Fujitsu Microelectronics (Malaysia) Sdn Bhd and Others v Singapore Airlines Ltd and Others [2000] SGHC 72

Case Number : Suit 566/1998

Decision Date : 28 April 2000

Tribunal/Court : High Court

Coram : Lim Teong Qwee JC

Counsel Name(s) : Belinda Ang Fong SC and Gerald Yee (Ang & Partners) for the plaintiffs; Lok Vi Ming and Ng Hwee Chong (Rodyk & Davidson) for the first and second defendants

Parties : Fujitsu Microelectronics (Malaysia) Sdn Bhd — Singapore Airlines Ltd

Carriage of Goods by Air and Land – Carriage of goods by air – Contracts of carriage – Non-delivery of part of goods carried – Whether liability of carrier limited under Warsaw Convention – Whether liability of carrier's agent limited under Warsaw Convention – Whether agent or agent's employees acting with intent to cause damage – Whether agent acting recklessly with knowledge that damage will probably result – arts 22, 25 & 25A Warsaw Convention 1929 as amended by Hague Protocol 1955

: This action arises out of the carriage by air of a consignment of integrated circuit (`IC`) dies from Tokyo (Japan) to Kuala Lumpur (Malaysia) via Singapore. The goods were shipped by the third plaintiff (`Kintetsu Japan`) and consigned to the fourth plaintiff (`Kintetsu Malaysia`). They were sold by the second plaintiff (`Fujitsu Japan`) to the first plaintiff (`Fujitsu Malaysia`) and in the shipment Kintetsu Japan and Kintetsu Malaysia acted as the forwarding agents of the respective parties.

The goods were carried by the first defendant (`SIA`) on its flight 011 which departed from Tokyo on 17 April 1996 bound for Singapore and at Singapore they were on-carried by SIA on its flight 100 which arrived at Kuala Lumpur at about 0710 hrs on 18 April 1996. They were delivered to the second defendant (`MAS`) as SIA`s ground handling agent at the MAS Cargo Centre (`MCC`) where MAS carried on its business. The goods were packed in seven packages and all seven packages were received by MAS. An air waybill (`AWB 8994`) was issued in respect of the carriage of the goods.

On 19 April 1996 MAS delivered only six packages to Kintetsu Malaysia and on 20 May 1996 it issued a cargo/mail survey report (`CMR`). The CMR was prepared by Mr Peter Francis who was employed by MAS in its import tracing department. It states:

> *Due to exhaustions in tracing for LPS P1/7 missing cargo outchecks, CMR raised to clofi.*

`LPS`, `P` and `clofi` stand for `last part shipment`, `piece` and `close file`. I think it means that MAS was unable to deliver the last of the seven packages. A copy of the CMR was given to Kintetsu Malaysia.

This action was commenced by writ issued just a few days before the expiry of two years from the date of arrival of flight 100 at Kuala Lumpur. The plaintiffs claim against SIA damages for breach of the contract of carriage evidenced by AWB 8994 or breach of duty as bailee of the goods and against MAS damages for breach of duty as bailee and/or for negligence and/or for conversion. The claim against the third defendant was discontinued at the commencement of the trial. At the conclusion I gave judgment for the plaintiffs and I intimated that I would see counsel in chambers to give directions as to damages. In the meanwhile SIA and MAS have given notice of appeal and these are

my written grounds.

It is common ground that the Warsaw Convention for the unification of certain rules relating to international carriage by air with the amendments made to it by the Hague Protocol (`Warsaw (Hague) Convention`) applies to the carriage of the IC dies in this case and that its provisions have the force of law under s 3 of the Carriage by Air Act. Article 22 of the Warsaw (Hague) Convention provides:

> *(2)(a) In the carriage ... of cargo, the liability of the carrier is limited to a sum of 250 francs per kilogramme, unless the ... consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the ... consignor`s actual interest in delivery at destination.*

It is also common ground that no special declaration of interest has been made by Kintetsu Japan or anyone else. SIA admits the carriage of the goods and their delivery into the custody of MAS and notwithstanding its defence as pleaded it did not deny the non-delivery of one of the seven packages. Its case is that it is entitled to limit its liability under art 22.

