PT Soonlee Metalindo Perkasa v Synergy Shipping Pte Ltd (Freighter Services Pte Ltd, Third Party)
[2007] SGHC 121

Case Number : Adm in Per 143/2005

Decision Date : 27 July 2007

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Loo Dip Seng and Charmaine Fu (Ang & Partners) for the plaintiff; Bazul Ashhab Bin Abdul Kader and Kelly Yap Ming Kwang (T S Oon & Bazul) for the defendant; Wendy Tan and Anand Su Yin (Haq & Selvam) for the third party

Parties : PT Soonlee Metalindo Perkasa — Synergy Shipping Pte Ltd — Freighter Services Pte Ltd

Admiralty and Shipping – Carriage of goods by sea – Third party providing unseaworthy barge to carrier of goods – Whether third party liable to indemnify carrier of goods for loss caused by unseaworthiness of barge

Admiralty and Shipping – Carriage of goods by sea – Voyage charterparties – Seaworthiness – Goods falling overboard during voyage – Whether barge unseaworthy – Whether loss of goods caused by unseaworthiness of barge or inadequate lashing

Admiralty and Shipping – Limitation of liabilities – Bill of lading specifying goods "shipped on deck at shipper's risk" and containing limitation clause – Whether clauses in bill of lading incorporated into contract of carriage – Whether clauses sufficient to exclude or limit carrier's liability

Contract – Contractual terms – Contract of carriage – Whether any implied or express term that carrier would only use its own barge to carry goods

27 July 2007 Judgment reserved.

Judith Prakash J

Background

1 This is a claim arising out of the carriage of goods by sea. The plaintiff, PT Soonlee Metalindo Perkasa, an Indonesian entity, was the owner of 300 bundles of deformed steel bars (81,000 bars in all) ("the cargo") that the defendant, Synergy Shipping Pte Ltd, contracted to carry by sea from Singapore to Batam. The cargo was carried on board the barge "Limin XIX" ("the Barge") which was supplied to the defendant by the third party, Freighter Services Pte Ltd. On arrival of the barge at Batam, the cargo was not on board so the defendant was unable to deliver it to the plaintiff as contracted. The plaintiff accordingly sued the defendant for damages and the defendant in turn took out a third party claim to be indemnified by the third party against the plaintiff's claim on the basis of the contractual arrangements existing between it and the third party.

2 The defendant was incorporated in 2001. Its primary business was to provide a daily liner service between Singapore and Batam using tugs and barges as the mode of transportation. The third party was in the same business.

3 By an agreement dated 12 July 2004 ("the JO Agreement"), the defendant and the third party agreed to establish a joint operation whereby each party would contribute one set of vessels

comprising one tug and one barge so that each of them could offer its respective customers six voyages per week between Singapore and Batam. The sailing schedule from Singapore was to be on Mondays, Wednesdays and Fridays for one set of vessels and on Tuesdays, Thursdays and Saturdays for the other set. Each party was to be able to utilise half the stowage capacity of each barge on each trip. The agreement was to be effective for a period of one year from 12 July 2004 to 11 July 2005.

4 In the meantime, the plaintiff had been doing business for many years with a Singapore supplier called Sin Aik Hardware Pte Ltd ("Sin Aik"). Sin Aik sold goods to the plaintiff on an FOB basis and it made the arrangements, on behalf of the plaintiff, for the shipment and carriage of the goods from Singapore to Batam for delivery to the plaintiff at its factory in Batam. Sin Aik started using the defendant's liner service for this purpose after October 2004.

5 In January 2005, the plaintiff purchased 1,300 tons of deformed steel bars from Sin Aik at the price of US$410 per ton. This sale was, as usual, on an FOB basis. The goods sold to the plaintiff were imported by Sin Aik from South Korea and they arrived in Singapore some time in mid March 2005. Sin Aik then arranged with the defendant to take the goods to the plaintiff in Batam. The goods were delivered in full to the defendant on 21 March 2005. Subsequently, however, Sin Aik were informed that on that day only 500 metric tons of the goods could be loaded on the carrying barge and that the balance of the goods would have to be shut out and sent on another occasion. In the event, the defendant managed to load 598.8 metric tons of the goods onto the Barge and this became the cargo with which I am now concerned.

6 At the material time, the defendant owned a barge called "Synergy 1801". For the purposes of the joint operation with the third party, on its sailing days, the defendant used its barge "Synergy 1801". The third party on its sailing days generally used a barge called "Royal Freighter". Some time in February 2005, however, as certain work had to be carried out on the "Royal Freighter", the third party chartered the Barge in order to carry cargo between Singapore and Batam on the days when it was the third party's turn to provide a set of vessels pursuant to the JO Agreement. At the material time, the Barge was about 12 years old.

7 On 21 March 2005, the third party duly provided the Barge in tow of the tug "Fajar Putra" ("the Tug") for the purposes of the JO Agreement. The cargo was loaded onto the Barge by the defendant's stevedores at Jurong Port. The third party also loaded its own cargo onto the Barge. After loading operations were completed, the Barge in tow of the Tug, left Singapore at about 1750 hours. At about midnight, the third party was informed that most of the goods loaded on board the Barge had fallen overboard.

8 On 22 and 23 March 2005, a surveyor appointed by the defendant attended on board the Barge at Batu Ampar port, Batam. Mr Stephen de Silva reported that he observed on his visit that although the Barge was stated to have been fully loaded with cargo, at the time of his attendance, only four 20 foot containers, one steel round bar and one 20 foot ISO tank remained on board. He ascertained that the cargo had not been lashed (this was not disputed by either the defendant or the third party). In his opinion, the Barge was in very poor condition. He also noted that the aft-most port tank (no. 6 Port) was open to the sea and that the water level in this tank was at the same level as the sea. There was also water in the aft-most starboard tank (no. 6 Starboard) and the water level here was about 0.4 metres higher than the level of the water in no. 6 Port.

9 The cargo was not recovered and therefore the plaintiff's claim was for its total loss and for the sum of US$245,508 representing its value.

What was the cause of the loss?

10 I must first determine the most important factual issue and that is what caused the loss of the cargo. Having established that, I will be in a better position to deal with the issues regarding liability of the defendant vis-à-vis the plaintiff and liability of the third party vis-à-vis the defendant.

11 The plaintiff's position is that the loss was due to the unseaworthiness of the Barge. In addition, the plaintiff alleged that the evidence showed that the defendant had failed to care for the cargo whilst it was in the defendant's possession for carriage. This failure arose from the defendant's deliberate decision not to lash and/or secure the cargo on board the Barge so as to prevent it from shifting and/or from falling off the Barge.

12 The defendant accepted that it had deliberately decided not to lash the cargo on board the Barge but disagreed that this failure was a breach of its duty of care in respect of the cargo. It also disagreed that its failure to lash or secure the cargo caused the loss. As far as the defendant is concerned, the loss arose solely by reason of the unseaworthiness of the Barge arising from the poor condition of its hull and deck equipment (including the sideboards).

13 The defendant's case was that some time during the Barge's voyage from Singapore to Batam, it started taking in water via a hole or holes in the external plating of no. 6 Port. The water in no. 6 Port found its way into no. 6 Starboard via a hole in the bulkhead between the tanks, such hole having been caused by corrosion. The Barge subsequently took on a port list/stern trim causing the cargo on board to shift. The port and stern sideboards which ought to have easily contained such a shift gave way on account of their corroded condition thus causing the cargo to slip overboard via the Barge's port quarter.

14 The third party denied that the loss had been caused by the unseaworthiness of the Barge as pleaded by the defendant. It did not put forward a positive case on the cause of the loss but concentrated on attacking the defendant's theory of the loss. The third party did not dispute that seawater had entered the Barge through no. 6 Port and from there had moved into no. 6 Starboard through a hole in the bulkhead. Further it did not dispute that the cargo on board the Barge was lost at the port stern of the Barge. It also accepted that the Barge must have listed to port at the time of the loss and that this list must have been a substantial list in order to shift the unsecured cargo and cause it to fall overboard. The third party, however, did not accept that the entry of seawater into no. 6 Port through a hole in the steel plate resulting from corrosion had caused that substantial list. The third party produced no evidence that, while en route to Batam, the Barge had come into contact with an external object or that this contact caused a sudden and substantial ingress of water into the tanks of the Barge such that the substantial list was created and the cargo fell overboard. The third party, however, argued that this was a possible cause of the loss as the evidence produced by the defendant showed that any list which could have been created by a slow entry of water into no. 6 Port through a corrosion hole was insufficient to cause the cargo on board to even start to shift. The third party's main argument was therefore that the defendant had not been able to establish on the balance of probabilities that the loss was caused in the way posited by the defence.

