The "Sunrise Crane"
[2003] SGHC 291

Case Number : Adm in Rem 600097/2001

Decision Date : 26 November 2003

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Thomas Tan and Daryll Ng (Haridass Ho and Partners) for plaintiffs; John Seow and Kelly Yap (Rajah and Tann) for defendants

Parties : —

Tort – Negligence – Breach of duty – Standard of care – Dangerous goods – Whether defendants breached duty of care in discharging contaminated nitric acid into plaintiffs' vessel without any warning of its nature and characteristics

Tort – Negligence – Duty of care – Dangerous goods – Whether defendants owed duty of care to plaintiffs in discharging contaminated nitric acid into their vessel

1 In this action founded on negligence, the Plaintiffs as the registered owners of the *Pristine* are claiming damages from the Defendants for corrosion damage to their vessel *Pristine* and consequential losses. The Defendants, Doman Shipping S.A., are the registered owners of the *Sunrise Crane* of the port of Panama.

History and Nature of Dispute

2 At all material times, the *Pristine* operated from Singapore as a slop tanker collecting MARPOL Annex I (oil) slops off larger vessels for disposal. The *Pristine* a small steel tanker, built in 1975 was registered in Singapore. The vessel had four sets of wing cargo tanks (port and starboard) located forward of the accommodation, pump room and machinery space. The cargo tanks were constructed of steel. The vessel was classed with NK and was extensively refurbished in January 2001.

3 The *Sunrise Crane* is an IMO Type II and III chemical tanker, built in Japan in 1992. She had in her no.3C tank about 34mt of contaminated nitric acid for disposal. The contaminant was hydraulic oil that had leaked from the vessel's defective cargo pump.

4 At all material times, the *Sunrise Crane* under the management of Setsuyo Kisen Co Ltd ("Setsuyo") was time chartered to Tsurumi Sunmarine Co Ltd ("Tsurumi") who had sub-chartered the vessel to Uyeno Transtech Ltd ("Uyeno"). It was Uyeno's cargo of nitric acid that was contaminated by hydraulic oil. The Defendants are entered with the Japan Ship Owners' Mutual Protection & Indemnity Association ("Japan P & I Club"). The latter's local correspondents were Spica Services (S) Pte Ltd ("Spica"). Captain Malvinder Jit Singh Gill ("Captain Gill"), a marine surveyor with Matthews-Daniel International Pte Ltd, was appointed to make inquiries for the engagement of a suitable disposal contractor.

5 The *Pristine* was berthed port side to an anchored *Sunrise Crane* on the morning of 8 March 2001. *Sunrise Crane* discharged approximately 34mt of contaminated nitric acid into the *Pristine's* no.1 wing cargo tank via a flexible cargo hose using the port aft manifold. After discharge had commenced, yellowish fumes were seen emanating from her forward vent. The deck became hot and she was seen listing progressively to port whereupon her crew evacuated to the *Sunrise Crane.* Some of the crew members from the chemical tanker with protective equipment and breathing apparatus boarded the vessel to close the valves and openings on the *Pristine*. Thereafter, the crew of the *Pristine* returned to their listing vessel. On or about the time of the arrival of *Salvalet*, the flexible cargo hose was

disconnected and *Sunrise Crane* cast off from the listing *Pristine.* The *Sunrise Crane* shortly weighed anchor and departed for her next assignment.

6 The *Salvalet* was dispatched to the *Pristine* by salvors, Semco Salvage and Marine Pte Ltd ("Semco"). Lloyd's Open Form 2000 was signed at 0800 hours on 8 March 2001 by the respective masters of *Salvalet* and *Pristine*. By 1135 hours, *Pristine* had capsized but remained just afloat. Her hull bottom plating was found with corroded holes in way of cargo tank nos.1 and 2. Yellowish-brown fumes were seen issuing from the corroded holes. Eventually, Semco righted the capsized vessel and she was towed to Singapore where she was sold "as is where is" for S$50,000.

7 Dr. Neil Sanders, a chemist with Dr. J H Burgoynes & Partners Ltd, was appointed to assist Semco. He explained that nitric acid is a strong oxidising agent, corrosive and is very toxic. In addition, highly toxic nitrogen oxide fumes are produced by chemical reactions involving nitric acid. If sufficiently concentrated, nitric acid would corrode and dissolve mild steel rapidly. He concluded that the holes in the bottom steel plating (and also in the bulkheads between the tanks) of the *Pristine* were due to the effects of concentrated nitric acid loaded into the vessel.