Article 25A(1) of the Warsaw (Hague) Convention provides:

> *If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.*

MAS admits the delivery to it of the seven packages at MCC and that it was `not in a position` to deliver one of them. I think it means that it failed to deliver one of the packages as alleged in the statement of claim. Its case is that at all material times it was the agent of SIA and it acted within the scope of its employment and is entitled to limit its liability under art 22.

Article 25 provides:

> *The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.*

and art 25A(3) provides:

> *The provisions of paragraphs (1) and (2) of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that*

damage would probably result.

The plaintiffs` case is that the loss resulted from `acts or omissions of [SIA] and/or [MAS] ... done, or omitted to be done, with [intent] to cause damage and/or recklessly and with knowledge that damage would probably result within the meaning of Article 25 and/or Article 25A (as the case may be) of the [Warsaw (Hague) Convention]`. It is for the plaintiffs to prove that SIA or MAS either (1) acted with intent to cause damage or (2) acted recklessly and with knowledge that damage would probably result.

Intent to cause damage

Ms Ang referred to Swiss Bank Corp v Air Canada (1987) 44 DLR (4d) 680. In that case a package was handed to one employee of the carrier who handed it to another in the course of their respective duties. The package then disappeared. The trial judge found that the package was stolen by one of the carrier`s employees. On appeal Pratte J said at p 683:

> *... if, as the judge held, the parcel was stolen by the [carrier`s] employees, the latter as thieves must of necessity have had the intent described in art 25 of the Convention.*

I agree that if the employees of MAS have stolen the undelivered package then the damage must have resulted from an act of the employees done with intent to cause damage within the meaning of arts 25 and 25A(3) of the Warsaw (Hague) Convention.

Mr Rahmat bin Mokhtar is what is described as an import break down clerk employed by MAS. When the IC dies arrived at Kuala Lumpur on 18 April 1996 he was working at the MCC. He was in charge of a `break down` team of three employees including himself. At any time there would be seven to ten such teams working in the break down area depending on the volume of import cargo. He would be given a cargo manifest with `particulars of the shipments which [he] was required to breakdown and distribute in the cargo bins for storage` as he said in his affidavit.

Mr Rahmat referred to the manifest dated 18 April 1996 with particulars of the shipment of seven packages under AWB 8994 and he said in his affidavit that from the endorsements appearing there it was he who did the break down. The IC dies were carried as part of a consolidated shipment and the manifest shows that seven consolidated shipments including the shipment under AWB 8994 were carried on one of the pallets. `Breaking down` a pallet is the process of removing the covers, separating the shipments and putting the packages into bins for storage until delivery to the respective consignees. This was what Mr Rahmat did in respect of the seven consolidated shipments on one of the pallets.

The bins are rectangular pallets measuring 4 ft x 8 ft or square pallets measuring 4 ft x 4 ft protected on three sides by wire netting to a height of 4 ft. They are placed on open shelves for storage in double rows to a height of four bins. The bins are placed with the open sides facing each other on the shelves. The location of each bin is identified by a number and this number is clearly marked also on the bin.

When the pallet with the IC dies was broken down bins were brought by fork-lift to the break down

area. It was Mr Rahmat who assigned the packages to the bins for storage. He decided which packages went into which bins. In this case he assigned all the packages from six of the consolidated shipments and one package from one consolidated shipment to bin H031/C-6. The packages from the six consolidated shipments included the seven packages containing the IC dies. He said in his affidavit that he would ensure that the correct number of packages in each shipment in accordance with the information in the manifest were put in the designated bin before he endorsed the bin number on the manifest. In this case the manifest was so endorsed and I find that all seven packages were placed in bin H031/C-6.

Mr Rahmat said that once the storage bin was loaded it would be taken by fork-lift and placed in its designated location. That must have been what occurred that day. Under cross-examination he said he did not accompany the fork-lift to the designated location in this case. He said that when the fork-lift left with the bins for storage he brought the manifest to the break down officer who would key in the location of the cargo in the computer system. What the officer did was to key in the information provided to him in the manifest.