The evidence on the condition of the Barge

15 The plaintiff produced no evidence on the condition of the Barge at the start of the voyage or even thereafter. All evidence relating to this aspect of the case came from the defendant and the third party. It should be noted, however, that there was no first hand account of the loss. None of the crew members of the Tug came to court to testify as to what had happened on the night in

question. The theories as to how the loss occurred came from the parties' surveyors and their expert witnesses.

16 On the defendant's part, its witness of fact was the surveyor Mr de Silva. He stated that during his attendance on board the Barge on 22 March 2005, he saw that the main deck had several deep indentations and was wasted in areas which had been torn due to the movement of cargo. The deck fittings were also found to be largely wasted, with the result that most of the support stanchions were no longer able to support the sideboards. Cracks and tears were visible at the edges of the deck and side shell plating at both port and starboard sides. The Barge's side shell plating was generally rusted with no paint coating. He also found indentations and fairly deep pitting in various areas of the side shell plating.

17 On 23 March 2005, the Tug's crew opened up all the manhole covers for the tanks/void spaces. For safety reasons, Mr de Silva did not enter the tanks. From his position at the upper area of the tanks, in way of the manhole openings, however, he could see considerable corrosion within the tanks. He noticed that there was fairly deep pitting at the side shell plating within the tanks as well as on the divisional bulkheads. He also found serious wastage at the ladder rungs and brackets in some of the tanks.

18 Having examined the two aft-most tanks, Mr de Silva found the water level in no. 6 Port to be at sea level (at about 1400 mm from the top deck) while the water level in no. 6 Starboard was higher than sea level, at about 400 mm from within the tank to the top deck. The rest of the tanks were either empty or contained an insubstantial amount of seawater. Mr de Silva opined that the seawater in no. 6 Starboard had most likely entered from no. 6 Port through a seriously corroded section/crack at the bulkhead. In his report, he stated that save for the possibility of contact with a submerged object at the hull in way of no. 6 Port, the seawater ingress was most likely to have been caused by the serious corrosion/wastage of the Barge's tanks. He also considered that it was likely that the ingress of seawater into the tanks had been occurring for some time during the voyage.

19 In Mr de Silva's opinion, the further ingress of seawater into no. 6 Starboard would have caused the aft section of the Barge, and thus the no. 6 Port to be completely submerged in the seawater during the voyage. This was confirmed by his observation that there was no sand or dirt on the aft section of the Barge, thus indicating that it had been awash with seawater. During his survey, he also found that the sideboards and their supports at the aft portside of the main deck had been completely ripped off from the deck plate. Therefore he was of the view that the lost cargo had fallen overboard from this section as a result of the list and trim of the Barge caused by the seawater ingress. Once the Barge had been freed from the weight of the cargo, its aft-end would have risen up to a certain extent.

20 Mr de Silva stated in his report that the Barge appeared not to have complied with safety requirements as it was not fitted with navigation lights or stanchions. He also noted some recent doubler repairs at the aft portside edge of the deck/side shell. During cross-examination, Mr de Silva stated that the usual thickness of deck steel plating for a barge of the size of the "Limin XIX" would be about 10mm to 12mm. He told the court that he had found two areas of the Barge's deck where the thickness of the plating was no more than 5mm. As regards the stanchions, Mr de Silva said in evidence that they were so badly wasted that there were "almost holes all over the place". The condition of the stanchions was such that they were hardly able to support the sideboard.

21 It is worth noting that Mr de Silva's survey report which contained his observations was issued on 14 April 2005, a few weeks after he inspected the Barge. He noted in his report that he had asked the owners of the Barge to supply him with various documents including the class certificates, the

last thickness gauging reports and documents relating to the last drydocking/repairs and surveys. He had also recommended that the water in the aft-most tanks be pumped out and that full inspections of no. 6 Port and no. 6 Starboard be carried out thereafter. None of the documents that Mr de Silva asked for were provided. Further, its owners did not make the Barge available for further inspection after the water in the tanks had been pumped out.

22 The other witness who saw the Barge after its arrival at Batam was Capt Christopher Phelan, the third party's surveyor who was also there on both 22 and 23 March 2005. Capt Phelan's observations during his survey were set out in a report dated 17 August 2006, that is just a month prior to the commencement of the trial. It was clear from the language of the report that Capt Phelan was not simply giving a report of what he observed but was supporting a point of view as to the condition of the Barge. He was also attempting to make arguments to support the third party's defence to the defendant's claim. In his first affidavit of evidence-in-chief, Capt Phelan simply referred to the report and made no assertions of fact relating to the incident in the body of the affidavit. He subsequently filed a second affidavit in which he stated that in his report he had been asked to consider the issues of the physical condition of the Barge, whether the physical damage pleaded by the defendant would have rendered the Barge unseaworthy and whether water could have entered the Barge's tanks causing it to list in a manner alleged by the defendant.

23 In his report, Capt Phelan noted that when inspected on 22/23 March 2005, the Barge had suffered damage to the sideboards and the deck "caused by the movement and loss of 1,370 mt of cargo". It was apparent from the damage that the cargo had been lost over the port quarter. When seen in Batu Ampar the Barge was trimmed by the stern due to water in the aft void tanks.

24 Capt Phelan noted that the paint coating of the Barge had become worn and it had a rusty appearance. He was quick to qualify this observation by stating that the lack of a paint coating was not in itself a measure of the structural integrity of a vessel. He stated also that though rusting causes steel to corrode it would not adversely affect the structural integrity of the vessel until wastage of 20%-25% had been recorded. He said that unfortunately he had no record of steel gauging and therefore was unable to accurately determine the residual strength of the structure of the Barge. Capt Phelan went on to assert that the apparent condition of the Barge was "seemingly of no concern to the personnel who attended the Barge during its previous nine voyages" and that the Barge had been berthed at a place where it was "readily visible" to the defendant's personnel.

25 Capt Phelan then went on to describe the certificates held by the Barge. He noted that about seven months prior to the incident, the Barge had been issued with a Cargo Ship Safety Construction Certificate after a survey and this survey had indicated that the condition of the structure of the Barge was satisfactory. He noted also that the inspections of the Barge at Batu Ampar after the incident were all of a purely visual nature. The void decks had not been sufficiently aired for man-entry, and so only a restricted deck appraisal could be made. No steel gauging was carried out. The Barge was not thereafter made available for a proper structural survey.

26 In relation to the various components of the Barge, Capt Phelan noted that sidewalls and their supports are not part of the integral structure, but are an appendage added to protect the cargo, not to contain it. He said that the side boards would not be taken into consideration when assessing the structural integrity and seaworthiness of the Barge. The sidewalls are flimsy and are forever getting buckled and damaged during cargo operations.

27 As regards the deck, Capt Phelan observed that most barges of the size and age of the Barge had undulations on the decks. He noted Mr de Silva's observation that the deck plating had been found to be "extremely thin/wasted" but was not sure of the parameters of that statement.

Capt Phelan had found that there was some surface rust on the deck and that it had lifted during the course of cargo operations. He agreed that some wastage had occurred but stated that there were no plans by which the degree of wastage could be measured. He said that apart from a couple of tears in the deck plating which seemed to have been caused by the cargo movement, he did not notice any cracks of obvious weaknesses in the deck. Capt Phelan was at pains to note that the undulating appearance of the deck had "obviously caused no concern to those loading the cargo at Jurong".

28 As regards the hull, Capt Phelan confirmed that the side shell plating was of a rusty appearance, with no paint coating remaining. Nevertheless, no structural failures above the water line were noticed during his inspection. As for the void tanks, he pointed out that these can produce a climate (of water in a warm atmosphere) which is conducive to corrosion and it is in this area that one would look for evidence of corrosion and conduct steel gauging to determine the residual thickness of the hull plating. Capt Phelan noted "inevitable signs of corrosion" of the tanks when he viewed them through the manholes but he was not able to determine the extent of the corrosion and wastage. In his view, there was no definitive basis to objectively state that the Barge was unseaworthy due to the condition of the tanks.

