The "Neptra Premier"
[2001] SGHC 223

Case Number : Adm in Rem 481/1998

Decision Date : 15 August 2001

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Michael Lai and Wendy Tan (Colin Ng & Partners) for the Plaintiffs; Haridass Ajaib and Augustine Liew (Haridass Ho & Partners) for the Defendants; Goh Kok Leong, Chan Leng Sun and Yu Siew Fun (Ang & Partners) for the Third Party

Parties : —

Admiralty and Shipping – Bills of lading – Bills of lading as document of title – Defendants-carriers releasing cargo without production of bill of lading pursuant to letter of indemnity from third party-shippers – Plaintiffs claiming entitlement to delivery of cargo upon production of bill of lading – Whether plaintiffs obtained bill of lading pursuant to and as security for illegal or unenforceable moneylending transaction – Whether plaintiffs proved loss – Whether plaintiffs acquiesced in or consented to delivery of cargo without production of bill of lading – ss 2, 23 Money Lenders Ordinance (Cap 163) [HK]

Conflict of Laws – Choice of law – Contract – Defendants-carriers and third party-shippers Singapore companies – Loading cargo in Malaysia – Shipping to and releasing cargo in China – Parties in opening statements accepting Singapore law as law of contract of carriage – Whether proper law of contract Malaysian or Singapore law

Credit and Security – Guarantees and indemnities – Contracts of indemnity – Defendants-carriers releasing cargo without production of bill of lading pursuant to letter of indemnity from third party-shippers – Plaintiffs claiming entitlement to delivery of cargo upon production of bill of lading – Whether third party liable to indemnify defendants – Whether defendants released cargo in compliance with third party's instructions

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The background

This is a case of a consignment of gasoil which went through several deals, and ended in litigation between the three parties in this action.

The plaintiffs are Fortune Hong Kong Trading Ltd, a company incorporated in Hong Kong. The defendants are the owners of the vessel Neptra Premier. They are identified as Neptra Shipping Pte Ltd, a company incorporated in Singapore, in the charterparty. The third party are Cosco-Feoso (Singapore) Pte Ltd, a Singapore incorporated company.

In late August 1997 the third party contracted to sell 5,500-6,000 metric tons of gasoil to Promises Petroleum Ltd, a company in Hong Kong, to be delivered to Shanya, Hainan, China. The third party chartered the Neptra Premier from the defendants under a charterparty dated 4 September 1997 to carry the gasoil to Shanya.

Promises Petroleum in turn sold the gasoil to Pacific Fond Ltd, another Hong Kong company, before paying the third party. Pacific Fond needed financial assistance to pay for the gasoil, and entered into

an agreement with the plaintiffs for the plaintiffs to open the letter of credit for the purpose.

The agreement dated 26 August 1997 read in part:

Party A:	Pacific Fond Limited
	Suite 3, 15/F Sino Plaza,
	255-257 Gloucestor Road,
	Causeway Bay, Hongkong
Party B:	Fortune Hong Kong Trading Limtied
	Room 1601, Emperor Group Centre,
	288 Hennessy Road, Wanchai
	Hongkong

Both Parties A and B, upon friendly consultation, reach the following agreement on the matter of Party A`s entrustment of Party B to open a Letter of Credit in favour of Party C (Cosco Feoso (S) Pte Ltd, 400 Orchard Road [num]13-05 Orchard Towers, Singapore 238875) on its behalf.

(1) Party A`s responsibilities and obligation:

1. To pay Party C 20% (US$183,000.00) of the value of the Letter of Credit in advance as deposit before the Letter of Credit is opened.

2. To remit the amount of Letter of Credit (less the above-mentioned deposit) to the account designated by Party B two days before Party B honours the Letter of Credit and to fax the payment advice to Party B. In the event that Party A is not able to pay the balance to the account designated by Party B within the scheduled date, Party B is entitled to forfeit the deposit and the cargo under the said Letter of Credit as well as claim damages from Party A.

3. To pay 2.5% of the total value of the Letter of Credit amounting to US$22,875.00 to Party B as agent fee during the validity of the Letter of Credit.