8 The Plaintiffs' contention is that the *Pristine* was to have loaded "contaminated lubes" from the chemical tanker *Sunrise Crane.* Their case is that at the time in question, the Plaintiffs did not know, as they were not told, that the substance to be disposed of was nitric acid that had been contaminated by hydraulic oil. They say contaminated nitric acid being a dangerous liquid, they were entitled to a warning of that fact. There was no sign of trouble until after the contaminated nitric acid was pumped into her cargo holds following a ship-to-ship transfer operation with the *Sunrise Crane*.

9 Their pleaded case is that the Defendants were under a duty which they had breached to give full details of the dangerous nature of the cargo before *Pristine* received it into the cargo tanks. The Defendants were also in breach of an alternative duty to deliver cargo that was safe for the receiving vessel. It is further alleged that prior to receiving the contaminated cargo, the Defendants represented to the Plaintiffs and their representatives on board that what was to be delivered was "contaminated lubes". The Plaintiffs and their representatives relied and acted on that representation by making arrangements to proceed to outside the port limits of Singapore ("OPL") to receive the "contaminated lubes".

10 It is not disputed that Captain Gill had at all material times dealt only with Malcolm Douglas Windsor ("Windsor") from Pink Energy Enterprises ("Pink Energy") and the disposal contract awarded to Pink Energy was for approximately 34mt of nitric acid contaminated with hydraulic oil. Moreover, prior to the ship-to-ship transfer, Pink Energy had seen a sample of the contaminated nitric acid. It was Pink Energy who had fixed the *Pristine* to collect the contaminated nitric acid. The *Pristine* was at that time on a two-year time charter to Pristine Maritime Pte Ltd ("Pristine Maritime").

11 The Defendants have denied negligence. The Defendants accept that they owed a duty to inform Pink Energy of the nature of the cargo to be disposed of. But they deny that they owe a similar duty to the Plaintiffs. There was no antecedent contract between them and the Plaintiffs and they did not know the identity of Pristine Maritime and the Plaintiffs. There could therefore be no proximate relationship insofar as the Plaintiffs and Pristine Maritime were concerned so as to give rise to a duty of care. Neither was it foreseeable that Pink Energy would misinform Pristine Maritime (and consequently the Plaintiffs) in the Works Order issued to Pristine Maritime by Pink Energy that the *Pristine* was to collect Annex I slops from *Sunrise Crane*. The Defendants argue that it was Windsor's wrongdoing that had caused the damage to the *Pristine*.

12 In the event they are held liable in damages, the Defendants say they are entitled to limit their liability. They have pleaded as a defence limitation of liability under s136 of the Merchant Shipping Act (Cap.179). According to the Defendants' calculations, tonnage limitation is $380,267.52

The Law

13 It is common ground that nitric acid is a dangerous chemical. The law applicable to dangerous goods is the well-established principles of the law of negligence. The duty owed is that of reasonable care to prevent the dangerous goods from doing injury or damage to persons or property likely to come into contact with them. The burden of proving negligence is on the plaintiff.

14 The persons who are likely to come into contact with dangerous goods would be those who come within Lord Atkin's two-step test in *Donoghue v Stevenson* [1932] AC 562. This invokes questions of reasonable foreseeability of injury or harm and the establishment of a proximate relationship. English law has added a third limb to the two-step test, namely a duty of care would only arise if it is "fair just and reasonable" to impose such a duty. Until 1996, the threefold test has been largely applied in cases concerned with economic loss or public services. See *Clerk & Lindsell on Torts* (18th ed) para. 7-22. The third limb is now recognised as part of an overall test that applies generally to all tort cases. In other words, it also applies to a personal injury or physical damage case. In *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] 1 AC 211, the House of Lords rejected the suggestion that in cases of physical damage the threefold test has no application and held that it applies to all cases of tort. In *Mohd bin Sapri v Soil-Build (Pte) Ltd* [1996] 2 SLR 505, the Court of Appeal adopted the proposition in *Marc Rich* and applied the threefold test to a personal injury claim.

15 What would constitute reasonable care or precaution must necessarily depend on the facts and circumstances of each case. In *Hodge & Sons v Anglo-American Oil Company and D T Miller & Co* [1922] 12 Lloyd's Law List Rep.183, Lord Scrutton observed that the obligation to take reasonable care would probably be fulfilled by entrusting the dangerous goods to a competent person with reasonable warning of its dangerous character, if that danger is not obvious.

16 In that case, a serious explosion on a petroleum barge, the *Warwick*, caused the death of a number of workmen and injury to others. Considerable property damage was also done. The *Warwick* was the property of the defendant Anglo-American Oil and was used for the carriage of petroleum. Anglo- American Oil had contracted with ship repairers, Miller, to do certain work on the barge. Miller in turn subcontracted the work to Hodge. On the morning of the casualty, Miller had informed Hodge that the barge was on the way to its wharf in order that the tank with which the barge was fitted might be altered and repaired by Hodge. The barge was brought to Hodge's wharf by a lighterman employed by Anglo-American Oil. An explosion occurred within half an hour of her arrival at the wharf. The foreman of Hodge had commenced work on the *Warwick's* tank with an oxy-acetylene burner before it was free of petrol vapour and consequently caused the disastrous explosion.