29 Capt Phelan noted the water in the aft tanks. Basing his calculations on the dimensions of the tanks and the depth of the water, he stated that there was about 160 mt of seawater in the tanks. He opined that for this amount of water to have entered the tanks subsequent to departure from Jurong, water ingress would have had to take place at the rate of 40 mt per hour and that rate would, in turn, have required a sizeable hole in the hull. As the weather was fine at the material time, there could have been no undue movement in the Barge to cause an unprovoked breach in the hull. Any deterioration in the hull due to alleged wastage would initially appear as a small localised crack, which would not have permitted such a large rate of ingress of water. As a substantial hole was required for such a rate of ingress, Capt Phelan was inclined to the view that there may have been contact with a submerged object which had caused damage to the hull below the port quarter.

30 In his conclusion, Capt Phelan stated that on present evidence, he could not make a definitive statement on the seaworthiness of the Barge but he was able to state that he had seen no fracture or objective evidence which would incline him to overrule the Safety Construction Certificate or which would prove that the Barge was unseaworthy at the commencement of the voyage.

31 It was interesting that whilst in his report, Capt Phelan had stated that he could not determine the residual strength of the Barge's structure due to his having no record of any steel gauging or non destructive testing, during cross-examination he admitted that at the time of inspection he had had in his possession the requisite equipment to measure the thickness of the deck and shell plating of the Barge. He admitted that this equipment was easy to use and the measurements would only have taken a few minutes. He was asked why he had not carried out these measurements. He was unable to give a coherent reason for not doing so. His reply was:

> I saw no reason to use it, your Honour. I was there to investigate an incident and --- and see that --- the condition of the barge and the, erm … interview the captain. There was no --- I saw no cause to use this equipment.

Having admitted that one of his reasons for being on the Barge was to ascertain its condition, it was certainly peculiar that he did not use the measuring equipment in his possession especially since he admitted that this was part of his normal kit and carried everywhere with him. He must therefore have been aware of its availability at the material time. During cross-examination, however, he did admit that the Barge was in poor condition – it was 12 years old and could have done with some painting

and other work. At some point during cross-examination, Capt Phelan also admitted that some of the wastage of plating exceeded 25%. Subsequently, he changed his evidence to say that the wastage was not more than 25% but later on he again admitted that it might after all exceed 25% of the plate thickness.

32 Before I go on to analyse the evidence, it may be helpful to consider the legal definition of "seaworthiness". In the case of *Kopitoff v Wilson* [1876] 1 QBD 377, the court stated that a seaworthy vessel was one that was "fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage". The definition given by the Marine Insurance Act (Cap 387, 1994 Rev Ed) is along the same lines. Section 39(4) states that a ship is deemed to be seaworthy when "she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured". In the case of *Ever Lucky Shipping Company Limited v Sunlight Mercantile Pte Ltd* [2003] SGHC 80 ("the *Ever Lucky* case"), I commented that a seaworthy vessel is one that has that degree of fitness which an owner would want it to have at the time it starts its voyage having regard to the circumstances the vessel would probably meet during the voyage and noted that this was an objective test as the question to be asked was whether a prudent owner would have required the defect in the ship to be made good before sending his ship to sea had he known of it. It would be noted that there was nothing in the definition that would restrict its application to only certain parts of a vessel. As the defendant pointed out also, there were many authorities which supported the contention that for a vessel to be seaworthy, it was not only its "integral structure" that had to be in good condition but also essential equipment for the voyage like engines and compasses. In this respect, I would add that when one considers the circumstances of the voyage embarked on, a very relevant factor is whether the vessel is going to be carrying cargo or not and if she is, whether she is fit to carry such cargo safely.

33 In its pleadings, the defendant had alleged that the Barge was not seaworthy because it was in poor physical condition at the commencement of the voyage and the particulars given of this allegation were that:

(a) the deck fittings were in a poor wasted condition;

(b) the deck plating was thin/wasted due to corrosion;

(c) various sections of the deck and side shells on both sides had cracks and tears;

(d) the side shell plating was generally rusted with indentations and deep pitting at various areas; and

(e) the tanks were substantially corroded.

34 The third party's submission was that the defendant had not proved all of these particulars and that in respect of those that it had, the damaged areas were not part of the integral structure of the Barge and therefore the condition of such areas could not affect the Barge's seaworthiness. The third party contended therefore:

(a) that the deck fittings such as the stanchions/support for the sideboards may have been in a poor condition as contended by Mr de Silva but since he had also accepted that these fittings did not form part of the structural part of the Barge, the condition of these items could not be taken into consideration in assessing its seaworthiness;

(b) as regards the deck plating, there was no evidence regarding the degree of wastage

because no one knew what its original thickness had been nor what its residual thickness was. In this connection, Mr de Silva's assertion that he measured the existing plating and found it to be about 5mm thick could not be believed. Whilst there was some corrosion of the deck plating, that was not unusual and the extent of thinness or wastage was a subjective matter and the court had no evidence to enable it to make a finding as to whether the wastage was such as to adversely affect the structural integrity of the Barge;

(c) the cracks and tears in the deck and side shell plating on the port side of the Barge which were noted by Mr de Silva, were not evidence of unseaworthiness at the start of the voyage because Mr de Silva had agreed that that damage at the port side could have been caused by the cargo sliding and falling overboard. As for the cracks observed at the starboard side, there was no photographic evidence of the same;

(d) as for the side shell plating, although the same was generally rusted with indentations and deep pitting at various areas, the defendant's witnesses had accepted that rusting by itself does not affect structural integrity and that the indentations were not large or sharp and therefore would not affect integrity either; and

(e) as regards the condition of the tanks, the third party submitted that the evidence given did not establish that the corrosion seen (mainly on the ladder rungs) had affected the Barge's structural integrity especially since Mr de Silva said he was unable to comment on the percentage of wastage of the internal shell plating.

35 Having considered the arguments and the evidence, I am satisfied that the Barge was in an unseaworthy condition when it departed from Singapore. Its structure was generally in a very poor condition with many parts seriously corroded. The Barge had to be looked at on an overall basis and there was clear evidence of wasting of various parts of the shell plating both external and internal. The stanchions might not have been part of what the third party referred to as the "integral structure" of the Barge but they were an important part of its equipment and had been appended to the Barge to support the sideboards which were needed both to protect the cargo from waves and, to a certain extent, to contain the cargo on the Barge. One very important piece of evidence indicating the unseaworthiness of the Barge was not really in dispute. It was accepted by the parties, including the third party, that there was a hole in the bulkhead between no. 6 Port and no. 6 Starboard which allowed water to move from one tank into the other. Such a hole was not only an indication of the degree of corrosion of the bulkhead plating but also an indication that other areas of the tank plating were likely to be equally wasted. This observation is also supported by the evidence of the extensive wasting of the ladder rungs inside the tank. As regards other areas where wasting of plating was observed and generally on the condition of the Barge (including the evidence of deep pitting in the shell plating and indentations), where the evidence of Mr de Silva differed from that of Capt Phelan, I consider Mr de Silva's evidence to be more reliable.

36 With regard to the measurement of the residual deck plating left after the corrosion had occurred, Mr de Silva's figure of 5mm may not be accurate because it was not noted in his report at the time but only mentioned in court, some one and a half years later. Apart from that, however, his evidence was straightforward and credible. I accept that he found significant wasting of the plating and pitting and indentations. He considered the corrosion that had occurred to have reduced the thickness to a level that was not acceptable from the point of view of seaworthiness and, in my judgment, he had sufficient experience to come to such a conclusion even if the actual figure of 5mm given by him might have been an estimation made later rather than a measurement made on inspection. It should also be noted that Mr de Silva had confirmed that he had taken photographs of the cracks and tears on the starboard deck but had not considered it necessary to put these in his

report. Counsel for the third party was given the opportunity to ask for the photographs but stated that she did not require them. There is no reason therefore to disbelieve Mr de Silva's evidence on this point simply because it was not supported in court by photographic evidence.

37 In contrast to Mr de Silva, Capt Phelan appeared from the start (looking at his report) to be tailoring his evidence to fit a certain point of view. In cross-examination, his tendency to try and put a good light on evidence that was not favourable to the third party led him into several contradictions and on occasion made his evidence incoherent and difficult to understand. Notwithstanding his partial attitude, he did admit that the Barge was not in a good condition, that the sideboards had not been maintained and that it was possible for them to collapse and if so damage the cargo. He had also agreed that the usual thickness of deck plating of a similar barge would be 9mm and at various points of his cross-examination, he agreed that there had been more than 25% wastage of the plating and that wastage to such an extent was not acceptable.

