Feoso (Singapore) Pte Ltd v Faith Maritime Company Limited
[2003] SGCA 34

Case Number : CA 116/2002/D, Adm in Personam 32/2000, Adm in Rem 21/2000

Decision Date : 25 August 2003

Tribunal/Court : Court of Appeal

Coram : Belinda Ang Saw Ean J; Chao Hick Tin JA; Yong Pung How CJ

Counsel Name(s) : Haridass Ajaib, Thomas Tan (Haridass Ho & Partners) for the Appellants; Richard Kuek,R Govintharasah (Gurbani & Co) for the Respondents

Parties : Feoso (Singapore) Pte Ltd — Faith Maritime Company Limited

Admiralty and Shipping – Bills of lading – Freights and liens – Whether contractual lien for demurrage can be asserted in rem against cargo where cargo owner is not lawful holder of bill of lading

Admiralty and Shipping – Bills of lading – Order bills – Lien clause in order bill of lading – Whether right of possession under lien survived transfer of ownership of bill of lading

Admiralty and Shipping – Carriage of goods by sea – Voyage charterparties – Claim for demurrage – Whether notice of readiness validly tendered – Whether vessel an arrived ship

Civil Procedure – Appeals – Whether appellant should be granted leave to introduce new contention on appeal contradicting pleaded case and submissions at trial

Delivered by Belinda Ang Saw Ean J

1 This appeal involved two consolidated actions. In the first of them, which is Admiralty Action In Personam No. 32 of 2000, Faith Maritime Company Limited ("Faith"), the registered owner of *Daphne L* was the plaintiff and Feoso (Singapore) Private Limited ("Feoso"), a company incorporated in Singapore, was the defendant. In the second action, which is Admiralty In Rem no. 21 of 2000, Feoso was the plaintiff and the defendant was the vessel *Daphne L*. Faith entered an appearance to the in rem action as owner of the *Daphne L*.

The background facts

2 A full account of the facts appears from the judgment of Woo Bih Li JC (as he then was) reported at [2002] 4 SLR 716. A summary of the facts relevant to this appeal is as follows.

3 On 8 September 1999, Feoso bought a consignment of oil described as heavy crude oil (off specification) from Ever Bright Energy Co Ltd ("Ever Bright"), a Hong Kong company. On the same date, Feoso on-sold the whole consignment to Titan Oil Pte Ltd as 380CST fuel oil. The cargo specifications attached to both the sale contracts were the same. The cargo description was later changed by agreement between Feoso and Ever Bright from "heavy crude oil (off specification)" to "crude oil slops". It was also arranged that Ever Bright would before discharge of cargo provide Feoso with a second set of shipping documents describing the cargo as fuel oil (3.5s). In order to perform the sale contract, Ever Bright through an associated company, Nordic Long Term Lease Limited ("Nordic") of Hong Kong, chartered on 13 October 1999 the *Daphne L* from Persing Energy Corporation ("Persing") of Panama.

4 Persing as disponent owner agreed, amongst other things, to issue new bills of lading in exchange for the original set. The new bills would contain some altered details like the name of shipper, cargo description and net quantity. Nordic also agreed to provide "owners" with a letter of indemnity to cover the issuance of the new bills of lading.

5 By voyage charter on an ASBATANKVOY form dated 13 October 1999, Persing chartered the *Daphne L* from Faith ("the head charter") for the carriage of a full cargo of crude and/or dirty petroleum product from Kharg Island, Iran to Huangpu, China. Persing was given the option of discharging the cargo outside the port limits of Singapore ("OPL Singapore"). In the event, cargo documents and the set of bill of lading issued at Kharg Island would be exchanged for a new set with the place of discharge changed to OPL Singapore.