4. To undertake of one`s own all the responsibilities and risks in respect of the cargo.

(2) Party B`s responsibilities and obligation:

1. To open Letter of Credit immediately upon receipt of Party A`s deposit.

2. To honour payment of the Letter of Credit immediately upon receipt of the balance amount of the Letter of Credit and hand over all the documents in respect of the Letter of Credit to Party A.

Pursuant to the agreement the plaintiffs arranged for its bankers the Yien Yieh Commercial Bank Ltd to open an letter of credit. The letter of credit named the plaintiffs as the applicant and the third party as the beneficiary, and specified that the credit was available by negotiation against the presentation of the bill of lading and other documents.

The gasoil was loaded on board the Neptra Premier at Pasir Gudang, Malaysia on or about 8 September 1997 evidenced by a bill of lading of the same date. The bill named the third party as the shipper, the consignee was `to the order of Cosco-Feoso (S) Pte Ltd`, and the notify party was Sinochem Hainan Co Ltd.

The quantity of gasoil was stated in the bill of lading as 5,908.437 metric tonnes, in conformity with a certificate of quantity signed by the third party`s terminal supervisor, a surveyor and the master of the Neptra Premier. However, the quantity measured on board and recorded in the load ullage report was 5,860.690 metric tonnes.

On 11 September 1997 the defendants received a telex from the third party requesting the gasoil to be released to Sinochem Hainan Co Ltd without production of the bill of lading. The relevant part of the telex stated:

> *The above goods were shipped on the above vessel by Messrs Cosco-Feoso (S) Pte Ltd and consigned to order of Cosco-Feoso (S) Ltd but the relevant bills of lading have not yet arrived.*
>
> *We hereby request you to deliver such goods to Sinochem Hainan Co Ltd at the port of Shanya, Hainan, China without the production of the bills of lading ...*
>
> *In consideration of your complying with our above request we hereby agree as follows*
>
> > *1. To indemnify you, your servants and agents and to hold all harmless in respect of any liability, loss or damage or what nature which you may sustain by reason of delivering the goods (**sic**) Sinochem Hainan Co Ltd at the port of Shanya, Hainan, China in accordance with our request.*
> >
> > *2. In the event of any proceedings being commenced against you or your servants or agents in connection with the delivery of goods as aforesaid to provide you or them from time to time sufficient funds to defend the same.*
> >
> > *3. If the vessel or any other vessel or property belonging to (**sic**) should be arrested or detained or if the arrest or detention thereof should be threatened to provide such bail or other security as may be required to prevent such arrest or detention to secure the release of such vessel or property and to inform you in respect or (**sic**) any loss, damage or expenses caused by such arrest or detention whether or not the same may be justified.*

The Neptra Premier arrived at Shanya on 13 September, and the cargo was discharged by 15 September without the bill of lading pursuant to the letter of indemnity.

On 19 September the third party issued another letter of indemnity. This letter was issued to the plaintiffs to enable the third party to receive payment for the gasoil without presenting the bill of lading. The letter reads:

> *Letter of Indemnity*

Date	:	19 Sept 1997
Seller	:	Cosco-Feoso (S) Pte Ltd
		400 Orchard Road
		Hex 13-05 Orchard Towers
		Singapore 238875
Buyer	:	Fortune Hong Kong Trading Limited
		1601 Emperor Group Centre
		288 Hennessy Road
		Wanchai Hong Kong
Re	:	L/C No.: B-01-P-03889 issued by The Yien Yieh Commercial Bank Ltd Hong Kong Branch.
		Shipped per: MV Neptra Premier
		Bills of Lading dated 08 Sept 1997

Gentlemen,

We refer to a cargo of 5,500.000 mt of gasoil sold by us to you pursuant to contract no. C/CF/PI 065/97 dated 05 Sept 1997 and shipped on board the vessel MV Neptra Premier at the port of Pasir Gudang, Malaysia pursuant to B/L dated 08 Sept 1997.

Although we have sold the cargo to you we have been unable to provide you with the original bills of lading and the shipping documents covering the said sale.

In consideration of your paying to us the full purchase price of US$1,006,500.00, we hereby warrant that we have tittle free and clear of any lien or encumbrance to such material, and having the full right and authority, we herewith transfer such title and to effect delivery of the same to you.