38 The third party submitted that there was no evidence on which the court could make a finding that no. 6 Port or any other tank had started taking in water prior to the Barge's departure from Singapore. There was therefore, the third party said, no evidence to show that the tanks were not water tight at the commencement of the voyage. In fact, the evidence given by Mr Rahmat Bin Ahmad, the third party's tally clerk was that, prior to loading, he had observed the Barge to be on even keel and that it was not listing to either side. This showed that no ingress of water occurred before departure.

39 In this connection, however, I accept the defendant's submission that just because the structure of the Barge did not give way prior to its departure, it does not necessarily mean that the Barge was seaworthy at the commencement of the voyage. The test for seaworthiness, as I have already mentioned, is whether the Barge was in such condition as to be able to meet the expected conditions of the voyage. If its condition was such that something was bound to give way during the voyage, then the Barge has to be considered unseaworthy. In the *Ever Lucky* case, the defect in the vessel which I found rendered it unseaworthy was a latent defect which only manifested itself after the vessel set sail. This is a similar case. In my judgment, the condition of the Barge when it left Jurong port was so bad that something was bound to, and did, give way during the voyage thus allowing water to enter the tanks. As for the hole in the bulkhead between the tanks, it is most likely that that was already present when the Barge was in port.

Did the unseaworthiness of the Barge cause the loss?

40 The third party's submission was that even if the Barge was unseaworthy, there was no causal link between that unseaworthiness and the loss of the cargo. The third party accepted that the Barge must have listed to port at the time of the loss. It submitted that this list must have been a substantial list in order to shift the cargo and cause it to fall overboard. The third party did not accept, however, that such a substantial list could have been caused by the entry of water into no. 6 Port. It contended that the evidence of Mr de Silva and Capt Ramli Bin Mohd, the defendant's expert witness, showed that any list which could have been created by the entry of water into that tank would have been insufficient to even cause the cargo on board to start to shift.

41 The third party noted that these witnesses accepted that water must have entered and filled both aft-most tanks up to a depth of at least 2.65m prior to the time of loss. It submitted that when the water in both these tanks reached that depth, any list to port created by the water entry into no. 6 Port would have been corrected or equalised by the water in no. 6 Starboard. Thereafter, any additional water that could have filled no. 6 Port so as to create a list of port would only be of a depth of 0.4m and the list angle created by this additional water would have been very small, as

Capt Ramli accepted during cross-examination. The third party submitted, based on calculations made by Capt Ramli in the course of cross-examination, that this angle would have been at best 3º and such an angle would not have been sufficient to cause the cargo to shift. This latter submission was based on the evidence of Capt Ramli that movement between two unrestricted metal surfaces is expected to occur at a list angle of between 5º and 16º. Additionally, Capt Ramli had accepted in cross-examination that on the assumption that at the time the Barge departed from Singapore there was a half a metre trim at the aft, his calculation showed that even when both no. 6 Port and no. 6 Starboard were filled up with water to a depth of 2.65m each, the aft deck of the Barge would not be submerged in the sea (I note here, however, that this answer was based on an assumption). The third party submitted that as such the entry of water into the Barge's tanks alone could not have resulted in the creation or development of such a substantial list that would explain the loss.

42 The defendant, naturally, did not agree. It pointed out that there was no evidence before the court which could objectively be used to confirm the actual list or stern trim taken by the Barge prior to or at the time of the incident. Whilst the plaintiff and third party had tried, through the cross-examination of Capt Ramli, to establish that, at the material time, the Barge's port list was 2.73º and the stern trim was 1.4º, those figures were not based on factual evidence but were merely hypothetical. This was because Capt Ramli was asked to carry out these calculations based on various assumptions made by the cross-examining counsel. His responses could not therefore in any way reflect the true situation on board the Barge at the time of the incident.

43 The defendant submitted that it was not possible for any of the experts to come to a definitive conclusion on the actual trim or list of the Barge at the relevant time. This was because there was no evidence before the court on the following matters that were needed to make the calculation:

(a) the actual amount of cargo on board at the time the Barge departed Jurong port;

(b) the draft of the Barge after completion of loading operations;

(c) the list and trim of the Barge at the time of departure;

(d) the Barge's general arrangement plan, hydrostatic tables, stability booklet and tank calibration tables;

(e) the actual positions in which the cargo was stowed at the material time; and

(f) how the Barge had behaved just prior to and at the time of the incident.

44 In the light of the above, the defendant submitted, the calculations and assertions made by the third party were nothing more than theoretical propositions on what could have happened at the time of the incident. The third party did not bring in any evidence to support these theories. In my view, the defendant has made valid points regarding the theoretical nature of the third party's submissions.

45 I have found that the Barge was unseaworthy at all material times. Exactly how the loss occurred cannot be determined in the absence of evidence from the crew of the Tug and the fact that the Barge itself was not made available for a full inspection after all the tanks had been drained. The third party having submitted that the rate of ingress of water into the tanks through corrosion holes would not have been sufficient to cause a substantial list then posited that the Barge must have come into contact with some external object which damaged it so that there was a sudden influx of water which would have resulted in a list large enough to cause the cargo to shift and then fall overboard. This was only a theory. The physical condition of the Barge, however, was in evidence

before me and it could not be gainsaid that in all probability there were corrosion holes in the external plating of no. 6 Port. The rate of water ingress through these holes could have been amplified by contact with an external object. We will never know. The Barge certainly would have been more vulnerable to external contact than a barge whose plating was in good condition. In any case, even if the hole in the hull was caused or increased by contact with an external object, no water would have entered no. 6 Starboard had it not been for the corrosion hole or holes in the bulkhead. In all the circumstances, I am satisfied that on the balance of probabilities, the loss was due to the unseaworthiness of the Barge.

46 I must observe at this point that the defendant went rather overboard in its submissions in its attempt to establish that the Barge was unseaworthy in that portions of its submissions relied on matters that had not been adduced by witnesses at the trial. For example, the defendant sought to rely on points made in a textbook that had not been put to any witness in the course of the case. The defendant justified this by arguing that I could take judicial notice of the textbook. In my opinion, such a submission is misplaced. The textbook dealt with technical matters and the defendant could not use it in submissions as the witnesses at the trial had had no opportunity to comment on or explain the technicalities on which the defendant sought to rely. Secondly, the defendant sought to rely on lengthy calculations to support its submissions relating to the likely list of the Barge even though such calculations had not been put to the witnesses. Those calculations should not have appeared in the submissions.

47 The plaintiff emphasised that the defendant had not lashed the cargo or secured it to the Barge in any way. In the plaintiff's opinion, this failure to lash was a breach of the defendant's duty to take reasonable care of the cargo. The plaintiff also submitted that had the cargo been lashed, it would not have shifted, fallen over board and been lost. The defendant disputed that assertion on the basis that Capt Ramli had taken the view that lashing or securing would not have prevented the cargo from shifting or falling off the Barge. He had testified that the fact that this was not done probably prevented the Barge and all of its cargo from becoming completely lost. The defendant also denied that its omission to lash the cargo was a breach of duty because, according to the defendant, it was a custom of the liner trade between Singapore and Batam that cargo would not be lashed when loaded onto the carrying barge.