17 Hodge sued Anglo-American Oil for property damage. Willmott, an employee of Hodge was seriously injured and he also sued the owners of the barge. Anglo-American Oil had no contract with either Hodge or Willmott, though they knew that Miller was subcontracting with Hodge and the barge would be worked on by Hodge's workmen. It was in these circumstances that the Court of Appeal imposed upon Anglo-American Oil, a duty to warn of the dangerous character of the tank. A warning would not be required where the person who would otherwise be entitled to a warning was already aware of the danger, or who might reasonably be assumed to be aware of it. Hodge in relation to Anglo-American Oil was entitled to a warning unless Hodge like Miller was aware of the danger. On the evidence, Hodge needed no warning. But if a warning was needed it was sufficiently given. The

lighterman who brought the barge to Hodge's wharf had told Hodge's foreman, when he saw the oxy-acetylene burner being brought to the barge, not to use the oxy-acetylene burner until the tank was properly ventilated.

18 Scrutton LJ set out the legal position, which Lord Atkinson in the House of Lords [1923] 16 Lloyd's List Law Rep. 61 at 64 approved:

> "The law, therefore, seems to be: (1) That if the barge which has carried petrol is an article dangerous in itself, it is the duty of the owners to take proper and reasonable precautions to prevent its doing damage to people likely to come into contact with it. These precautions may be fulfilled by entrusting it to a competent person with reasonable warning of its dangerous character, if that danger is not obvious. If such precautions are not taken, the owner will be liable to third persons with whom he has no contract for damage done by the barge, which they could not have avoided with reasonable care. (2) If the barge which has carried petrol is not dangerous in itself, but becomes dangerous because it has been insufficiently cleaned, and the owner is ignorant of the danger, the owner is not liable for damage caused by it to persons with whom he has no contract… (3) In the case of a thing dangerous in itself, where either the danger is obvious or the owner has given proper warning to the person entrusted with it, not being his servant, the owner is not liable for negligence of such person causing injury to a third party; such negligence is nova causa interveniens." [p188]

19 Those quoted passages must be read in connection with the particular circumstances of that case, but the principles there appear to me entirely applicable to the case before me.

20 The first proposition (and another part of Scrutton LJ's speech at p 187 of the report) recognises that a warning is not a sufficient discharge of the duty of care if the person to whom the dangerous article or substance is delivered is not a competent person: see *Burfitt v A & E Kille* [1939] 2 All ER 372 at 375. A competent person would include those persons who are in the business of handling or transporting such dangerous goods. They would usually be persons who would otherwise be entitled to notice or warning of the dangers but were already aware of it, or who might reasonably be assumed to be aware of the dangers.

21 Some dangerous goods are common so much so that it would be difficult for one to deny their dangerous characteristics as a matter of general knowledge. In that situation, knowledge of the danger could be imputed. In this regard, I found the speech of Pring J in *Hoey v Hardie and Anor* [1912] 12 SRNSW 268 helpful. He said:

> "If a person delivers gunpowder to a carrier and tells him that it is gunpowder, there is no need of any further communication, because everybody knows the nature of gunpowder. And if the person to whom the goods are delivered knows that they are dangerous, there is no duty on the person who delivers them to inform him of the fact, because the duty can only be to inform him of that of which he is ignorant." [p 274]

22 In *Hoey v Hardie and Anor,* the defendants were the owners of a consignment of bichromate of potash in bags. They were handed over to the plaintiff for carriage in his cart without notifying him that the bags contained a dangerous and poisonous substance. Some of the bichromate of potash spilled out of the bags and got mixed up with the hay in the cart. The plaintiff's horse ate the hay and was poisoned. The plaintiff complained that the defendant delivered the bichromate of potash to him, knowing its dangerous nature, but did not give the plaintiff notice of its danger. The court held that the defendant was under a duty to give notice of the dangerous nature of the substance, if they were aware of it and the other person was not. In the case of a substance like bichromate of potash,

which was not a common substance and the nature of which was not a matter of common knowledge, merely naming the substance did not discharge the duty.

Application of the Law

Was there a duty of care

23 The Plaintiffs' action is founded, not on contract, but on the duty to inform which attaches in cases where a person is dealing with a thing dangerous in nature and likely to cause damage, unless reasonable care is exercised. The Defendants rightly contend that the Plaintiffs have to satisfy the threefold test enunciated in *Caparo Industries Plc v Dickman* [1990] 2 AC 605. This burden, the Defendants submit, has not been satisfied.