***We further agree to make all reasonable effort to obtain and surrender to you as soon as possible the original bills of lading and other shipping documents and to indemnity** (sic), **protect and hold you harmless from any all cost (including costs as between attorney or solicitor and own client), claims, losses, damages, demands and any consequences or expense which you may suffer, incur or put to as a result of not having received such document or breach of the warranties given above, including but not limited to any claims and demands which may be made by a holder or transferee of the original bills of lading or by any other third party claiming an interest in or lien on the cargo or proceeds hereof*.

This indemnity shall be governed and construed in accordance with the laws of England and to the exclusive jurisdiction of the English High Courts.

> *This letter of indemnity shall expire automatically and simultaneously with your receiving the original bills of lading and other shipping documents in full conformity with the letter of credit No. B-01-P-03889 in exchange for which you agree to return to us forthwith any signed original hereof and confirm by return telex the cancellation if (**sic**) any telex version of this letter of indemnity. [Emphasis is added.]*

The plaintiffs agreed to make payment on the letter of credit on account of this letter of indemnity and payment was made on 7 October.

Subsequently the bill of lading became available and arrangements were made to exchange the bill of lading and other related shipping documents for the letter of indemnity of 19 September. On 13 November that was accomplished, and the plaintiffs came into possession of the bill of lading indorsed in blank by the third party, two months after the gasoil was discharged.

In the meantime Pacific Fond failed to fulfil its commitments to the plaintiffs, and did not make any payment to them. When the plaintiffs threatened to take delivery of the gasoil with the bill of lading, they were informed that it was not possible because the gasoil had already been released.

The plaintiffs still gave time for Pacific Fond to make payment, but that was in vain. On 28 July 1998 they acted. They arrested the Neptra Premier. On 29 July the defendants requested the third party to furnish security for the release of the vessel under the letter of indemnity of 11 September 1997. When the third party took no action, the defendants secured the vessel`s release on 31 July on an undertaking furnished by their P & I Club.

Eventually the third party furnished a bail bond on 25 August 1998 to replace the P & I Club`s letter of undertaking. The bond was furnished in compliance with an order of court of 12 August 1998. The defendants had applied for an order for the third party to furnish security for the release of the vessel on the basis of the letter of indemnity of 11 September 1997. The third party resisted the application on two grounds, firstly, that it was a profitable company and if it was in breach of its obligations under the letter of indemnity it was able to compensate the defendants by payment of damages, and secondly, that the plaintiffs` claim against the defendants was a sham. Significantly, it did not take the position that the gasoil was not released in accordance with its instructions.

The actions

The plaintiffs asserted that as the indorsees and/or lawful holders of the bill of lading, they were entitled to the delivery of the gasoil from the defendants upon production of the bill of lading. The defendants in turn brought the third party into the proceedings. The defendants claimed that it was liable to indemnify them against any liability they incurred through releasing the gasoil without production of the bill of lading on the strength of its letter of indemnity. They also claimed against the third party damages for losses incurred following the arrest of the vessel and expenses incurred in securing its release.

When opening the defence Mr Haridass, counsel for the defendants stated with praiseworthy candour that the defendants did not see a defence to the plaintiffs` claim, and that the defences were raised

at the request of the third party.

The third party was not confined to raising defences through the defendants. It took an active and direct role in disputing the plaintiffs` claim. On 24 May 1999 the defendants obtained an order of court that it caused investigations to be made for obtaining evidence in respect of defences for the defendants against the plaintiffs` claim. On 11 October 1999 it was given leave to appear in the action between the plaintiffs and the defendants and cross-examine witnesses as if it was the defendants, and to take such part in the proceedings as the court directed. In the event, the third party was allowed to contest the plaintiffs` claims without restriction at the trial as though it was a defendant.

In the closing submissions its counsel identified the defences it was relying on:

> *The third party has no case to answer to the defendants if the plaintiffs` claim against the defendants fail. The plaintiffs` case against the defendants must fail for the following reasons:*
>
> > *(a) The plaintiffs obtained the bill of lading pursuant to and as security for an illegal or unenforceable moneylending transaction. The effect of this is that the plaintiffs would not be able to enforce their alleged rights under the bill of lading.*
> >
> > *(b) The plaintiffs have not proved their loss.*
> >
> > *(c) The plaintiffs acquiesced in or consented to the delivery of the cargo without production of the bill of lading.*

In view of that, I shall examine the plaintiffs` claim against these defences.