48 Since the defendant's stand is that the cargo would have been lost even if it had been lashed, it is clear to me that the liability has to be decided on the basis of the unseaworthiness as the *causa causans* of the loss. Therefore, I do not need to decide whether the failure to lash was a breach of duty, though I am inclined to hold that it was. In this connection, I would observe that it was for the defendant, as the bailee of the cargo, to show that it had taken reasonable care of it and this would mean that it would have to show that the way that it had stowed the cargo on the Barge without lashing was reasonable in all the circumstances, *i.e.*, the physical conditions of the Barge, the expected sea and weather conditions in respect of the voyage and other foreseeable circumstances like the perils that might be encountered en route. From the defendant's lengthy arguments in relation to the alleged custom and its misguided attempt to argue that the plaintiff had the onus of showing that the defendant had a duty to lash, I infer that the defendant recognised (as Capt Ramli accepted in the course of cross-examination) that generally it is good seamanship to secure and lash cargo carried on board a vessel. It would in such circumstances be difficult for the defendant to establish otherwise. It is notable in this connection that one of the conditions of the protection and indemnity insurance ("P&I insurance") obtained by the third party for the Barge was that all cargo loaded thereon had to be lashed. I would also note that just because Capt Ramli saw a number of barges carrying cargo that had not been lashed and the defendant had, for commercial reasons, never seen fit to lash any of the cargo it carried on its barges, this would not lead inexorably to the conclusion that the custom asserted by the defendant existed. For the custom to exist and be legally binding on

all parties, it must, in the words of *Chitty on Contracts* (29th Ed, Vol 1, para 13-018) "be notorious, certain and reasonable, and not contrary to law; and it must also be something more than a mere trade practice". There was no evidence that shippers of goods to Batam were generally aware of the defendant's practice not to lash cargo. The defendant itself admitted that it had not told its customers of its reasons for not lashing goods carried by it nor did it claim that it had told the plaintiff or Sin Aik that it would not lash their goods. Its argument was the rather weak one of constructive knowledge – because so many shipments had been effected on its vessels, the plaintiff and Sin Aik should have known that cargo was not lashed. However, no evidence was adduced that anyone from Sin Aik or the plaintiff had ever observed either the loading or discharging operations. It does appear to me, therefore, that the evidence in the case was insufficient to establish the defendant's contention.

The alternative basis of the plaintiff's claim

49 The plaintiff pleaded that among the express and implied terms of the contract of carriage between it and the defendant were that the barge to be used for the carriage would be "the defendant's own barge 'Synergy 1801' and/or a barge that was not more than three years old". A further averment was made, in the alternative to the foregoing, that the defendant had warranted to the plaintiff that the barge to be used for the carriage would be "the defendant's own barge 'Synergy 1801' and/or a barge that was not more than three years old". The plaintiff then pleaded that in breach of the contract of carriage, the defendant had used "the barge 'Limin XIX' to carry the said cargo which barge was more than three years old being built in 1993". In its defence, the defendant denied the plaintiff's averments as set out above and stated that there was no such express or implied term in the contract of carriage. It further averred that it had not given such a warranty to the plaintiff.

50 The plaintiff's closing submissions on this point were somewhat different from its pleaded case. The plaintiff asserted that the evidence established that it was a term of the contract that the defendant would use "Synergy 1801" which was less than three years old to carry the plaintiff's goods. The plaintiff therefore dropped the alternative that it had pleaded, *i.e.*, that the defendant would use either "Synergy 1801" or another barge that was less than three years old.

51 On this point, the plaintiff relied on the evidence of Tan Sui Cai, the managing director of the plaintiff, that of Sim Ah Ban, the managing director of Sin Aik, that of Sim Wee Hong, Dawn, a clerk working for Sin Aik and that of Toh Wai Cheong, the sales manager of the defendant.

52 Mr Sim Ah Ban testified that in October 2004, Mr Toh came to visit him in his office in order to canvass business for the defendant. At that meeting, Mr Sim specifically asked Mr Toh what type of vessels the defendant would use to carry Sin Aik's goods and how old they were. His concern was to ensure that the goods shipped by Sin Aik would be carried and delivered safely. Mr Toh replied that the defendant would use its own barge "Synergy 1801" to carry the goods, that the barge was new and only between two and three years old. Mr Sim was reassured when hearing this. This was one of the conditions that he required before he decided to give the business to the defendant. Under cross-examination on this point, Mr Sim maintained that he was told by Mr Toh that the defendant would use its own barge and the same would not be more than three years old.

53 Mr Toh in his own affidavit of evidence-in-chief agreed that he had informed Mr Sim that the defendant owned the barge "Synergy 1801". He said, however, that he did not tell Mr Sim how old the barge was or that the defendant would always use "Synergy 1801". Further, he did not tell Mr Sim that the defendant would use barges that were aged three years or less. He told Mr Sim that what set the defendant apart from its competitors was the fact that the defendant owned and

operated its own equipment and vehicles in Batam and therefore had full control over the movement of the goods in its custody. Under cross-examination, Mr Toh agreed that he had told Mr Sim about "Synergy 1801" because Mr Sim had asked whether the defendant owned any barge. The plaintiff further submitted that Mr Toh's account of his explanation to Mr Sim of how the daily liner service provided by the defendant worked showed that, at the time of his meeting with Mr Sim, Mr Toh was out to give an impression that the defendant's service was carried out by equipment, including tugs and barges, that was owned by the defendant. He was not concerned whether the impression given by him was accurate and was not bothered to reveal the true picture unless specifically asked for information. He had said that when his customers asked him whether the defendant operated its own tug and barge, he had answered yes because he was trying to show the customer that the defendant was a vessel owner and that it operated its own tug and barge.

54 The plaintiff asserted that Ms Dawn Sim had corroborated Mr Sim's evidence because when asked whether Mr Sim had told her of Mr Toh's assertions that the defendant would use its own barge and that barge was not more than three years old, Ms Sim had answered that she was in the same office as Mr Sim at that time and therefore had been able to overhear the conversation between him and Mr Toh.

55 Mr Tan testified that on 21 March 2005, he had asked Mr Toh how the cargo was to be shipped to Batam. Mr Toh's reply was that the defendant used its own barge and tugboat and that it was a new one built in 2002 or 2003 and so the plaintiff should allow the defendant to undertake the carriage on its behalf.

56 The defendant had a different analysis of the evidence. It pointed out that Mr Toh had made it clear to Mr Sim that the service provided by the defendant was a daily service and, during cross-examination, Mr Sim had admitted that he knew that it would not be possible for the defendant to operate a daily service with just one set of vessels (*i.e.*, one tug and one barge). Secondly, it argued that during the negotiations between Mr Sim and Mr Toh, the only thing that mattered to Mr Toh was the freight rate and not the age or identity of the carrying vessels. Mr Sim had admitted in court that the freight rate first quoted to him was $15 per ton. During the meeting, Mr Sim asked Mr Toh to reduce this rate to $13 per ton as that was the rate offered to him by other shipping companies. Mr Toh agreed and subsequently sent out a revised quotation showing the new freight rate. This quotation did not mention the alleged condition that the barge used would be less than three years old. Mr Sim said he signed the quotation but did not notice that this condition had not been included.

57 Thirdly, Sin Aik's behaviour after the quotation was accepted was not consistent with the existence of any such term. Between November 2004 and 5 March 2005, Sin Aik had, on the plaintiff's behalf, shipped seven consignments with the defendant and these consignments were carried as follows: five on "Royal Freighter" (a barge that was 15 years old), one on "Synergy 1801" and one on the Barge itself. Until the incident, neither Sin Aik nor the plaintiff had ever complained about its cargo being carried on barges other than "Synergy 1801". In fact, Ms Dawn Sim who was the person who checked the defendant's invoices in order to verify invoice amount and the tonnage shipped, had testified that she did not need to check the name of the carrying vessel even though that appeared on the invoices. She said that she did not notice the name and that the name of the vessel was not important to her. In court, when shown an e-mail dated Wednesday, 29 December 2004 from the defendant informing her that an intended shipment would be sent on the "Royal Freighter", Ms Sim said that she could not remember having seen that e-mail and then she confirmed that it was her evidence that she did not see the name of the vessel in the e-mail. It was difficult to believe Ms Sim's consistent denials of having seen the names of the carrying vessels on the defendant's documentation.

58 Fourthly, the defendant argued that it would not have made sense for Mr Toh to represent to Mr Sim and Mr Tan that only "Synergy 1801" would be used. This was because by 19 October 2004, when Mr Toh first met Mr Sim, the defendant was already in collaboration with the third party under the JO Agreement. To Mr Toh's knowledge at that time, this contract required the defendant and the third party to take turns to supply a set of vessels on alternate days to ship goods belonging to their respective customers. He was also aware then that the third party's barge "Royal Freighter" was 15 years old. Further, on 21 March 2005 when Mr Toh met Mr Tan, it would have made even less sense for him to make such a representation since the contract had already been concluded, several shipments had been effected on vessels other than "Synergy 1801" and Mr Toh knew that on that day itself, the carrying barge would be the Barge.

