one-way road, FedEx M pointed out that when this had been put to Mr Turairaj in cross-examination, his answer was that he was overtaken along a two-way road. He referred to a photograph to show that the road in question was originally a dual carriage way and then it turned into a one-way street and stated that it was after overtaking him and once both vehicles reached the one-way street, that the Proton had stopped and blocked Mr Turairaj's way forcing him to stop as well.

77 As regards timings, FedEx M pointed out that Kevin Teoh's evidence was that Mr Turairaj would have to leave the shuttle point by 1.00pm and would have to reach it by 12.50pm. When Mr Ng was questioned, he was told that Kevin Teoh had said that Mr Turairaj would have to reach the shuttle point by 1.00pm and therefore Mr Ng had given evidence on the timing on the wrong basis. Kevin Teoh had also stated that it would have taken 20 minutes or more, if there was a jam, to reach the shuttle point from Acer. Since Mr Turairaj could not be sure of reaching the shuttle point by 12.50pm if he left Acer at 12.25pm, FedEx M submitted that it was highly unlikely that he could have left Acer at that time. This was especially so since he had previously received a warning for being late. Mr Ng had testified that if Mr Turairaj had been late and had had to proceed directly to the airport instead of handing over the goods at the shuttle point, he would have been disciplined. In these circumstances, it was eminently reasonable for Mr Turairaj to have been concerned about reaching the shuttle point on time and no reason to believe that he was untruthful when he said he was rushing out of the Acer factory to get to the shuttle point.

78 As regards the alleged inconsistencies in terms of various driving distances and timings given by Mr Turairaj, FedEx M said that these were not significant as the timings and distances were rough estimates in relation to an incident that took place years ago. Mr Turairaj could not be expected to keep track of every minute or kilometre of an incident that happened so long ago. In any case, the logbook which showed the timings had been given to the Malaysian police who had subsequently released Mr Turairaj. As for Mr Turairaj's recent suspension, that was of no relevance to the case and simply indicated that FedEx M was candid with the court in order to give Sun Tech every opportunity to cross-examine Mr Turairaj while he was in FedEx M's employ.

Holdings

79 Having considered the evidence and the submissions including the matters summarised above, I have come to the conclusion that the loss of the goods was caused by an event beyond the control of FedEx M, to wit, the hijacking of its van by persons unknown. I have also concluded that there was no negligence on the part of FedEx M or its employees that was causative in relation to the loss.

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 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 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.

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.

83 In respect of the evidence given by Mr Phipps, although he did consider that FedEx M had not implemented a proper security system, he also conceded that this hijack could not have been prevented. Mr Phipps did not have sufficient local knowledge of conditions in Penang at the time of

the incident to give authoritative evidence on the type of security precautions that were required in those conditions. I think that at times he set the standards far too high.

Conclusion

84 In the result, this action fails and must be dismissed with costs.

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