The defences to the plaintiffs` claim

(1)THE PLAINTIFFS OBTAINED THE BILL OF LADING PURSUANT TO AND AS SECURITY FOR AN ILLEGAL OR UNENFORCEABLE MONEYLENDING TRANSACTION

The bill of lading would in normal circumstances be presented when the third party collected payment under the letter of credit, and it would then become available to the plaintiffs. In this case, the bill of lading was not presented when payment was made because the third party undertook in the letter of indemnity of 19 September 1997 to obtain and surrender it to the plaintiffs later.

Against this background, the bill of lading was delivered from the third party to the plaintiffs after payment for the gasoil was made. When the bill of lading was tendered to the plaintiffs, that was done in discharge of the third party`s obligation under that letter of indemnity. It is difficult to see how the plaintiffs` claim can be characterised as an action to enforce security taken in respect of the loan to Pacific Fond. When the plaintiffs, in their capacity as holders of the bill of lading sued the defendants in their capacity as the carriers, no reliance was placed on the contract with Pacific Fond.

The third party relied on s 23 of the Money Lenders Ordinance (Cap 163) (`the Ordinance`) of Hong Kong which reads

> *Loan etc. not recoverable unless money lender licensed*
>
> *No money lender shall be entitled to recover in any court any money lent by him or any interest in respect thereof or to enforce any agreement made or security taken in respect of any loan made by him unless he satisfies the court by the production of his licence or otherwise that at the date of the loan or the making of the agreement or the taking of the security (as the case may be) he was licensed:*
>
> *Provided that if the court is satisfied that in all the circumstances it would be inequitable if a money lender who did not satisfy it that he was licensed at the relevant time was thereby not entitled to so recover such money or interest or to enforce such agreement or security, the court may order that the money lender is entitled to recover such money or interest or to enforce such agreement or security to such extent, and subject to such modifications or exceptions, as the court considers equitable.*

The plaintiffs` director Sheng Hua described the circumstances leading to the plaintiffs` agreement with Pacific Fond. He deposed that in 1997 the plaintiffs` activities were mainly concentrated on exporting products to China. His principal duties in the plaintiffs were to find and develop business opportunities for the company and to supervise their operations.

He was looking for business opportunities for the plaintiffs when he met up with Yu Jianbin, an old friend and former colleague in July 1997. Yu was a director of Pacific Fond at that time. Yu informed him that Pacific Fond was engaged in oil trading and had the opportunity to buy oil from the third party and sell it to China at a profit, but it did not have the financial resources for the transaction, and sought his help to issue letters of credit for it to buy the oil from the third party.

Sheng wanted to help his old friend and at the same time enable the plaintiffs to enter into the oil trading business. After he obtained his fellow directors` approval, the plaintiffs entered into the agreement with Pacific Fond.

Sheng`s account was not contradicted by either Yu or anyone from Pacific Fond, or by any other evidence. There was no evidence that the plaintiffs were engaged in similar activities with other parties. The third party made strenuous assertions that the plaintiffs were acting as money lenders in their dealings with Pacific Fond, and relied on the fact that there were two earlier similar agreements with Pacific Fond dated 28 July and 25 August 1997.

Under the interpretation section, s 2 of the Ordinance, a money lender includes a `person whose business (whether or not he carries on any other business) is that of making loans`. Under the laws of Hong Kong, a person is not a money lender unless it is proved that there is a degree of system or continuity in his money lending transactions.

The three agreements of 28 July, 25 and 26 August show that there was some system and continuity in the dealings between the two companies.

Do these transactions establish that a part of the plaintiffs` business was to make loans? There was

no evidence that the plaintiffs were in the business of opening letters of credit, or that they entered into similar transactions with other parties. The explanation that the transactions were entered into to help an old friend and to learn the oil trading business was not refuted. On the evidence, I accept the submissions that the plaintiffs were not carrying on money lending business within the contemplation of the Ordinance.