The printout from the computer (`UBOA`) shows an entry at 1047 hrs on 18 April 1996 to the effect that all seven packages of the shipment under AWB 8994 were stored at location H031/C-6. The entries are serially numbered and this is entry 9. The computer system keeps a record of the cargo (`CAR`) under each air waybill. (`UBOA` and `CAR` are acronyms commonly used by the employees of MAS working at the MCC but no one has said with any degree of certainty what they stand for.) Access to the CAR is by way of the air waybill number.

The next entry (entry 10) in the UBOA is for 1250 hrs the same day. It reads `SPOT CHK 18APR96 FND LOCN F095/B-2 [ast ]1PC..NW`. Mr Nordin bin Abdullah who was a cargo clerk (import) employed by MAS at the MCC at the relevant time said in his affidavit that the entry was made by him and that `NW` was his code. He said the entry `indicates that one piece from [the shipment under AWB 8994] was found at location F095/B-2`. He further said:

> *I cannot now recall exactly how the one package at F095/B-2 was found. I would assume, as I was then part of the MCC`s Unlocated Team, that I or part of my team had located it during our search for some other unlocated cargo.*

Under cross-examination Mr Nordin said:

> *Q: Nordin (1). Para 4. Can`t recall who located?*
>
> *A: I am sure not me.*
>
> *(To court): Sentence 2. Actually I was the one who located it. What I said earlier not correct.*
>
> *Q: Why now so sure it was you?*
>
> *A: I depend on UBOA. Relying on page 10 entry 10. I mean looking at it I am sure it was me.*
>
> *Q: Sure you were clerk who found package because entry 10 has `NW`?*
>
> *A: Yes.*

Q: You are saying you did entry based on what entry tells you?

A: Yes.

Mr Munusamy A/L Arichinam is employed by MAS and since 1990 he has been the cargo operations executive (import). He said in his affidavit that one package was located at F095/B-2 during a `spot check`. Under cross-examination he said it was found at this location during a `stocktake`. `Stocktake` is an on-going exercise which would take four to five days to complete. It involves taking every bin down and physically checking the cargo `one by one` as he said. The computer system is then updated by accessing the CAR for each air waybill. This is the `stock-check system` Mr Nordin referred to in his affidavit.

Under cross-examination Mr Nordin said:

Q: Nordin (1). Para 4. Sentence 2. Found by unlocated team. Mr Munusamy said stock-check team found package?

A: Perhaps Mr Munusamy did not know what took place.

Q: Very sure found by unlocated team?

A: Yes.

Q: Why?

A: Relying on page 10 entry 10. Personally made entry.

His evidence is that the package was found by him. He found it during `[his team`s] search for some other unlocated cargo` as he said. He also said that the duty of the unlocated team was to search for missing cargo and such cargo was `generally discovered missing at the time when the consignee or its agent came to take delivery`.

Entry 11 in the UBOA is for 1819 hrs the same day 18 April 1996. It reads `[num ][num ]GBA TRANSFER`. Mr Munusamy said under cross-examination that `GBA Transfer` meant `Gudang Berlesen Agen Transfer` or `transfer to agent`s bonded warehouse`. The agent in this case was Kintetsu Malaysia. Mr Munusamy was referred to the delivery order which shows that the IC dies were released by the MCC at 0337 hrs on 19 April 1996. He explained that what entry 11 in the UBOA meant was that `GBA` was requesting transfer. He referred to entry 16 for 0349 hrs on 19 April 1996 which recorded `D` for `Delivered` which he said meant that six packages were handed over to Kintetsu Malaysia.

All entries in the CAR carried the respective times when they were made and the time was in each case automatically recorded by the computer. It was not possible for the entries to be made out of sequence chronologically. That was the evidence of both Mr Munusamy and Mr Nordin. Kintetsu Malaysia requested transfer to its bonded warehouse or in other words demanded delivery and an entry in the CAR was made at 1819 hrs on 18 April 1996. Six packages were delivered and an entry in the CAR was made at 0349 hrs on 19 April 1996.