59 Having considered the arguments and the evidence, I am satisfied that there was no term of the contract to the effect that the defendant would only use "Synergy 1801" to carry the plaintiff's cargo. Whilst Mr Toh might have been at pains to represent to Mr Sim that the defendant owned a barge that was less than three years old and while Mr Sim may have had the impression from this that that barge would be the one mainly carrying the plaintiff's cargo, Mr Sim was not concerned enough with this point either to make the identity of the vessel an express term of the contract or to protest when vessels other than "Synergy 1801" carried the plaintiff's goods. Ms Dawn Sim must have been aware of the carrying vessel in respect of each shipment since she checked the defendant's documents. Since she also claimed to be aware of the conversation between Mr Sim and Mr Toh she would have, at the least, mentioned it to Mr Sim when the first shipment on 7 November 2004 was carried on "Royal Freighter" instead of on "Synergy 1801" as at that time, the conversation of 19 October 2004 would have been fresh in her memory. She did no such thing. Her omission must have been due to the fact that it made no difference at all, contractually, which barge was used for the carriage.

The defences

60 It was not in dispute that at common law, a shipowner or carrier of goods by sea has an absolute obligation to send his ship out to sea in a seaworthy state at the commencement of the agreed voyage. This duty arises by reason of the contract of affreightment and not by reason of ownership of the vessel, see *Sunlight Mercantile Pte Ltd v Ever Lucky Shipping Co Ltd* [2004] 1 SLR 171 and *Atlantic Shipping and Trading Co v Louis Dreyfus & Co* [1922] 2 AC 250. Thus, the fact that the defendant did not own the Barge did not relieve it from the duty of ensuring that the Barge was in a seaworthy state at the commencement of its voyage to Batam. As I have held that the Barge was not seaworthy at this time, the defendant was in breach of this obligation.

61 The defendant raised a number of defences to liability for such breach. It pleaded:

(a) that it was excluded from liability by virtue of the fact that the bill of lading was endorsed "SHIPPED ON DECK AT SHIPPER'S RISK" and by virtue of the operation of cl 9(c) of the bill of lading which read:

> "DECK CARGO. Deck cargo to be handled and carried on deck and is so carried at the sole risk of the shipper. The carrier will be exempted from liability for any loss, damage or expense connected with deck cargo howsoever caused and whether due to negligence, unseaworthiness or otherwise."

(b) alternatively, that it was entitled to limit its liability to the maximum sum of £30,000 based on a per package limitation of £100 per package because there were 300 bundles shipped.

62 The plaintiff disputed the defendant's entitlement to rely on the exemption and limitation clauses of the bill of lading on the following bases:

(a) that the alleged endorsement and cl 9(c) of the bill of lading were not made known to it prior to the shipment of the cargo or the making of the contract for carriage;

(b) that the alleged limitation provisions were not made known to it at any time prior to the shipment of the subject cargo or the making of the contract for carriage; and

(c) in the alternative, that the alleged endorsement and clauses of the bill of lading were not applicable to the plaintiff's claim because the defendant's breach of contract and/or duty and/or negligence were in respect of the fundamental or underlying obligations of the defendant to carry the cargo in a seaworthy vessel and/or were deliberate breaches on the part of the defendant.

63 All the clauses that the defendant relied upon to exempt it from liability or to reduce its liability are found in the defendant's bill of lading. The rather peculiar situation that I face here, given that this is a claim for carriage of goods by sea and in such situations a bill of lading is almost invariably issued, is that the plaintiff in this case never received or saw an original bill of lading. What happened on each of the ten or so occasions on which the defendant carried the plaintiff's goods from Singapore to Batam was that the defendant issued one original bill of lading for the goods so carried and some non-negotiable copies thereof. The defendant kept the original bill of lading at all times and only sent Sin Aik, as agent for the plaintiff, one of the non-negotiable copies in order to show that shipment had taken place. The original bill of lading had five clauses endorsed on the front of it and another 37 clauses printed on its reverse side. The non-negotiable copy that was sent to Sin Aik was identical on its face with the original bill of lading but no clauses at all appeared on its reverse which was completely blank.

64 The terms that the defendant sought to rely on appear either on the face or on the reverse of the bill. They are as follows:

(a) the stamped endorsement "SHIPPED ON DECK AT SHIPPER'S RISK" that appeared on the front of both original and copy bill of lading;

(b) cl 9(c) on the reverse of the original bill of lading which reads:

> Deck cargo to be handled and carried on deck and is so carried at the sole risk of the shipper. The carrier will be exempted from liability for any loss, damage or expense connected with deck cargo howsoever caused and whether due to negligence, unseaworthiness or otherwise.

(c) cl 4 on the front of the original and copy bill of lading which reads:

> This Bill of lading limits liability to £100 British Sterling per package. To obtain higher limits of liability shipper must declare a greater value and pay additional freight to be agreed.

(d) cl 25 on the reverse of the original bill of lading which reads:

> 25. INDEMNITY. If the carrier is responsible for damage or loss, … the carrier shall in no event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 British Sterling per package … unless the nature of goods and a valuation higher than £100 British Sterling have been declared in writing by the shipper upon

delivery to the carrier and inserted in the Bill of Lading and extra freight paid if required …

The first question that I have to determine is whether the above terms of the bill of lading (which I shall collectively refer to as "the four terms") or any of them formed part of the contract of carriage between the parties.

Incorporation of clauses

65 The plaintiff's submission was that the defendant had not made known to it the four terms prior to shipment or the making of the contract of carriage and as such the four terms were not terms that had been agreed to by the plaintiff. It was for the defendant to prove that these were the terms of the contract of carriage. In this connection, the plaintiff referred to the case of *McCutcheon v David MacBrayne Ltd* [1964] 1 LLR 16 ("the *McCutcheon* case") where the court held that carriers who had omitted to issue any contract document in the particular instance of the loss could not rely on previous shipments to avoid liability for the claim made. The plaintiff cited several passages from the judgment of Lord Devlin as being applicable to the present case to wit:

> They say that the previous dealings between themselves and the appellant, being always on the terms of their "risk note", as they call their written conditions, the contract between themselves and the appellant must be deemed to import the same conditions. In my opinion, the bare fact that there have been previous dealings between the parties does not assist the respondents at all. The fact that a man has made a contract in the same form 99 times (let alone three or four times which are here alleged) will not of itself affect the 100th contract in which the form is not used. Previous dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them. If a term is not expressed in a contract, there is only one other way in which it can come into it and that is by implication. No implication can be made against a party of a term which was unknown to him. If previous dealings show that a man knew of and agreed to a term on 99 occasions, there is a basis for saying that it can be imported into the 100th contract without an express statement. It may or may not be sufficient to justify the importation – that depends on the circumstances; but at least by proving knowledge the essential beginning is made. Without knowledge there is nothing. (per Lord Devlin at p 25)
>
> There can be no conditions in any contract unless they are brought into it by expression, incorporation or implication. They are not brought into it simply because one party has inserted them into similar transactions in the past and has not given the other party any reason to think that he will not want to insert them again. …
>
> If a man is given a blank ticket without conditions or any reference to them, even if he knows in detail what the conditions usually exacted are, he is not, in the absence of any allegation of fraud or of that sort of mistake for which the law gives relief, bound by such conditions.
>
> (per Lord Devlin at p 26)

66 The plaintiff submitted that if the principles enunciated in the passages set out above were applied to the present case, it would be clear that the four terms were not applicable to the plaintiff as the plaintiff was not aware of the same. This was even more so in respect of the two terms on the reverse of the bill of lading. Even if it was argued that the plaintiff ought to have read the non-negotiable bill of lading, if it had turned that document over, it would have found a blank page. That being the case, the plaintiff would have been fully entitled to conclude that since there was nothing there, there were no other terms that it needed to be concerned with.

67 The defendant's response was that the contract of carriage between it and the plaintiff was contained in and/or evidenced by the quotation signed by Sin Aik on 21 October 2004 and the terms and conditions of the defendant's original bill of lading. The quotation which the defendant sent to Sin Aik on 19 October 2004 after Mr Sim's meeting with Mr Toh contained a description of the services offered by the defendant to the plaintiff and its rate for such services. It also contained a section entitled "Terms and Conditions". There were ten conditions under this rubric and term 3 read "Our rates exclude the insurance coverage of cargo & the carriage of goods is subjected to the terms and conditions as stipulated in our Bill of Lading". The quotation also stated that the freight payable would be $13 per revenue ton and that this figure included the cost of issuing the bill of lading. Accordingly, Sin Aik and the plaintiff were precluded from asserting that they did not know that the defendant would issue bills of lading for each shipment and that they were not aware that the carriage of goods would be subject to the terms and conditions of the bills of lading. This was a case where the contractual conditions on which reliance was put had been expressly incorporated by reference in the contract of carriage that was subsequently concluded. It was unlike the *McCutcheon* case cited by the plaintiff where there had been no document issued at all let alone a prior contract making express reference to the terms of prospective transactions.