Even if the plaintiffs were engaged in money lending with Pacific Fond, they may still get redress. Under s 23 a money lender may recover if the court is satisfied that it would be inequitable to deny recovery. The third party was not deserving of protection because (1) it was a stranger to the transaction between the plaintiffs and Pacific Fond; (2) it requested the defendants to discharge the gasoil without production of the bill of lading; and (3) it received payment for the gasoil on its undertaking to produce the bill of lading to the plaintiffs. In these circumstances, it was inequitable to deny the plaintiffs their rights under the bill of lading. (This issue was considered with reference to the third party because it was the real and ultimate party liable under the letter of indemnity.)

(2)THE PLAINTIFFS HAVE NOT PROVED THEIR LOSS

The third party argued that the plaintiffs had not proved their loss because they came into possession of the bill of lading after the gasoil was delivered, and secondly, they could not have taken delivery of the gasoil in Shanya as they were not licensed to import gasoil into China.

The first limb of the argument lacked merit. If the third party had not released the gasoil, it would still be available for collection with the bill of lading. It was not open for the third party to say that the plaintiffs were not entitled to the cargo because it had caused it to be released.

The second limb too cannot stand. The fact that the plaintiffs were not licensed importers does not mean that the gasoil was without value. It was not suggested that the gasoil was liable to be forfeited without compensation. The plaintiffs may be able to sell it to licensed importers, or they may be able to ship it out of China and sell it elsewhere. When the gasoil was lost to the plaintiffs and they could not deal with it, they suffered loss.

(3)THE PLAINTIFFS ACQUIESCED OR CONSENTED TO THE DELIVERY OF THE CARGO WITHOUT PRODUCTION OF THE BILL OF LADING

The third party submitted that:

> *In the instant case, the plaintiffs were told on 26 August 1997 that the goods were loaded on board. On 27 August 1997, the plaintiffs opened a letter of credit which contemplated that the bill of lading need not be presented for negotiation. They therefore knew that the goods would be discharged by August or September 1997 at the latest. Yet, they stood by and made no attempt to contact the defendants or anyone at all to indicate that they were interested in the goods, or that they would object to delivery of the goods to anyone other than the plaintiffs. The plaintiffs actually approved the negotiation of the letter of credit in late September or early October 1997 without presentation of the bill of lading. When they authorised their bank to accept the bill of lading in November 1997, it did not matter to them that the bill of lading was in respect of goods that would already have been delivered. They never presented the bill of lading to the carrier to demonstrate their interest in the goods. This is the*

> *clearest case of standing by, and in fact, encouraging the carrier to think that there was no objection to the delivery in September 1997. It would be unconscionable for the plaintiffs now to complain of the delivery without production of bill of lading in September 1997, and they are estopped from doing so.*

The third party was correct to say that the plaintiffs should have known that the gasoil would have arrived at Shanya in September, and would be available for collection. However, that did not mean that they knew on 15 September that the third party was releasing the gasoil without the bill of lading, or that they had consented to it at any time.

Volume 16 ***Halsbury`s Laws of England*** (4th Ed) (1992 Reissue) para 924 states:

> *The term `acquiescence` is ... properly used where a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act. In that sense* ***the doctrine of acquiescence may be defined as quiescence under such circumstances that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct****, the principle of estoppel by representation applying both at law and in equity, although its application to acquiescence is equitable. The estoppel rests upon the circumstance that the person standing by in effect makes a misrepresentation as to a fact, namely, his own title; a mere statement that he intends to do something, for example to abandon his right, is not enough. Furthermore, equitable estoppel is not applied in favour of a volunteer. [Emphasis is added.]*

Sheng Hua`s evidence was that the plaintiffs only knew that the gasoil had been released after they received the bill of lading on 13 October 1997. When he gave notice to Yu Jianbin that the plaintiffs would collect the gasoil if Pacific Fond did not make payment, Yu informed him that the gasoil was already collected. This evidence was not contradicted. The matters the third party complained of did not support a defence of consent or acquiescence.