The request for `GBA Transfer` would have been made after the discovery of one package in F095/B-2 and as Mr Nordin said the discovery would have been made when his team was looking for some other unlocated cargo. The delivery order carries the endorsement `F095/B-2 - (1)` and Mr Nordin said this meant that the package found there was one of the packages delivered to Kintetsu Malaysia and the package was `perhaps found when [his] entry in the computer system at 10.47am of 18 April 1996 was referred to`. The time of the entry should of course be 12.50pm and not 10.47am which is the time of an unrelated earlier entry. On the evidence before me I see no reason to disagree with him that the package was found after his entry in the computer system was noted.

Mr Nordin said in his affidavit:

> *There is however no evidence of such theft, and there are several other possible reasons for the missing package:*
>
> *(a) The missing piece may have been mistakenly sent with other cargo to the export section for transshipment.*
>
> *(b) The missing piece may have been released together with other cargo to the wrong consignee.*
>
> *(c) The labeling on the package may have been missing or may have dropped off and the package misplaced. Without the labeling, the package would not be recognised as being from the Shipment during the stock-check and would instead be regarded as unclaimed/ unknown cargo. Unclaimed/unknown cargo, if not claimed after some period, would I understand be disposed or sold off by the customs authorities.*
>
> *(d) The missing piece did not arrive into the MCC ...*

Paragraphs (a) and (d) do not apply in this case as all seven packages did arrive at the MCC and were placed in bin H031/C-6 in the import section.

Mr Nik Mohd Nor bin Nik Omar is employed by MAS as its head of security at Penang International Airport. In 1996 he was the security administrator (cargo) in charge of security at the MCC. He said in his second affidavit:

> *(a) The MCC staff were not allowed to bring bags into the warehouse ... Security wardens were also stationed at all exits of the warehouse to make sure that staff do not leave with any cargo. Vehicles leaving the MCC compound were checked at the guardpost exit.*
>
> *(b) There were close-circuit television cameras in the warehouse to monitor staff activity.*
>
> *I had mentioned these cameras in my previous affidavit. I wish to point out further that the cameras in the warehouse have zoom lens. They were mounted at the top of the walls in the warehouse in tinted circular domes (so that no one can see where the camera is facing) and were capable of rotating*

360[ordm] so that all aisles between the storage shelves can be observed ...

(c) This matter concerns a cargo originally stored at `H031-C6`. I have re-visited the MCC warehouse and noted that the aisle in front of the H031 to H036 shelves are directly in the line of sight of modular office no 3. This is the office of the cargo supervisor and is manned 24 hours a day ...

(d) Security staff were also stationed at the points where cargo was released from the warehouse to the consignees or their agents to ensure that no one attempted to remove stolen cargo at these points.

Mr Kenneth Holmes is the proprietor of Holmes Aviation Protection Consultants and the managing director of Holmes Aviation Protection Consultants Ltd which deal solely with the provision of guidance and advice on aviation security matters to airline operators, airport authorities and government agencies worldwide. He read Mr Nik Mohd Nor`s first affidavit and said in his affidavit that the `number of cameras should have been sufficient if they had been sited correctly and were either being monitored or video recorded for evidence purposes`. So far as the aisle in front of the shelves at H031 to H036 is concerned I think they would have been sited correctly and would have been monitored 24 hrs a day.

Mr Nik Mohd Nor said under cross-examination:

Q: CCTV operational on 18/4/96?

A: Operational.

Q: Why not covered in affidavit?

A: Very difficult to answer.

Q: How you know all operational on that day?

A: Guess so. If not normally would be recorded and as far as I am concerned, my memory, I did not remember any.

Q: Where record now?

A: Either misplaced during transfer from Subang Airport to KL International Airport or missing.

Q: Recording tape. CCTV system has recorder or connected to recorder system?

A: Yes.

Q: How long recorder on?

A: 24-hour basis.