68 The plaintiff responded that the signing of the quotation did not in itself conclude any contract of carriage in respect of the plaintiff's goods. It did not require the plaintiff to ship goods with the defendant. Therefore, the plaintiff said, the terms of the bill of lading could not be incorporated into the contract of carriage. In my judgment, whilst it is correct that there was no contract of carriage when the quotation was signed and no obligation on the part of the plaintiff to utilise the defendant's services for even one shipment, the terms of the quotation were intended to be part of the terms of any contract of carriage that might subsequently be concluded. Once the quotation was accepted on the plaintiff's behalf it had contractual force. The plaintiff had been concerned about the freight rate and that was why there were negotiations and an amended quotation was sent to Sin Aik. Sin Aik having signed that quotation on its behalf, the plaintiff would have regarded the defendant as being in breach of contract if the defendant had subsequently tried to charge it more than the agreed rate. The quotation having been signed, the plaintiff must be taken as having agreed to all the terms of the quotation and therefore also to having agreed to term 3, ie that the terms of the defendant's bill of lading would be part of the terms of any contract of carriage that was subsequently concluded. In this respect, the legal principle explained by Devlin J (as he then was) in *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 that where parties enter into a contract of carriage with the expectation that a bill of lading will be issued to cover it, they enter into it upon those terms which they know or expect the bill of lading to contain, is apposite.

69 The question that then arises is whether the terms of the bill of lading that were incorporated into the subsequent contracts of carriage were the terms that appeared on the face and reverse sides of the original bills of lading or the terms that appeared on the face of the copy of the bill of lading only. It is common ground that the defendant did not at any time give the plaintiff or Sin Aik an original bill of lading. A specimen of that document was not furnished to Sin Aik at the time the quotation was signed. Later, each time the plaintiff made a shipment, Sin Aik was only given the non-negotiable copy and there was nothing to indicate that the non-negotiable copy differed in any significant way from the original. The evidence was that it was the defendant's practice never to release its original bill of lading. The system that the defendant followed was that once cargo was loaded onto its barge, one original bill of lading (together with a number of non-negotiable copies) for such cargo would be issued and the bill would be given a unique number. Then, the original bill of lading would be kept in the defendant's office and would never thereafter leave its premises. Instead, the defendant would send the non-negotiable copies to the customs authorities in Batam for customs clearance of the goods and also to the customer. On the evidence therefore, the only document that was in circulation outside the defendant's office and available to third parties as a bill of lading issued

by it was the non-negotiable copy.

70 In this case, prior to the material shipment, the plaintiff shipped goods with the defendant on seven occasions. On each of those occasions, the defendant followed its usual practice and sent Sin Aik a non-negotiable copy of the bill of lading. Thus, from the very first time that goods were shipped, Sin Aik or the plaintiff looking at the bill of lading to see what terms of carriage it bore, would have seen only the five numbered conditions on the top right hand corner of the front of the bill, the clause entitled "Jurisdiction and Law Clause" in the bottom left hand corner of the front of the bill plus the sentence below the five numbered conditions stating "Subject to the conditions on back and to terms of Carrier's applicable tariff". When they turned the bill over, however, they would have seen only a blank page.

71 In my judgment, the words in the quotation "subjected to the terms and conditions as stipulated in our Bill of Lading" must be interpreted as referring to the bill of lading that was made available to third parties which was the non-negotiable copy of the bill of lading. This would have applied to the first shipment and even more so to each subsequent shipment including the eighth shipment when the loss occurred because, whilst the plaintiff may have tried to argue before the first shipment that it had no knowledge of the bill of lading and its terms and conditions, from the second shipment onwards, the plaintiff would have believed that the bill of lading was the non-negotiable copy supplied to it with the conditions as printed thereon and would have accepted that for the second and subsequent shipments, those terms would be applicable to the carriage. No doubt there was evidence here that the plaintiff actually never paid much attention to the bill of lading it was given, and did not realise that whilst there was a reference on the front to terms on the reverse side, there were actually no terms on the reverse side. I do not think, however, that that changes my conclusion since the document was at all times available to the plaintiff and it would be deemed to have knowledge of the contents of the same. In my judgment therefore, although the defendant has relied on the four clauses set out in [64] above, the only ones that were incorporated as part of the contract of carriage in this case were those set out in [64(a)] and [64(c)].

Construction of clauses

72 I now go on to consider whether and if so how the conditions on the front of the bill of lading affect the defendant's liability for the plaintiff's loss.

73 First, I refer to the clause set out in [64(a)] above. This was an endorsement on the front of the bill of lading. It is surprising that even though its closing submissions were prolix, the defendant did not therein make any comments on the effect of this endorsement. As far as the endorsement is concerned, I accept the plaintiff's submission that it is insufficient to assist the defendant as the words "at shipper's risk" cannot exclude the defendant's liability arising out of its use of an unseaworthy barge to carry the cargo. In *Sunlight Mercantile Pte Ltd v Ever Lucky Shipping Co Ltd* [2004] 1 SLR 171, the Court of Appeal held that this phrase was clearly referable to risks other than that of a breach of the fundamental obligation of the shipowner to provide a seaworthy ship.

74 Next, is the clause set out in [64(c)] above. For convenience, I set out again its full wording which is:

> This Bill of lading limits liability to £100 British Sterling per package. To obtain higher limits of liability shipper must declare a greater value and pay additional freight to be agreed.

75 The plaintiff submitted that the effect of the clause was unclear and, on a proper construction, it did not limit the defendant's liability for the loss in question to £100 per bundle. First, it did not

state what type of liability was intended to be limited, whether it was the defendant's contractual liability as a carrier or its liability in negligence or its liability for deliberate breach of any of its obligations. Secondly, it was also unclear as to the nature of the consequence that the clause was seeking to limit. Was it limiting for non-delivery of goods or for their late delivery or even for their delivery to a wrong destination? The provision did not even specify whether it was intended to deal with and cover loss or damage to goods. It was totally silent on this in contrast to the other limitation provision (cl 25 on the reverse of the bill of lading) relied upon, where the words used included "any loss or damage to or in connection with goods". The plaintiff submitted that when the court construed a limitation clause in the contract, it had to do so strictly against the party in whose favour it had been made. In order to be applied, the clause had to be clear and unambiguous. In this case, the provision was not clear or wide enough to cover the defendant's breach of its fundamental obligation to use a seaworthy vessel to carry the plaintiff's cargo.

76 The defendant submitted that the words in the limitation clause must be given, if possible, their natural, plain meaning. This was because the courts did not regard limitation clauses with the same hostility as they did clauses of exclusion as limitation clauses had to be related to other contractual terms, in particular the risks to which the defending party would be exposed, the remuneration which he received and possibly the opportunity of the other party to insure, see *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 All ER 101 ("the *Ailsa Craig Fishing Co Ltd* case") per Lord Wilberforce. In the same case, Lord Fraser of Tullybelton observed that conditions which limited liability had to be read *contra proferentem* and had to be clearly expressed but did not have to be judged by the especially exacting standards which were applied to exclusion and indemnity clauses. On this basis, the defendant submitted that the limitation clause in question was wide and clear enough to include liability in all respects, whether the same arose from bailment, contract or negligence, because it did not contain any words which restricted its operation. There was no need to specifically mention the nature of the liability which the clause was supposed to cover because it covered all liability. Similarly, that clause was clear and wide enough to include consequences of all types because there were no words restricting its operation.