6 On 14 October 1999, Persing gave voyage instructions to Faith for *Daphne L* to load a cargo of crude oil slops at Kharg Island. At Kharg Island, cargo described as crude oil slops was loaded on board *Daphne L* between 16 October 1999 and 20 November 1999. The vessel departed Kharg Island on 30 November 1999. After completion of loading, the master issued bill of lading no. KHA-001 at Kharg Island. It described the cargo as crude oil slops with a gross and net weight said to be 35,839.031 mt and 31,000.824 mt respectively. The bill of lading was issued "clean on board" on 21 November 1999 and provided, inter alia, that "freight payable as per charter party dated 13.10.99" and "all terms and conditions, liberties and exceptions of the charter party …are herewith incorporated." All other source documents accompanying the shipment described the cargo as crude oil slops.

7 On the instructions of Persing, *Daphne L* called at Singapore on 14 December 1999. Both Feoso and Faith took samples of the cargo. The report Faith received from its surveyors suggested that the cargo was fuel oil contaminated with water, ash and sludge.

8 On 15 December 1999, *Daphne L* was instructed by Persing to proceed directly to Huangpu to discharge her cargo by ship-to-ship transfer. Her master was to tender Notice of Readiness ("NOR") "upon arrival at the customary anchorage and when the vessel is in all respects ready to discharge her cargo." The master was also informed of the nomination of China Ocean Shipping Agency ("Penavico") as discharge port agents. On 16 December 1999, Nordic sent an urgent fax to its broker, Discovery Chartering Ltd ("Discovery") and copied to the brokers for Persing, Meridian Brokerage Inc ("Meridian"). It stated:

> "Re: MT 'Daphne L'
>
> ….
>
> We have already advised that **owners/Master should declare this cargo as 'fuel oil (3.5s) not crude oil slops.** The fuel oil grade has been attested by both SGS and Saybolt in Iran and new certificate quality shown as 'fuel oil (3.5S) have been duly issued.
>
> **Pls ensure that Master do not disclose or present any loadport document with description as crude oil slops.** Master should prepare a new cargo manifest for 'fuel oil (3.5S)' and fax a copy to us…
>
> As you know that **China prohibits import of crude oil**, **we would remind owners/Master to abide by this instruction otherwise owner/Master will be fully responsible for all consequences that may arise to the vessel and the cargo**.
>
> Pls treat this as an important instruction and confirm owners/master's compliance." [emphasis added]

9 On 16 December 1999, Meridian passed on Nordic's instructions to the vessel's manager, Seaworld Management & Trading Inc ("Seaworld"). Meridian's fax included the following instruction:

> "Very Important
>
> We understand that Master has already informed agents [Penavico] that cargo is crude oil. Please request Master to immediately send agents correction advising them that cargo on board is fuel oil 3.5S."

10 On the same date, Meridian also sent another fax to Faith's broker, DLP Maritime:

> "In the meantime agents have kept master's correspondence which was sent in error and will (sic) handed to our [charterers'] reps. Mwhile please ensure master will only name cargo as fuel oil. Also please request master to amend cargo manifest read "Fuel Oil 3.5S" and sent (sic) a copy to us."

11 Meanwhile, Nordic in Hong Kong issued bills of lading nos. KHA-002, KHA-003 and KHA-004 dated 30 November 1999 on 17 December 1999 ("the switch bills") with details of the original bill altered. Freight was stated as "freight prepaid"; Ever Bright was named as shipper and Sinochem Guangdong Import and Export Corporation as notify party. The switch bills of lading described the cargo as Fuel Oil (3.5s) and on the switch bills only the net weight of the cargo was stated. Nordic's letter of indemnity dated 17 December 1999 was addressed to Persing and Faith with Nordic agreeing to indemnify Persing and Faith for all loss, damage and expense of whatsoever nature which they might sustain by reason of authorising Nordic at its request to issue the switch bills. The indemnity also contained a promise to deliver up the original bill of lading no. KHA-001 once it was in Nordic's possession. Although the letter of indemnity was addressed to Faith, the latter did not receive a copy of it. Faith had also not authorised Nordic to issue the switch bills on its behalf. Feoso received the switch bills from Ever Bright on 25 December 1999.