Q: Recorder on 18/4/96?

A: Yes.

Q: How you know?

A: Same answer as before for all cameras operational.

Q: Anyone played back tape for 18/4/96?

A: Don`t remember.

Q: Video tapes. Re-used?

A: Yes.

Q: When?

A: Month to month basis eg 1st day of month. Next 1st day of 2nd month.

Q: Tape for 18/4/96. What happened?

A: Tape misplaced or missing.

Q: Who on duty monitoring CCTV on 18/4/96?

A: Can`t remember.

The transfer from Subang Airport to Kuala Lumpur International Airport did not take place until after the notice of claim in respect of the undelivered package had been received by MAS. The record of the operational status of the CCTV and the recording tape would have been helpful. The officer who monitored the CCTV might have been able to give relevant evidence but he was not called.

I think the number of cameras was sufficient and the camera pointing at the location of H031 was correctly sited. It would have recorded movements in the vicinity of H031 and would have been monitored and the movements would have been recorded on tape. Sadly the evidence is not available.

All seven packages were placed in bin H031/C-6. When delivery was demanded only five were found in it. One was recovered from F095/B-2. One could have been stolen. It was along with six other packages under AWB 8994 and packages from other shipments last in the custody of the fork-lift operator.

The package found at F095/B-2 was not stolen but it was not where it should have been. It would not have been recovered and delivered to Kintetsu Malaysia if the CAR had not been accessed through the air waybill for the IC dies. It would not have been entered in the CAR if it had not been found. Mr Nordin found it because his `unlocated team` was looking for some missing cargo at the particular location. It could also have been found during a routine stocktake over four or five days. If it had been found with `the labelling` missing or having dropped off it would be regarded as `unclaimed/unknown cargo`. If the air waybill number had been obliterated the relevant CAR could

not be accessed for any entry to be made and it would similarly have been regarded as unclaimed or unknown cargo.

I think there is a real possibility that as in the case of the package found at F095/B-2 the undelivered package could have been in the wrong location but it was not recovered. It was not found or if it was then the air waybill number on it was obliterated (or the labelling was missing). On the evidence before me I cannot say that the undelivered package was stolen by the fork lift operator or by anyone else employed by MAS. I cannot say that he or MAS as his employer acted with intent to cause damage within the meaning of art 25 or art 25A(3).

Recklessly and with knowledge that damage would probably result

In **Goldman v Thai Airways International Ltd** [1983] 1 WLR 1186 the plaintiff who was travelling on an international flight as a passenger on the defendant`s aircraft sustained serious injury to his spine when he was thrown from his seat. He was sitting with his seat belt unfastened when the aircraft encountered severe clear air turbulence. The aircraft had entered an area in which moderate clear air turbulence had been expected but the pilot had not switched on the sign ordering passengers to fasten their seat belts despite instructions to pilots in the defendant`s manual to illuminate that sign during all flying in turbulent air and when turbulence could be expected. He claimed damages and relied on art 25.

In the Court of Appeal Eveleigh LJ said at p 1194:

> *I say at once that, reading art 25 as a whole for the moment and not pausing to give an isolated meaning to the word `recklessly,` the article requires the plaintiff to prove the following: (1) that the damage resulted from an act or omission; (2) that it was done with intent to cause damage; or (3) that it was done when the doer was aware that damage would probably result, but he did so regardless of that probability; (4) that the damage complained of is the kind of damage known to be the probable result.*

He referred to the travaux preparatoires of the conference leading to the Warsaw (Hague) Convention `not in order to interpret art 25, but to check upon the interpretation which to [him] it seems to bear`. I have read the relevant passages and I think they are in consonance with his views. He then considered the meaning of `probable` and said at pp 1195-1196:

> *Article 25 however refers not to possibility, but to the probability of resulting damage. Thus something more than a possibility is required. The word `probable` is a common enough word. I understand it to mean that something is likely to happen. I think that is what is meant in art 25. In other words, one anticipates damage from the act or omission.*

With respect I agree with this construction of arts 25 and 25A(3) which in material respects is in similar terms.