In addition to asserting that the plaintiffs have no valid claim against the defendants for which the defendants need to seek indemnity, the third party submitted that the letter of indemnity did not operate. This was not a position taken by the third party consistently. When they filed their original defence on 13 November 1998 to the defendants` claim they admitted that the defendants had released the gasoil on its instructions. However, on 14 March 2000, more than a year after its defence was filed and two and a half years after the delivery of the gasoil, it changed position and denied that the gasoil was released to Sinochem Hainan in compliance with its instructions.

Several questions arose from this late and unexplained turnabout:

(1) Why the third party did not complain when its instructions were not complied with?

(2) Why Sinochem Hainan did not complain about not receiving the gasoil that the third party intended it to receive?

(3) Why, when the defendants applied to court to compel the third party to provide security for the release of the Neptra Premier under the terms of the letter of indemnity, the third party did

not say that the letter was not enforceable because the gasoil was not delivered in compliance with its instructions?

The third party`s attitude towards the whereabouts of the gasoil was interesting. It made a report with the Shanya police authorities on 22 September 1999 after third party proceedings were instituted against it. In the report it referred to the shipment in question and another shipment in another vessel. It stated that when the gasoil was unloaded from the Neptra Premier on 16 September, it viewed the gasoil as having been delivered to Sinochem Hainan, and it received payment. It referred to the arrest of the Neptra Premier by the plaintiffs and to its obligation under the order of court of 24 May 1999 to the third party to investigate the whereabouts of the gasoil. It requested the authorities `to carry out an investigation on the whereabouts of the two shipments ... so as to help us understand whether the said good ( ***sic*** ) had been delivered to Sinochem Hainan`.

This was a curious way of complying with the order of court of 24 May 1999. Apparently, it had not sought confirmation from Sinochem Hainan whether they received the gasoil, and it did not state that the gasoil was not delivered to Sinochem Hainan. Furthermore it appeared that it would not even have sought assistance from the authorities but for the order of court.

There was evidence that the gasoil was collected by its agents at Shanya. The obligations of the parties regarding the vessel and its cargo at Shanya were set out in the charterparty. The special provisions stipulated, inter alia:

> *5 Charterers` agent both ends provided rates competitive.*
>
> *...*
>
> *8 Sinochem terms and clauses as attached to apply.*

Term 6 of the Sinochem terms and clauses provided that `Vessel agents shall be nominated by Charterers at loading and discharging port(s). Customary fees shall be for owners` account provided rates competitive`.

The third party nominated Penavico Shanya Hainan as the agents for Shanya on 5 September. The agents were changed by the third party on the next day to Sino Agent, Shanya, Hainan, China (also known as China Marine Shipping Agency Co), and the person in charge was identified as Hu Peng.

When the Neptra Premier arrived at Shanya a notice of readiness was issued in compliance with cl 6 of the charterparty. Clause 6 required the master to issue such a notice to the charterer or his agent that the vessel is ready to discharge cargo. A notice dated 13 September addressed to `Consignee Representative` was issued to the third party, giving notice that the vessel was ready to commence discharge of the cargo of gasoil. Acceptance of a copy of the notice on 14 September was acknowledged by Hu Peng on behalf of Sino Agent.

Subsequently Hu Peng boarded the vessel and assisted with the inward clearance formalities. A surveyor and two other persons also boarded the vessel. The surveyor introduced the two persons as representatives of the receivers and Hu Peng identified them as representatives of Sinochem.

It was contended that when the charterparty gave the charterer the right to nominate agents, the agents nominated were the vessel`s agents. In support of that argument it was pointed out that as the vessel`s agents` fees are borne by the shipowner, the nomination was conditional to the agents`

rates being competitive; if the agents nominated were the charterer`s agents, that condition is not necessary as the shipowner does not pay the charterer`s agents.

That may be correct, but it did not mean that Sino Agent was not the agents of the third party as well. The charterer may need agents to represent it at a discharge port. Hu Peng/Sino Agent`s acceptance of the notice of readiness issued to the third party indicated that Sino Agent was the third party/charterer`s agents. The third party did not rebut this. The evidence showed that the third party`s agents participated in the discharge of the gasoil.

The proper law of the contract of carriage

The amendment of the defence was not the only late turn in the third party`s case. Counsel sprang another surprise in the closing submissions.