12 On 21 December 1999 *Daphne L* arrived at Gui Shan, the area specifically designated by Penavico for the vessel to drop anchor and await cargo receiver's instructions. *Daphne L* tendered NOR at 1237 hours.

13 On 21 December 1999, Nordic wrote to Meridian with instructions and those instructions were forwarded to Faith's brokers, DLP Maritime:

> "Prior to releasing of cargo and commencing discharge, please instruct Master to forbid any person to go aboard the vessel to inspect and/or take cargo sampling."

14 Faith became aware of the existence of the switch bills on 21 December 1999. The switch bills were referred to in a telex the master had received from Meridian. At that point, Faith objected to the switch bills as they were issued without Faith's authority. Penavico was alerted not to accept the switch bills and the latter in turn notified Feoso of the position on 24 December 1999. On 27 December 1999, Persing confirmed to Feoso that it had not given Nordic authority to issue the switch bills.

15 Counsel for Feoso, Mr. Haridass Ajaib, at the trial below conceded that the switch bills were issued without Faith's authority. However, Feoso's position during the vessel's stay at Gui Shan was quite the opposite. At all material times, Feoso insisted on delivery of the cargo against the switch bills whereas Faith was only prepared to deliver the cargo against presentation of bill of lading no. KHA-001 as the switch bills were unauthorised and hence invalid. The present claim arose out of

the circumstances that existed and developed in Huangpu on account of the cargo documents.

16 Faith made a number of proposals to resolve the impasse. None of them were acceptable to Feoso. Eventually, Faith ordered the vessel to sail from Huangpu to Singapore which she did on 13 January 2000. The vessel reached OPL Singapore on 18 January 2000 and entered port limits on 26 January 2000.

17 On 1 March 2000, Faith obtained an order from the High Court for the cargo to be appraised and sold by the Sheriff. The cargo was sold for US$1,607,638.12. The cargo was discharged to the new buyer on 29 April 2000. *Daphne L* was free of the cargo by 2 May 2000.

18 The delays occasioned at discharge port and in Singapore extended over 130 days – from 1837 hours on 21 December 1999 to 2100 hours of 29 April 2000. Faith's demurrage claim amounted to US$1,951,489.50. In consequence, Faith asserted a lien on the cargo on board. Feoso in its action alleged breach of contracts contained in or evidenced by bills of lading nos. KHA-002 to 004 occasioned by Faith's failure to deliver the cargo to Feoso at Huangpu or to discharge the cargo into shore tanks at Huangpu. Feoso also put forward a claim for damages for conversion.

The decision below

19 The judicial commissioner gave judgment on 1 October 2002. He held that Faith was entitled to assert a lien on the cargo for demurrage in the sum of US$1,890,000 (based on 126.1 days x US$15,000) together with interest thereon at the rate of 6% per annum from the date of Faith's action to date of judgment. Furthermore, the lien was to be satisfied in part from the proceeds of sale of the cargo lying in court.

20 He also dismissed Feoso's action. He held that a case of conversion had not been made out. Feoso was not the person with immediate right to possession of the cargo and thus had no locus standi to sue in conversion. In any event, he found that Faith had acted reasonably in ordering *Daphne L* to sail with her cargo from Huangpu to Singapore to minimise the risk of detention of the vessel and her cargo. The decision was made at a time when there was a genuine apprehension that the vessel was at risk of being detained by the authorities in China.

21 Initially, Feoso sued Faith on the switch bills and in the alternative on bill of lading no. KHA-001. During the trial, Mr. Haridass informed the judicial commissioner that Feoso was no longer claiming any rights under bill of lading no. KHA-001. As stated, Feoso in its Closing Submissions accepted that the switch bills were issued without Faith's authority and were not binding on Faith. Accordingly, the judicial commissioner dismissed Feoso's claim against Faith for breach of contract(s).