In 1996 the MCC consisted of the warehouse building within the airport and a number of agents` warehouses or gudang berlesen agen. A security fence and manned check points provided control over movement of personnel and vehicles into and out of the MCC. The main warehouse building housed facilities for customs procedures and the warehouse offices, strong rooms and cold rooms and

a large part of it was set aside for `breaking down` pallets and for shelves for the storage bins. There were about 450 bins in the warehouse.

Mr Munusamy said that the import cargo section had about 60 employees working three shifts through a 24-hour day. They attended to as many as 1,000 shipments a day. About 14,000 pieces of import air cargo were received at the MCC each day. The 15 December 1994 edition of the Business Times (Malaysia) carried an article which included this paragraph:

> *The present cargo complex built in 1986 was designed to handle up to 200,000 tonnes of cargo daily but the handling volume has shot up to 260,000 tonnes lately with Malaysia`s robust economy.*

The statements in that paragraph are not disputed.

There was a problem with congestion at the MCC in 1994. The anticipated relocation of the Kuala Lumpur International Airport to Sepang some distance away effectively inhibited any significant improvement. The minutes of a meeting between MAS and AFAM (an association representing airfreight forwarders) on 17 September 1992 carried a statement that MAS was not keen to build a new warehouse as the investment could not be recovered by 1997 when the relocation was expected. The problem with congestion continued into 1995 and 1996.

In 1994, 1995 and 1996 the cargo release section of the MCC issued an average of six to ten CMRs (cargo/mail survey reports) a day. Mr Munusamy said that he did an analysis and he found that almost 60% to 65% were for damage to cargo and about 30% for cargo found wet on receipt and only about 5% for shortlanded, not received, unlocated and missing cargo. He treated cargo as damaged in his analysis when it was damaged and its contents were also missing. Mr Munusamy also said that in each of those years MAS had an ongoing problem with items which could not be located for delivery to consignees.

Mr Tan Boon Khiang is a senior cargo supervisor employed by SIA at Kuala Lumpur International Airport at Sepang. In 1996 he was a cargo officer at the former location at Subang. His office was in the warehouse building. His department received reports from MAS as to loss of and damage to cargo. Under cross-examination he gave a `rough estimate` of three cases of loss of cargo a week. If these were covered by the six to ten CMRs a day (42 to 70 a week) analysed by Mr Munusamy they would account for at least 4% to 7% of all the CMRs. I think there were more CMRs a day than Mr Munusamy said and I think there were three cases of loss of cargo a week as Mr Tan estimated.

In its answer to interrogatories as to short deliveries SIA said:

> *I: ... state the steps, measures, precautions or other things that were taken and when were they implemented.*
>
> *A: We assigned a staff to work closely with MAS daily, doing warehouse search, supervising breakdown and all telex correspondence.*

Mr Tan said under cross-examination:

> *Q: SIA took this action because of short deliveries they experienced at MAS*

warehouse?

A: Yes.

Q: You agree for them to take such step means they were concerned at level of short deliveries experienced at warehouse?

A: No.

(To court): Part of customer service to send staff to work closely with MAS.

Q: SIA must want to assign staff because concerned about level of customer service?

A: Would not say SIA concerned about level of customer service.

Q: Why not?

A: Would say part and parcel of customer service.

...

Q: Agree level of short delivery must be enough to worry SIA to assign staff to work closely with MAS on daily basis?

A: No.

Because of short deliveries an employee was assigned by SIA to work closely with MAS. It may have been part of customer service as Mr Tan was keen to emphasize but SIA must have been concerned about the quality of customer service if not its level. SIA was concerned about short deliveries at the MCC. There were monthly meetings between SIA and MAS on operational issues which included the problem with short deliveries. Someone was assigned to work with MAS and to work closely with it.

Mr Munusamy attended these monthly meetings. He said under cross-examination:

Q: What discussed with regard to CMR raised?

A: Number of CMRs issued for month.

Q: They asked for number issued in month and reasons?

A: In fact they know. Only expressed concern on number issued.