24 The Defendants accept that where dangerous goods are concerned, there is a notional duty to inform the recipient of the dangerous nature of the goods. However, they submit that the duty is imposed where the recipient is the carrier and there is privity of contract between the shipper and the carrier. No duty to inform the recipient of the dangerous nature of the cargo arises in the present case as the contract was with an intermediate party, namely Pink Energy who had subcontracted the disposal of the contaminated cargo to Pristine Maritime, the time charterers of the *Pristine*. In that sense, the Plaintiffs as owners of *Pristine* are thrice removed from the Defendants.

25 It is clear from the Defendants' pleaded case and evidence that Pink Energy was an independent contractor. I find that Windsor had in his dealings with Captain Gill, acted for and behalf of Pink Energy. He was not the employee or agent of either Pristine Maritime or the Plaintiffs. The disposal contract was with Pink Energy.

26 The Defendants' relationship with Pink Energy was contractual and whether the Defendants owed concurrent duties in contract and in tort to Pink Energy is distinct from the wholly independent consideration whether the law would impose a duty of care on the Defendants where the Plaintiffs are concerned. On the same factual situation, the law could (as the appellate court in *Hodge & Sons v Anglo-America Oil Co* did) impose on the Defendants a separate duty of care owed to those whom the Defendants are considered to be in a relationship of proximity. It is a tort independent of contract.

27 In my judgment, the absence of an antecedent contract between the Plaintiffs and Defendants and the presence of intermediate parties in the chain of events is neither distinguishable nor determinative. The true question here like in most cases is whether the particular defendant owed to the particular plaintiff a duty of care having the scope that is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty would depend on all the circumstances of the case. See Lord Keith in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 at p240.

28 The nature of the goods would be one of the circumstances (often a highly important circumstance) that determines whether a duty arises and, if so, whether reasonable care has been taken or not. So the greater the danger, the greater the care is required of a defendant. Singleton LJ in *Beckett v Newalls Insulation Company Ltd and Lightfoot Refrigeration Company Ltd* [1953] 1 WLR 8 clarified that the law applicable to dangerous goods is the law of negligence and approved a passage in an earlier edition of Winfield on Torts where the author said:

> "….It is true that the law expects of a man a great deal more care in carrying a pound of dynamite than a pound of butter, or in keeping a bottle of poison than a bottle of lemonade. But

that is only another way of saying that what is a reasonable amount of care in one set of circumstances is not so in another set circumstances, and reasonable care is the sole test of negligence. ..And, passing to the decided cases of dangerous chattels, we have been unable to trace anything in the reports that is inconsistent with the view that the law of negligence is all that is needful for the purpose." [p 15]

29 Contrary to the Defendants' submission, it is not necessary for the Plaintiffs to prove that the Defendants had any knowledge of the existence of the Plaintiffs or of their particular circumstances. The test of reasonable foreseeability is based on the knowledge that the Defendants had or ought to reasonably have had in contemplation the victim and the potential for harm. It is an objective test. If the risk of harm were real and not far-fetched, the more likely this element would be established.

30 The Defendants, Japan P & I Club and their local correspondents, Spica as well as Captain Gill were well aware of the nature of the cargo and its dangerous characteristics. The Defendants knew that the contaminated nitric acid had to be carried in stainless steel tanks. The Defendants were anxious that a competent contractor be engaged for the disposal of the contaminated nitric acid in accordance with local regulations. The Defendants had requested the Japan P & I Club to assist them in the disposal and had requested that a competent disposal contractor be engaged.

31 On the overall evidence before me, I find that Captain Gill (and hence the Defendants) knew that someone else (and not Pink Energy) would undertake the actual collection and disposal of the contaminated nitric acid. After the disposal contract was awarded to Pink Energy, the Defendants knew the identity of the receiving vessel. The Defendants were provided with certain information. They were given, in particular, the name of the receiving vessel, her registration no. SB411J, the VHF channel for radio communication between *Sunrise Crane* and *Pristine* and the coordinates at OPL for the two vessels to rendezvous the night of 7 March 2001. The master of the *Sunrise Crane* testified that he had similarly received instructions from Uyeno to meet the *Pristine* at the agreed location for a ship-to-ship transfer of the contaminated nitric acid. It was against this factual matrix that the contaminated nitric acid was entrusted to the *Pristine* for disposal.