Matters on Appeal

22 The principal ground of appeal as advanced by Mr. Haridass on behalf of Feoso, centred upon the finding of the judicial commissioner on the claim for demurrage. In this respect, Mr. Haridass submitted that Faith should have failed at the first hurdle of the demurrage claim. The vessel was not an "arrived ship" to trigger the demurrage provision. Consequently, no discharge port demurrage was earned and the judicial commissioner should have held that Faith had no lien on the cargo. The sales proceeds in court should rightfully be Feoso's.

23 Mr. Haridass contended that the judicial commissioner was wrong in making a finding that (i) Feoso was estopped from denying that the vessel was an "arrived ship"; (ii) Feoso knew all along that

the cargo was not fuel oil; (iii) there was a risk of an investigation and detention by customs for smuggling and (iv) it was reasonable for the *Daphne L* to leave China for Singapore with her cargo and, in so doing, (a) failed to appreciate that such a finding was tantamount to the court assisting Faith to break or evade Chinese law and (b) failed to find that in the absence of a lien on the cargo, Faith necessarily converted Feoso's cargo by not discharging it at Huangpu.

24 Furthermore, Mr. Haridass submitted that even if demurrage was due and payable, Persing and not Feoso were liable for demurrage, as Clause 8 of the head charter was not incorporated into bill of lading no. KHA-001. This point was not argued below.

25 The points made by Mr. Haridass could be crystallised into three principal issues. They were:

(i) whether leave should be granted to Feoso to raise the new point relating to Clause 8 of the head charter. And if leave was granted, the effect of Clause 8 on Faith's entitlement, if any, to exercise a lien on the cargo.

(ii) whether a contractual lien for demurrage was effective against Feoso;

(iii) whether discharge port demurrage was earned by Faith.

The Principal Issues

(i) No incorporation of Clause 8 of the head charter as a bill of lading term – a new point

26 In this appeal, Feoso contended that the demurrage clause (clause 8) of the head charter was not incorporated into the bill of lading contract. If that were so, then only Persing could be liable for demurrage. Without imposition of liability for demurrage on a lawful holder of the bill of lading, the lien clause alone would not be effective to give Faith a lien on cargo where Feoso owned the cargo. Faith could not as a consequence exercise a lien on the cargo for demurrage.

27 Clause 8 of the head charter reads:

Demurrage: Charterer shall pay demurrage per running hour and pro rata for a part thereof at the rate specified in Part 1 for all the time that loading and discharging and used laytime as elsewhere provided exceeds the allowed laytime elsewhere herein specified…

28 This new point was not argued below and leave was required to raise it at appeal: O57 r. 9A(4)(b) of the Rules of Court. The principles on which an appellate court should decide an application to raise a new point have been stated as follows (in relation to an appeal to the House of Lords, but in terms which also apply to an appeal to this Court) by Lord Watson in *Connecticut Fire Insurance v Kavanagh* [1892] AC 475,

"When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully

investigated, would have supported the new plea." [p480]

29 The judicial commissioner's approach to the issue of enforcement of the lien clause reflected the way the matter had been pleaded and argued before him. Feoso had pleaded that if Faith was entitled to exercise a lien on the cargo for demurrage, the lien could be satisfied from the sale proceeds of the cargo in court. Paragraph 20 of Feoso's Re-Amended Defence stated:

> 'If the Plaintiffs are entitled to a lien as pleaded (which is denied), the maximum they can recover in this action is the sale proceeds of the cargo arising from the sale of the cargo by the sheriff in Singapore and no more. The Defendants are not personally liable to the Plaintiffs in respect of the claim as pleaded.'

30 The judicial commissioner rightly held that Clause 21 (the lien clause) of the head charter was incorporated by the general words of incorporation in Clause 1 of bill of lading no. KHA-001 namely, "All terms and exceptions, liberties and exceptions of the charter party …...are herewith incorporated." There was nothing inconsistent or insensible in Clause 21 so as to make it inapplicable to bill of lading no. KHA-001. Clause 21 reads:

> The Owner shall have an absolute lien on the cargo for all freight, deadfreight, demurrage and costs, including attorney fees, of recovering the same, which lien shall continue after delivery of the cargo into the possession of the Charterer, or of any Bills of Lading covering the same or of any storagemen.