Q: They asked for something to be done?

A: Yes.

Q: Anything done by MAS?

A: Yes.

Q: What?

A: Suspended few fork-lift drivers found negligent damaging cargo, reduced number of fork-lifts in warehouse, tightened up all exits at import storage area.

SIA was concerned about the number of CMRs and asked for something to be done. MAS responded by among other things `tightening up` all exits. This could only have been to address the problem with short deliveries.

In the few years down to 1996 MAS not only knew of the problem of congestion at the MCC. It knew of the problem of missing cargo. It knew of the problem of short deliveries to consignees. It knew that all exits at the import storage area had to be `tightened up`. I think it knew or had reason to believe that some cargo went missing because it had been released with other cargo to the wrong consignee and had passed through the exits.

Mr Denis Phipps is a partner in ASGARD Security Management Services an independent consultancy service specialising in aviation security management. In his affidavit he said:

I have previously mentioned the local media reports of an unacceptable level of mishandling and theft within MAS Cargo [Centre]. I am unable to verify the accuracy of these reports, but they were public knowledge. In such a situation, I would have expected a prudent management to ensure that it scrupulously implemented the accepted industry cargo security principle that all losses should be investigated for the purposes of:

[bull] Ascertaining how the loss occurred.

[bull] Identifying deficiencies in the system.

[bull] Designing measures to rectify revealed deficiencies.

[bull] Deterring and/or identifying those responsible for the loss, either by failure to implement procedures, negligence or malpractice.`

The reports were in Malaysian newspapers in the few years prior to April 1996 and also for some time after.

Mr Phipps went on to say in his affidavit:

The scenario involving internal theft of the subject cargo was a very likely scenario. It is well known in the industry that a prevalent method of committing theft in a cargo warehouse is to remove an item from its assigned location in the warehouse and place it elsewhere. If the item is not located for delivery, it is subsequently removed from the warehouse by the thief or an accomplice visiting the warehouse for other purposes after any subsequent investigation/search has taken place and the item has been written off as mishandled.

In his examination in chief Mr Phipps said:

> *Q: Cargo stored at warehouse pending delivery. H031/C6. Where goods moved from one location without any explanation. Suggests?*
>
> *A: 2 possibilities. Bad warehouse practice/housekeeping or pilferage.*
>
> *Q: Bad housekeeping?*
>
> *A: If there was valid reason to remove one item from one consignment and store in another location somebody must have made decision for reason and authorised transfer.*
>
> *Q: If not?*
>
> *A: If nobody authorised and somebody removed it you can`t locate it. No control. Don`t know what is where.*

Under cross-examination Mr Phipps said:

> *Q: Phipps (1). Para 10.3.2. Scenario 1. Reasons?*
>
> *(Note: This is the scenario referred to above.)*
>
> *A: A: Unauthorised removal of item from its allocated place and could no longer be found. Item as we know subsequently was very attractive item.*
>
> *(To court): One item could not be found. Might have been stolen. Logical scenario.*
>
> *Q: Internal?*
>
> *A: Went missing from inside. Told good security system so unauthorised persons could not get in.*
>
> *Q: Also possible misdelivered?*
>
> *A: Yes. Scenario 2. Could include giving it to wrong consignee.*

The missing package measured 69 cm x 37 cm x 36 cm and its weight including contents was about 6.3 kg. I think it would have been unlikely that an employee of MAS could have left the MCC with it without being noticed. If he used a bag it would have had to be a large bag and bags were not permitted to be brought in. If the security system was effective then it was unlikely that an employee could have passed through one of the exits carrying the missing package.

When Mr Nordin found one package at F095/B-2 he was able to see the air waybill number on it. He could see it was not in its proper location. He left it where he had found it. All that he did was to

access the CAR for AWB 8994 and make an entry as to its having been found at F095/B-2. If the air waybill number could not be seen the CAR could not have been accessed and no entry would have been made in it. The package would have been regarded as unclaimed or unknown. This was in accordance with the practice at the MCC. This was part of the system employed by MAS.