This was on the law applicable to the contract of carriage. This was not specifically set out in the pleadings, but it was clear at the commencement of the case all parties regarded the proper law to be the law of Singapore by referring to the relevant Singapore statutes. The plaintiffs and the third party referred to the Bills of Lading Act (Cap 384) in their opening statements. Likewise the defendants referred to art IV r 2(i) of the Hague-Visby Rules which are applied through the Carriage of Goods by Sea Act (Cap 33) in their opening statement. (The rules do not apply in Malaysia.)

However, without so much as an explanation the third party contended in its closing submissions that:

> *60 The plaintiffs have not based their claim on the Singapore Bills of Lading Act (Cap 384). In paragraph 4 of the statement of claim, they sue as indorsees of the bill of lading `to whom the property in the said goods passed upon and by reason of the indorsement`. This is the provision in section 1 of the English Bills of Lading Act 1855, which is the law in Malaysia but no longer the law in Singapore. The plaintiffs are therefore applying Malaysian law, being the law of the port of shipment, as the applicable proper law.*
>
> *The plaintiffs` chosen cause of action must fail because property did not pass to them upon and by reason of the indorsement:-*
>
> *(1) An indorsee who does not obtain full property in the goods, but only a special proprietary interest, eg a pledgee or someone seeking to hold the bill of lading as security. **Sewell v Burdick** [1884] 10 App Cas 74.*
>
> *(2) Property cannot pass before, or independently of, consignment or indorsement. If, for example, the property passed before the goods and the bill of lading arrived, the indorsee would not come within this provision: **The Delfini** [1990] 1 Lloyd`s Rep 252. In this case, the property did not pass at all to the plaintiffs, whether before, at or after the bill of lading was allegedly indorsed to the plaintiffs.*
>
> *61 As the plaintiffs did not base their cause of action on the Singapore Bills of Lading (Cap 384) (**sic**), the provisions of that statute are irrelevant.*

That was a remarkable argument to make. It was clear from the conduct of the plaintiffs` case that it

was founded on Singapore law. They did not refer to the Bills of Lading Act 1855 or to the laws of Malaysia, but to Singapore law.

The submission was mischievous where it asserted that the plaintiffs were applying Malaysian law. It was confusing where it appeared to regard the proper law to be Malaysian law. I say appeared because the submission was based on its reading (or misreading) of the plaintiffs` position, without stating specifically whether it was championing Malaysian law as the proper law. In later submissions, it asserted that Malaysian law was the applicable law, but it neither explained the shift in position from the opening statement nor amended its defence to plead that Malaysian law was the applicable law.

In the absence of any contrary pleading, a Singapore court will apply Singapore law to any dispute before it. In this case the parties had in their opening statements accepted that the law of the contract of carriage was Singapore law. Furthermore, on the facts, the contract had more connection with Singapore than Malaysia. The defendants-carriers and the third party-shippers are Singapore companies. The only connection with Malaysia was that the gasoil was loaded at Pasir Gudang. Even China had a greater connection to the contract than Malaysia as the gasoil was shipped to and released there.

Findings and orders

I find that the defences raised by the third party fail. In the circumstances, judgment is given in favour of the plaintiffs on their action against the defendants with costs.

The parties made some efforts to establish the damages to be paid to the plaintiffs. After reviewing the evidence, it was clear that further evidence is necessary for a proper determination to be made. This includes evidence on whether gasoil could be sold by the plaintiffs to licensed importers in China if they had possession of it, the price that it would have fetched, the customs duty payable on the gasoil, etc. If the gasoil cannot be sold to licensed importers, there should be evidence, eg whether it can be shipped to another place, the shipment and other expenses, and the price it would then fetch. In the absence of such evidence, I order that the plaintiffs` damages be assessed.

With regard to the defendants` claim for indemnity from the third party, I order that the third party indemnifies them against the damages and costs payable by them to the plaintiffs, and that it pays them the costs of the their defence against the plaintiffs` claim on an indemnity basis.

On the defendants` claim against the third party for damages they incurred following the arrest of the vessel, it was agreed that if the defendants succeeded, the damages are to be assessed. I therefore order that there be judgment for the defendants against the third party with damages to be assessed, and that the defendants are to have the costs of these claims.

Outcome:

Order accordingly.