32 I am satisfied that a reasonable person in the position of the Defendants would have foreseen that if no notice of the contaminated nitric acid and its dangers was given, the *Pristine* would not be in a position to take reasonable steps to avoid damage. Hence, there was a likelihood that the *Pristine* would suffer some harm. Not only was there a foreseeable risk of likely harm (which was not far-fetched), it was also reasonably foreseeable. The test laid down by Lord Atkin in *Donoghue v Stevenson* is in these terms:

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

33 Lord Atkin also said:

" *The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended.* But they all illustrate the general principle."

[emphasis added; p596]

34 Reasonable foreseeability of damage is in my judgment established. The casualty was the sort of occurrence that was distinctly possible (the Defendants knew it had to be stored in stainless steel tanks as nitric acid is corrosive) and plainly foreseeable. Yan Chuan Chee ("Yan"), the Claims Director of Spica, testified that nobody at the meeting on 7 March 2001 asked whether the *Pristine* had stainless steel cargo tanks but Captain Gill was asked to verify whether the receiving vessel could handle the disposal.

35 In my judgment, there was proximity of relationship between the Plaintiffs and the Defendants to support the imposition of a duty of care. The physical damage that materialised provided the requisite degree of proximity. The damage was of the kind reasonably foreseeable following a ship-to-ship transfer of contaminated nitric acid into a steel cargo tank. Lord Oliver in *Caparo Industries* at 635 said that in the case of direct physical damage, the circumstances itself may constitute the element of proximity.

36 Once the twin elements of foreseeability and proximity are established, there is no reason to exclude in the present case a duty of care on "fair and reasonable" ground. For the reasons explained later in my judgment, my view is that the Plaintiffs and those employed by them did not know, as they were not told, and had no means of knowing the dangerous quality of the goods that caused the casualty. It would be unjust and inexpedient to say that they have no remedy against those who might have easily prevented it.

37 Nitric acid (including nitric acid contaminated with hydraulic oil) is a chemical dangerous in itself. In my judgment, the Defendants owed the Plaintiffs a duty to take reasonable precaution to prevent damage from it. The Plaintiffs were entitled to a warning of its dangers, as they were not aware that contaminated nitric acid was transferred to them. It is important not to conflate this duty of care the Defendants owed to the Plaintiffs with those duties that are owed by the Defendants to Pink Energy under the contract or in tort.

38 In *Hodge & Sons v Anglo-American Oil*, it was Anglo-American Oil who had physically entrusted the dangerous barge to Hodge. Likewise, the *Sunrise Crane* had entrusted the contaminated nitric acid to the *Pristine* for disposal. The *Sunrise Crane* and *Pristine* were berthed alongside for the ship-to-ship transfer operation. Yet, no one from the Defendants told the Plaintiffs or those on board the *Pristine* that the ship-to-ship transfer operation would involve contaminated nitric acid. In the transportation of dangerous goods like chemicals, *Sunrise Crane* as the discharging vessel would be required to independently disclose to the receiving vessel *Pristine,* the character of what is being discharged and received for disposal. It is the very point of the duty to warn of the dangerous nature of the goods that carriers like the Defendants, who are in the business of transportation of dangerous goods, cannot take for granted (a) their own common knowledge assumptions about safety in the transportation of chemicals and (b) that their contractor, Pink Energy, would properly discharge its contractual duties. I pause here to make one observation in connection with the last point. Windsor had asked Captain Gill for a fax confirmation of the disposal assignment, but Captain Gill replied that he was too busy to attend to it. With a verbal contract, the opportunity for mistakes occurring is not so remote.

39 In the transportation of chemicals, an appropriate mode of conveying the information of the cargo would be in the form of an information form or data sheet called material safety data sheet ("MSDS"). MSDS are prepared for the purpose, inter alia, of warning persons dealing with the product of any dangers that might be associated with its use, including fire risk, accidental spillage, and procedures for clean-up. Akihiko Kashiwagi ("Kashiwagi"), a director and vice-president of the Defendants and a director of Setsuyo, agreed that the MSDS is an important document. He said that ordinarily the *Sunrise Crane* would still receive nitric acid as cargo on board even if the shipper had

not given the vessel the MSDS for the particular cargo. This is because their crew is trained to handle nitric acid in the normal course of business and is knowledgeable about nitric acid. However, that is not to say that when the roles are reversed, the Defendants could reasonably adopt the same attitude. The whole purpose of disclosing the nature of the cargo and its dangers is to enable the recipient to take reasonable care to avoid damage. Captain Gu Ji Bon, the master of the *Sunrise Crane,* acknowledged that the MSDS is an important document and those who shipped the cargo and correspondingly those who received the cargo should have a copy of its MSDS. Spica received a copy of the MSDS for the shipment in question from Uyeno on 9 March 2001, a day after the casualty.