He accordingly held that Faith was entitled to a lien on the cargo.

31 After pointing out that a lien is a passive right to retain the cargo until payment is made to discharge the lien and not a right of action, the judicial commissioner noted:

> '138. In the present case before me, there was likewise no argument that even if Faith is entitled to a lien for demurrage and Feoso's claim to the cargo is subject to the lien, Faith is nevertheless still not entitled to the cargo or the sale proceeds. There was no argument that in such a situation, the sale proceeds would have to simply remain where they are. Indeed, para 30(sic) of Feoso's Re-Amended Defence accepts that if Faith is entitled to a lien, it can recover the sale proceed of the cargo but no more. In the circumstances, I will not deny Faith the sale proceeds of the cargo.'

32 If the matter had been raised before the judicial commissioner, leave to amend paragraph 20 of the Re-Amended Defence would have been required and, if granted, further findings and evidence and specific answers might well have been made, given or raised. The result is that this Court was deprived of any findings and reasoning of the judicial commissioner on the point. In *North Straffordshire Railway Co v Edge* [1920] AC 254, Lord Birkenhead refused to deal with a contention advanced by the appellants on the ground that it had not been put forward in the pleadings nor argued before the court below. He explained:

> "The efficiency and authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the Judges in the Courts below." [p263]

33 Mr. Haridass argued that leave should be allowed as it would be an opportunity to revisit

Mustill J's decision and re-examine the lien clause in the light of Lord Diplock's obiter comments on its correctness. This was not the stand taken below. Before the judicial commissioner, Mr. Richard Kuek, Counsel for Faith, submitted that the general words of incorporation in Clause 1 of bill of lading no. KHA-001 were wide enough to incorporate as a term of the bill of lading Clause 21 of the head charter, relying on the decision of Mustill J in *The Miramar* [1983] 2 Lloyd's Rep. 319 and *The Trade Resolve* [1999] 4 SLR 424 as authority. The judicial commissioner noted in his decision that Mr. Haridass did not dispute Mr. Kuek's submission on the law. Mr.Haridass also accepted that the reference to "charterparty dated 13.10.99"on the face of the bill related to the head charter.

34 For the foregoing reasons, we disallowed Feoso leave to introduce a new contention that contradicted its pleaded case.

(ii) Could a contractual lien for demurrage be enforced against Feoso?

35 The incorporation of the lien clause into bill of lading no. KHA-001 was not seriously disputed by Feoso. Before the judicial commissioner, the argument centred on its effectiveness against Feoso since it was not a lawful holder of the bill.

36 A question raised by the appeal for consideration was whether a contractual lien for demurrage could be asserted against the cargo where Feoso was not the lawful holder of bill of lading no. KHA-001. It was contended in the absence of a contract between Faith and Feoso, Faith could not rely on the contractual lien as against Feoso. The judicial commissioner said:

> "132. This submission assumes that Feoso can claim the cargo from Faith without relying on B/L No 1, and hence avoid the lien provision, just because it is owner of the cargo."

37 In the judicial commissioner's view, although Feoso was the owner of the cargo, that did not mean that vis-à-vis Faith, Feoso was entitled to delivery of the cargo free of the lien. If it wanted the cargo, Feoso would have to present to Faith bill of lading no. KHA-001 as well as discharge the lien.

38 Mr. Haridass referred us to *The Epic* [2003] 3 SLR 735 and *Ocean Projects Inc v Ultratech Pte Ltd* [1994] 2 SLR 369. In *The Epic*, the shipowner did not have a lien on cargo for unpaid freight as there was no lien clause in the bill of lading itself nor was one incorporated into the bill of lading as there was no lien clause in the spot charter.