Mr Munusamy said in cross-examination:

> *Q: If discrepancy found action required to be taken? As in this case wrong location? Entry 10?*
>
> *A: Staff who updated continues his normal duties.*
>
> *Supervisor when delivery asked for will call up system. Will read entry 10 and retrieve from F095/B-2. Until delivery asked for no action taken. If valuable or vulnerable cargo he takes immediate action.*
>
> *Update clerk. Will not know from stocktake. Only when he calls up CAR to update. CAR shows `CMOD` for commodity. This case `Consol`. In other cases maybe say firearms, watches. Then he knows what to do.*

An ordinary package found where it should not be is just left where it is found. It could be a case of unauthorised removal from where it ought to have been. It could be a case of authorised but unrecorded removal. It could also be a case of accidental or negligent removal.

If a package is in a location where it should not be loss through theft or delivery to the wrong consignee are the likely consequences unless the package is recovered in time for delivery to the right consignee. That is clear from the evidence of Mr Phipps. It cannot make any difference whether the package is marked valuable or vulnerable or otherwise appears to be so. To leave the package where it should not be is to expose it to the risk of such loss. The risk becomes very real when such a package can leave the warehouse concealed with cargo delivered to a consignee.

Mr Nordin said in his affidavit:

> *The fact that one package was left at F095/B-2 suggests that the following is a more likely account of what took place: the two pieces of the Shipment (the package found at F095/B-2 and the lost package) were mistakenly taken from `H031/C-6` when some other cargo in the same bin was retrieved for delivery to some other consignee. The lost package could have then been wrongly delivered.*

Under cross-examination he explained:

> *A: I mean if small cargo in bigger box and bigger box covered no one know it is removed.*

Mishandling a package in this way would not attract any attention to anyone monitoring the CCTV. A

package measuring 69 cm x 37 cm x 36 cm could easily be concealed or be covered by other packages inside a box. It would have passed through one of the exits which needed `tightening up`. It would have been `wrongly delivered` or delivered to a party not entitled to it.

As appears from the manifest 15 packages from other shipments were stored in bin H031/C-6 together with the seven packages under AWB 8994. The missing package might have been delivered along with these. The missing package might also have dropped from the open side of the bin into a bin on a lower shelf and been delivered along with other packages. There is no evidence of any investigation involving deliveries to consignees of shipments which were likely to have been affected. The missing package might also have been intentionally removed from H031/C-6 and stored somewhere else.

The practice of leaving a package which has been found to be where it should not be is likely to lead to short delivery to the consignee rightfully entitled to it. MAS was aware of the problem of short deliveries and loss of cargo. It was aware or had reason to believe that missing cargo was passing through the exits. Its principal SIA was concerned with short deliveries and asked for something to be done. Yet the practice continued. It was part of the system employed by MAS. Cargo was passing through the exits which required `tightening up` and it was passing through together with concealed cargo to which the receiver was not entitled. I think MAS was aware that `damage` (ie loss of cargo) would probably result from such practice and nevertheless continued that practice regardless of that probability.

The missing package was not found in the warehouse although a search had been made as Mr Munusamy said in his affidavit. No satisfactory evidence has been adduced by SIA or MAS to explain why it could not be delivered to Kintetsu Malaysia or why it could not be found or what had happened to it. A CMR was raised to close the file. Either it was stolen or it was wrongly delivered. The only thing that appears certain is that it must have passed through one of the exits and that is what I find. The loss of that package was precisely the kind of loss that MAS must have known would probably result from its practice of leaving a package which is found where it should not be in a warehouse where cargo can be concealed to pass through the exits undetected.

MAS acted recklessly when it continued with that practice. It did so with knowledge that damage would probably result. The loss of the missing package resulted from such practice employed in such a warehouse. In my judgment by reason of art 25 SIA is not entitled to limit its liability under art 22 as MAS was its agent and by reason of art 25A(3) MAS is not entitled to limit its liability under art 22.

Judgment was accordingly entered for the plaintiffs against both SIA and MAS.

Outcome:

Plaintiffs` claim allowed.