40 The duty to inform the receiver of the dangerous nature of the goods is not foreign to the chemical tankers in the industry. Such disclosure is very much part of and inherent in the basic safety procedures and work practices of chemical tankers in the industry. The ICS Tanker Safety Guide (Chemicals), (3rd ed) which is intended as a guide to complement and not replace a shipowner's own safety or operational guidelines for chemical tankers sets out the reasonable steps the recipient of chemical cargo are to take once the information on the cargo is received. The section on ship-to-ship transfer contains a checklist to ensure compatibility of ships and their cargo handling equipment. It provides that when preparing for a ship-to-ship transfer, the two masters involved should agree at the earliest opportunity on every aspect of the transfer procedure. The guide also provides that the cargo operation should be planned and agreed between the two ships. The same safety measures for handling cargo should be observed when handling slops or contaminated cargo for disposal.

41 Captain Gu who testified on behalf of the Defendants has some four years sailing experience as master on chemical tankers. At the time the *Pristine* went alongside, Captain Gu was on the bridge. On board at that time, were the incoming master and incoming and outgoing chief officers. All four were properly qualified and trained to sail on chemical tankers. They have appropriate certificates for the handling and transportation of dangerous goods. The incoming chief officer was on duty and supervising the operations on the *Sunrise Crane* side. Nothing was said beforehand to the *Pristine* about the contaminated nitric acid it was to receive. Kashiwagi admitted that the vessel was in a hurry to discharge the contaminated cargo as the *Sunrise Crane* was under pressure to meet her sailing schedule. They opted for a ship-to ship transfer operation at OPL as it would save some time for the *Sunrise Crane*. The *Pristine* was supposed to rendezvous with the *Sunrise Crane* between 2030 and 2100 hours on 7 March 2001. She was late and did not turn up until about 0055 hours on 8 March 2001. In my judgment all these factors had a bearing on the failure of the master and the officers on board the *Sunrise Crane* to give the necessary warning to the *Pristine*.

42 In these circumstances, I find that the Defendants in discharging the contaminated nitric acid to the *Pristine* without warning of its nature and dangerous characteristics were in breach of the duty owed to the Plaintiffs to take reasonable care to prevent damage from the contaminated nitric acid.

Causation and novus actus interveniens

43 The Defendants say that they have taken reasonable care since Pink Energy was notified that the cargo was nitric acid contaminated with hydraulic oil. It was Pink Energy who had issued a Works Order to Pristine Maritime for Annex I slops. It was Pink Energy who had not fixed a suitable vessel to receive the contaminated cargo. In context, these are matters of causation and not of foreseeability as contended for by the Defendants.

44 I would first have to decide whether Windsor was told that the cargo to be disposed of was nitric acid contaminated with hydraulic oil or "contaminated lubes". As to what was said, the evidence of Captain Gill is in direct contradiction with that of Windsor. In a case like this where there is a conflict of evidence, it is necessary to consider the objective facts, contemporaneous documents and

the overall probabilities. In the end, I favour on the balance of probabilities the testimony of Captain Gill. I therefore find as a fact that Captain Gill told Windsor that the cargo to be disposed of was nitric acid contaminated with hydraulic oil. I reach this finding assisted by several factors taken cumulatively.

45 Captain Gill was appointed on behalf of the Defendants and their P&I Club to look for a disposal contractor as a decision had been made to discharge the contaminated cargo from *Sunrise Crane*. Captain Gill made verbal inquiries with a few companies and only Pink Energy and Chem-Solv Technologies Pte Ltd ("Chem-Solv") were interested. The rest were either not interested or did not have the facilities or resources to handle the disposal.

46 Pink Energy proposed to receive the substance using ship-to-ship transfer operation within port limits for the sum of $8,000. Windsor would arrange for a licensed contractor to receive the contaminated nitric acid from the vessel and a certificate of disposal would be issued after disposal. A revised quotation of $9,000 was verbally received for a ship-to-ship transfer operation at OPL. Captain Gill said that at no time did he tell Windsor that he wanted to dispose of "contaminated lubes from the *Sunrise Crane*". He told Windsor that the cargo was nitric acid contaminated with hydraulic oil.

47 S. Awtar Singh ("Awtar"), Depot Manager of Chem-Solv quoted a figure of $44,821.40 for the disposal. Chem-Solv is in the business of handling, transportation, treatment and disposal of toxic industrial waste. Captain Gill had telephoned him on 7 March 2001 in the morning to inquire whether Chem-Solv could reprocess or dispose of a cargo of about 34mt of nitric acid contaminated with hydraulic oil. Awtar was able to corroborate Captain Gill's testimony. He told Captain Gill that it would not be possible to treat or reprocess the nitric acid to remove the hydraulic oil content. This is because nitric acid is a strong oxidising agent that would react with the hydraulic oil to form an irreversible compound. Awtar proposed to discharge the contaminated cargo into ISO tanks. ISO tanks are stainless steel tanks built specially for the receipt of chemicals such as nitric acid. The ISO tanks would then be transported to Chem-Solv's facilities to be treated and then disposed of.