39 The decision of *Ocean Projects Inc v Ultratech Pte Ltd* was also not helpful. In that case, a bill of lading was issued by the freight forwarder who had contracted as principal with cargo owners for the carriage of goods for the whole voyage. The freight forwarder as principal in turn engaged the shipowner to perform the carriage. There was no contract of carriage between the cargo owner and shipowner. The shipowner found out much later that the letter of credit established by the cargo owner in favour of the freight forwarder for freight had been negotiated and the freight forwarder would not be assigning any part of the proceeds to the shipowner as freight. It was only then that the shipowner issued its bill of lading for the same voyage and cargo. The shipowner's bill was claused with the words: "Cargo not to be released unless all freight charges are paid." It was held that the shipowner's bill was not evidence of a contract between the shipowner and the cargo owner. As such, the shipowner could not rely on the clause to detain the cargo for outstanding freight. The claim based on the common law lien for freight also failed for reasons not relevant here.

40 We did not consider either authority as providing conclusive guidance. However, reverting to first principles, it seemed to us that Feoso's contention that Faith could have no lien for

demurrage in the absence of a contractual nexus between Faith and Feoso was without merit.

41 The carriage was undertaken by Faith subject to the terms and exceptions of its bill of lading. The cargo was held by Faith subject to the charterparty lien clause. The contractual lien was created at the time of shipment. That would have been at the time bill of lading no. KHA 001 was issued on 21 November 1999 and made to the order of the named shipper Al Warqaa General Trading Co LLC who indorsed in blank and put it through the banking chain for payment by Ever Bright as notify party.

42 A "to order" bill of lading is a negotiable instrument as well as a document evidencing a contract capable of passing from hand to hand. The lien clause clearly envisaged in the course of transit a change in ownership of the cargo subject to a lien. That right of possession though conferred on Faith by the bill of lading contract with the shipper survived any later transfer of ownership by the shipper to Ever Bright and from Ever Bright to Feoso. The contractual lien was dependent on continued possession of the cargo. The right was a right to detain the goods so long as the power of detention remained. As the cargo was on board the vessel, Faith was in a position to exercise that right and it did exercise it when the cargo was in Singapore. The right operates as a remedy in rem in that it is asserted against the cargo. It would not operate against Feoso in personam. The right of lien conferred no right of action against the owner of the cargo. The contractual lien did no more than entitle Faith to refuse to deliver up the cargo until it was paid demurrage. Payment or tender of the amount due extinguishes the lien.

43 The Bill of Lading Act (Cap. 384) had removed the link between the right of suit under the contract of carriage and the passing of property. The fact that the bill was not indorsed and handed to Feoso only meant that no rights of suit under the contract of carriage have been transferred by operation of s2(1) Bills of Lading Act to Feoso as lawful holder. In this case, the cargo owner could not claim under the Act but there would be a lawful holder somewhere who might be entitled to sue the carrier in contract. The judicial commissioner rightly concluded that bill of lading no. KHA-001 had not ceased to be an effective document of title. Faith had not parted with the cargo and had refused to give delivery without the production of bill of lading no. KHA-001 that was still in circulation as a valid document of tile, having not been surrendered to Faith for cancellation.

44 Feoso's argument would require the Court to pretend that the contractual lien could not be asserted in rem against cargo in Faith's possession when the cargo owner was not the lawful holder of the bill of lading but someone else. To do so would mean defeating the underlying commercial purpose of such a lien clause which was to enable Faith to detain the cargo in the event of Persing's failure to make payments due under the head charterparty.

45 As an aside, Feoso's commercial expectation was not so different. The sale contract between Feoso and Ever Bright expressly provided that demurrage was "as per vessel's actual charterparty rate per day or pro-rata". It also envisaged that there would be a bill of lading and that the bill of lading would incorporate the terms of an ASBATANKVOY form charterparty, as it in fact did.

(iii) Was discharge port demurrage earned by Faith?