77 While I accept that limitation clauses must be read *contra proferentem*, the meaning of the clause in this case is plain and there is no ambiguity. This limitation clause is a declaration by the carrier as to the extent of the responsibility it is willing to bear in the light of the agreed freight rate and the agreed voyage and is the type of limitation clause referred to in the *Ailsa Craig Fishing Co Ltd* case. The clause is in two parts. First, there is the statement as to quantum of liability and then there is the exception that this limitation will not apply if the shipper has declared a greater value and paid additional freight. The references to the "shipper", "value" and "freight" make it plain that the liability referred to in the clause is liability in respect of goods shipped on the vessel. Since the wording does not qualify "liability" in any way, it is wide enough to encompass liability of various types and it does not matter whether such liability arose from contract, bailment or negligence. It means liability of any sort whatsoever and howsoever arising as long as it was in relation to the carriage. Thus, it is sufficient to cover liability to the owner of the goods in respect of full or partial loss of the same whether such loss arises from physical damage to the goods or from the same being lost at sea or negligently mis-delivered.

78 There is one caveat to this, however. It appears to me that the language of the clause is not wide enough to limit the defendant's liability for loss or damage deliberately caused by it because one would need very clear words to reduce one's responsibility for deliberately inflicted injury (if one could do so at all). That issue does not, however, arise in this case because the loss was not deliberately inflicted. The unseaworthiness of the Barge was not known to the defendant at the time it loaded the cargo and its failure to lash the cargo though intentional was effected in the usual course of its business and in the belief that such lashing was not required in view of the short voyage

contemplated and the mostly sheltered seas that would be encountered by the Barge.

79 In the circumstances, I conclude that in respect of the plaintiff's claim, the defendant is entitled to limit its liability to "£100 Sterling" (*i.e.*, that sum in the currency of the United Kingdom rather than its gold value) per package and therefore since 300 bundles of cargo were lost from the Barge, the defendant's liability for the same is in the sum of £30,000.

The defendant's claim against the third party

Background

80 The defendant in its pleaded claim for an indemnity from the third party relied on cl 3 of the JO Agreement which provided, *inter alia*, that the defendant and the third party "shall make all efforts in ensuring safe handling of each other *(sic)* cargos and provide Marine H&M and P&I Insurance". The defendant pleaded that by reason of cl 3:

(a) the third party was obliged to provide a seaworthy tugboat and a seaworthy barge for the voyage between Singapore and Batam; and

(b) the third party was obliged to ensure that the tugboat and the barge which it provided for any voyage between Singapore and Batam were properly and/or adequately covered by marine hull and machinery insurance and by P&I insurance.

There were other matters raised in the defendant's statement of claim against the third party but I do not need to deal with these in view of the conclusions I have already come to in this judgment and in view of the positions taken by the third party.

81 The third party accepted that cl 3 required it, when it was the third party's turn to provide a tug and barge for the operations, to provide a barge that was structurally fit for the carriage of cargo for otherwise the defendant's cargo loaded on board the barge might be in danger. It also accepted that it was obliged under the JO Agreement to provide a seaworthy barge for the voyage in question. The third party denied, however, that it had a duty to carry and deliver the cargo loaded by the defendant onto the barge it had provided or that it had acted as a carrier of the cargo loaded by the defendant. Finally, the third party denied that it was a term of the JO Agreement that it had to procure P&I insurance for the barge that would cover the defendant's liability for cargo carried on board the barge.

82 As I have found that the Barge was unseaworthy, it follows that I must find that the third party was in breach of its contractual obligation to the defendant to provide a seaworthy barge. The third party contended that even though such a finding might be made, it was still not liable for the loss. This was because first, the unseaworthiness of the Barge did not cause the loss and secondly, the defendant had agreed or acquiesced in the use of the Barge in the condition it was in and/or had waived the third party's breach. The first contention need not detain me further since I have already found that the unseaworthiness caused the loss. I now have to consider the second point.

Did the defendant agree to the use of the Barge in its unseaworthy state or waive the third party's breach?

83 The third party noted that the Barge had first been provided for the defendant's use under the JO Agreement on 28 February 2005 and that the defendant had loaded cargo on board it on nine occasions in Singapore prior to the voyage of 21 March 2005. Mr Joseph Ooi Yew Chin, the

defendant's managing director, had testified that the defendant's operations staff and appointed stevedores in Singapore would on these occasions have seen the physical condition of the Barge. He had also testified that the defendant's operation staff would have made a visual inspection of the Barge each time it had come alongside the wharf for loading. Mr Ooi testified that none of his employees was a marine surveyor but would be able to tell the defendant whether the Barge was in good condition or not. He confirmed that none of them had ever reported to him that the Barge was unsuitable or complained to him about its condition. He also accepted that prior to 21 March 2005, the defendant had never told the third party that the Barge should not be provided for the loading and transportation of the defendant's cargo under the JO Agreement.

84 The third party contended that in the premises, the defendant had taken it upon itself to satisfy itself that the Barge was seaworthy. By the defendant's conduct of having seen the condition of the Barge and yet having proceeded thereafter to load its cargo on board the Barge on nine occasions, it demonstrated its agreement to the third party's provision of the Barge under the JO Agreement. By its conduct, the defendant represented to the third party that it accepted the third party's provision of the Barge as sufficient compliance with the third party's obligation to provide a seaworthy barge under the JO Agreement.

85 The defendant rejected these contentions. It asserted that it was not obliged under the JO Agreement to inspect the vessels provided by the third party to ensure that they were seaworthy. The defendant was fully entitled to expect that the third party would fulfil its obligation under cl 3 of the JO Agreement by providing a seaworthy barge. Mr Kow Guan Hoe, the third party's managing director, had confirmed in court that there was no obligation under the JO Agreement for either party to inspect the barge provided by the other party. The defendant also noted that the third party had not requested it to inspect the Barge and even though it had the opportunity to have a look at the external structure of the Barge when it docked, the defendant had never seen or inspected or been given the opportunity to inspect the Barge's tanks. In any case, the defendant's employees were not marine surveyors and therefore were unable to tell whether the Barge was seaworthy or not. This had been confirmed by Mr Ooi when he was re-examined. Further, the unseaworthiness of the Barge had resulted from the hole in no. 6 Port and the defendant was not aware of this hole nor could it reasonably have been expected to be aware of the hole. Therefore, the defendant could not possibly have agreed to or acquiesced in the use of the Barge despite it being unseaworthy. Without knowledge that the Barge was unseaworthy, the defendant submitted that it could not have represented to the third party that it had waived the third party's contractual obligation to provide a seaworthy barge. Further, the third party had not shown that the defendant had represented that it would not enforce its legal rights under the JO Agreement in respect of an unseaworthy vessel and there was no evidence that the third party had acted in reliance on any such representation made by the defendant.

86 In my judgment, the third party has not been able to establish knowledge of, or acquiescence in, the unseaworthy condition of the Barge on the part of the defendant. No doubt the defendant's staff had access to the Barge on ten occasions after 28 February 2005 but it is important to remember the context in which such access was given. The Barge was berthed alongside the wharf for the purposes of loading the cargo, both that supplied by the third party and that supplied by the defendant, and the defendant's employees were on or near the Barge to ensure that loading was carried out smoothly and properly. They were not on the Barge in order to inspect its physical condition. Further, they were not marine surveyors and there was no evidence that any of them, although experienced in the tug and barge industry, had the experience to determine when a barge was in such a bad condition that its seaworthiness was in doubt. The third party, in another context, took pains to emphasise that the Barge was not a pretty sight and that this was to be expected as it was a working barge and not a thing of beauty. The third party also noted that it was not unusual in

a barge to find corrosion and some wasting in its steel plating. Some degree of wear and tear was to be expected. One can hardly blame the defendant's employees therefore for not having considered the condition of the Barge to be a matter for concern when they had simply observed it in passing and not carried out any detailed survey. As the defendant stressed, the Barge was afloat at all times when the defendant's employees saw it and they had no access to its tanks and no way of knowing the condition of the shell plating of the tanks below the water line. For the foregoing reasons, I hold that the third party is not released from its liability to the defendant in relation to the unseaworthiness of the Barge by reason of any acceptance, acquiescence or waiver on the part of the defendant.

87 In view of the conclusion I have come to above, I need not consider the other issue of whether cl 3 obliged the third party to provide P&I cover for the defendant's cargo carried on its barge.

Conclusion

88 In the result, I find that the defendant is liable to the plaintiff for the loss of the plaintiff's cargo but that the defendant's liability is limited to £30,000 and interest thereon from the date of the writ. I also find that the third party is liable to indemnify the defendant in respect of the plaintiff's claim. I will hear the parties on costs.

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