48 The two proposals were submitted to Spica who notified the Japan P & I Club. In contemporaneous correspondence sent by Captain Gill to Spica, the subject matter of disposal under consideration was indeed contaminated nitric acid.

49 Windsor's version is that he was told that the cargo was "contaminated lubes from the *Sunrise Crane*". He did not ask Gill what the contaminant was. He accepted at face value what he was told as he would normally handle MARPOL Annex I slops for 20 vessels a month. In Windsor's mind, there is no difference between "contaminated lubes" and "lube oil slops". They are MARPOL Annex I (oil) cargo.

50 In my judgment, it is inherently improbable that Captain Gill would tell Awtar one thing and Windsor another. Furthermore, Windsor accepts that there is no reason for Captain Gill who is his friend to lie to him about the nature of the cargo.

51 After the meeting at Spica's office on 7 March 2001, Captain Gill telephoned Windsor to inform him that Pink Energy was awarded the disposal contract. In that telephone conversation, he asked Windsor to confirm that the *Pristine* was capable of handling the contaminated nitric acid. This confirmation was sought following a request from one of the Japanese representatives present at the meeting to double check with Windsor. In that regard, Yan was able to corroborate Captain Gill's evidence. Windsor disputes this part of the conversation with Captain Gill.

52 Captain Gill said that Windsor's quotation of $8,000 was more than the usual charges for deslopping services. From his experience the disposal of oil slop for the quantity in question would be in the region of $2,000 to $3,000. Using the tariff schedule from Singapore Cleanseas Pte Ltd, the disposal cost of 34mt of oil slop would be $3,200. He said that bearing in mind that the cargo was chemical slop, the price quoted reflected what they were talking about i.e. chemical slop.53 Captain Gill testified that he had queried Awtar about his seemingly high quotation. The explanation was that the high charges were due to the safety precautions required. Their personnel would be supplied with safety gear and have on standby safety equipment. The discharge into ISO tanks would involve opening cargo tanks and the use of portable pumps to pump the cargo into the ISO tanks. The Pink Energy proposal would be in a closed controlled environment where a hose would be fixed to the manifold of the *Sunrise Crane* and the other end to the receiving vessel.

54 Captain Gill in his written testimony said that he told Windsor about Chem-Solv's quote and proposal to use ISO stainless steel tanks. This part of the testimony was not challenged by Windsor.

55 Captain Gill's testimony is that Windsor was shown three samples. On each of the bottles was a label with the name "nitric acid". Windsor refutes that. He said that he was shown one sample and it did not come with a label.

It is inconceivable that the samples were not labelled. They would have to be labelled and marked for identification as a matter of procedure, if not common sense. The samples were taken from the *Sunrise Crane* in connection with Captain Gill's initial instructions to determine the cause of the contamination. The samples were to be retained for analysis, if required, and in the usual order of things they would be labelled. The suggestion that Captain Gill had shown him a wrong sample altogether is entirely speculative. There is no explanation as how that might have happened and if it was not through an oversight or inadvertence on the part of Captain Gill, what then would have been the motive for Captain Gill to deliberately show Windsor a wrong sample. Awtar provided a possible explanation as to why Windsor suffered no ill effect from touching, smelling and rubbing the liquid. He explained that nitric acid could have been neutralised by the lime in the cement when the nitric acid from the sample was poured into the cement drain.

56 It is common ground that Windsor saw a sample on the evening of 7 March 2001 and that he touched the liquid in the cement drain with his finger. Windsor testified that he smelled and rubbed the liquid to have a "feel" of its viscosity. He wanted to find out if there were any visible traces of oil in the sample. Thereafter he reported to Roland Pang of Pristine Maritime that the "sample was ok". Windsor said he wanted a sample not for analysis but to see if it had any visible traces of hydraulic oil. If there were, it would mean additional money to be made from the disposal.

57 In the light of the overall evidence, the testing incident is not conclusive proof that Windsor was told that Captain Gill wanted to dispose of contaminated lubes. I am satisfied that Windsor's foolishness was not born out of ignorance of what the sample represented but a readiness to take a risk when it would ordinarily have been unwise to do so. Fortunately for Windsor, he did not suffer any ill effects. To that extent, Captain Gill's silence during that episode has little or no significance.

58 I am persuaded that Windsor, as Counsel for the Defendants put it, took a chance of there being more hydraulic oil content in the nitric acid. During cross-examination, Windsor gave an affirmative answer to a question put to him by Counsel for the Defendants that it was he who had decided on the nature of cargo to be disposed of after testing the sample. Windsor agreed during cross-examination that he issued the Works Order after satisfying himself that the sample had traces of oil.

59 Lastly, Windsor did not at any time after the casualty castigate Captain Gill for giving him the wrong information. It would have been a most natural thing for a person who had been misled to do.

60 Windsor testified that if he had been told that he was to dispose of contaminated nitric acid, he would not have taken the job. As he did not know the properties of nitric acid and if Captain Gill had told him that the cargo was nitric acid he would expect Captain Gill to give him more information. He should have been sent the MSDS of the cargo. Windsor claims that he did not know anything about nitric acid before the *Pristine*. I find his testimony unbelievable. Nitric acid is not an unusual chemical. Windsor with his seagoing background and experience as a deck officer should know of its corrosive nature as a matter of general knowledge. So disclosing the name of the chemical would be adequate warning of its obvious associated hazards or dangers. In my view, his evidence has the hallmarks of ex post factor reasoning as distinct from reflecting the actual situation prevailing. Accordingly, his testimony has no evidential value and is rejected.

61 In my judgment, a disclosure to Pink Energy and Windsor's knowledge of the dangerous nature of the contaminated cargo would not in law impute knowledge on the part of the Plaintiffs. Windsor was not the agent or servant of the *Pristine* and the duty to inform would not be discharged in the circumstances. What then arise are questions of causation and novus actus interveniens. So would Pink Energy's Works Order to its subcontractor Pristine Maritime describing the cargo as Annex I slops break the chain of causation? I do not think so.

62 It cannot be said that Windsor's misinformation obliterates the Defendants' breach of duty to warn. It is common to refer to a chain of causation between the negligent act and the Plaintiffs' loss, and to an intervening act that may or may not break the chain. In my judgment, the Works Order is not an intervening act as it was issued before the negligent act. The Works Order was not a later act or event as the Defendants' negligence was in the discharge of the contaminated nitric acid into the cargo tanks of the *Pristine* without warning and that discharge came about at a later point in time. In any case, Windsor's misinformation simply perpetuated the Plaintiffs' ignorance of the dangerous nature of the cargo they were to receive from the *Sunrise Crane* for disposal.

63 Windsor's breach of his contract to engage a licensed contractor for the disposal was not an intervening act. Whether or not the contractor was competent, the Plaintiffs were entitled to a warning since the danger was not obvious, as they were not told and did not know that they would receive contaminated nitric acid. On account of Windsor's actions, the *Pristine* was not competent so to speak to dispose of the contaminated nitric acid. If the contractor was not competent, something more than a warning may be required to discharge the duty of care. See *Hodge & Sons v Anglo American Oil* at p187.

64 I do not find that Windsor's actions constitute an intervening act breaking the chain of causation. The Defendants had not discharged the duty of care required of them and I find that the casualty was due to the Defendants' breach. Even if I had ruled in favour of Windsor's version on what was said, the end result is still the same.

65 For completeness, I would mention that the Plaintiffs' plea founded on misrepresentation fails. In the Further and Better Particulars filed by the Plaintiffs, the representations complained about were not made by the Defendants, their servants or agents and they do not constitute the necessary ingredient to support a plea of this nature.

Limitation of Liability- s136 MSA and absence of "fault or privity"

66 The Defendants have raised in their defence a right to limit their liability under s136 of the

Merchant Shipping Act to S$380,267.52.

67 Both parties accept that Kashiwagi was the directing mind of the Defendants. He was also a director of Setsuyo. Limitation of liability is concerned with the corporate structure and management of "*Sunrise Crane*" and with the question whether Kashiwagi was responsible at the corporate level for the failure to warn the Plaintiffs of the dangerous nature of the contaminated nitric acid: *The Volvox Hollandia* [1988] 2 Lloyd's Rep.361 at 371.

68 It is clear from the evidence that Kashiwagi had delegated the task of disposing the contaminated nitric acid. It is also clear from the authorities cited by Counsel for the Plaintiffs that a delegation of duties to someone else would not necessarily be enough to prove absence of fault or privity.

69 Kashiwagi in his written testimony said that the Defendants had appointed competent a master and officers who were all qualified and trained to handle nitric acid. That is not enough to show that the negligence of those on board the *Sunrise Crane* was without the fault or privity of Kashiwagi. It is not known what Kashiwagi at management level did or did not do to ensure that the master and those on board complied with the duty to warn recipients of dangerous goods like contaminated nitric acid of its dangers and associated hazards.

70 In my view, the Defendants have not established an entitlement to limit liability and the defence of limitation fails.

Result

71 For all these reasons, there is judgment for the Plaintiffs with costs and for damages to be assessed by the Registrar.