46 Feoso contended that Faith had no claim for demurrage because the notice of readiness, which triggered the demurrage provision, was tendered prematurely. Notice can only be tendered after the vessel is an "arrived ship". For a vessel to be an "arrived ship", not only must the vessel have arrived at the destination specified in the head charter, she must be both physically and legally ready to discharge her cargo. The vessel was not legally ready, as she had not passed joint inspection by the Chinese authorities. It was a precondition to the tender of NOR that the vessel

must have passed joint inspection.

47 Faith's contention was that the NOR was in all respects valid. This declaration to the Chinese authorities was not a prerequisite to the tender of NOR.

48 The judicial commissioner dealt with the issue of an "arrived ship" from an estoppel point. We disagreed with Mr. Haridass that the judicial commissioner, in reaching the conclusion that Feoso was estopped from denying that the vessel was an "arrived ship", had impliedly agreed that the NOR was tendered prematurely.

(a) Declaration of vessel and cargo within 24 hours of arrival

49 Under Chinese law, Faith was required to complete port entry formalities known as joint inspection by declaring the vessel and cargo within 24 hours upon her arrival at the customary anchorage but Faith did not do so within that time or at all. Clause 4 of the Additional Clauses to the head charter required the vessel even though she was already on demurrage at load port to tender NOR at the discharge port. The legal position is that laytime would not commence until the ship is ready to load or discharge her cargo unless charterer's fault prevented her from being ready.

50 Clause 6 of part II of the head charter states:

> NOTICE OF READINESS. Upon arrival at customary anchorage at each port of loading or discharge, the Master or his agent shall give the Charterer or his agent notice by letter, telegraph, wireless or telephone that the vessel is ready to load or discharge cargo, berth or no berth, and laytime, as hereafter provided shall commence on the expiration of six (6) hours after receipt of such notice…"

51 It was not disputed that at the time NOR was tendered, *Daphne L* was anchored at the customary anchorage stipulated in Clause 6 of the head charter. By the terms of Clause 6, she had reached the recognised waiting place for the port even though the customary anchorage was some 20 miles from the port. But for Clause 6, the waiting time at anchorage would have fallen on Faith. See *Julian Cooke on Voyage Charters (2nd ed.) p 765 para. 57.4*. The risk of waiting for instructions for the anchorage where ship-to-ship transfer was to take place was on Persing.

52 Was all that had to be done by Faith done when NOR was tendered? Faith said yes. The NOR was valid for two reasons. Firstly, Clause 6 governed the commencement of laytime and the requirements there were complied with. Secondly, the requirement that the vessel declared within 24 hours her arrival was a mere formality and not a precondition to the tender of NOR. It was common ground that a requirement that is a mere formality would not prevent the vessel from being an arrived ship. See *The Tres Flores* [1973] 2 Lloyd's Rep. 247.

53 Professor Si Yuzhuo ("Si"), Faith's expert on Chinese law, was of the view that the declaration of the arrival of the vessel and cargo for the purpose of joint inspection could be made before or after arrival of the vessel in Huangpu. The declaration could be made whilst the vessel was at the customary anchorage. Joint inspection however would have to be carried out when the vessel was within port limits. After 1995, Chinese officials would not board the vessel for a joint inspection. Instead the officials would only inspect the documents submitted. His testimony narrated thus far was the same as Feoso's expert, Professor Wu Huanning ("Wu"). She accepted that parties could in the charterparty provide for a time when laytime was to commence. She also agreed that parties could in the laytime clause provide for laytime to commence before or after joint inspection.

54 In Wu's view, it was a custom of Chinese ports that the passing of joint inspection was a prerequisite to tendering a valid NOR. Without completing joint inspection no cargo could be discharged. Therefore the vessel in such a situation could not be considered in all respects ready to discharge cargo. She referred to three cases to support her view. Two were Chinese arbitration awards involving the vessel *Georgios* and the other the vessel *Golden Hope.* The third case was *The Haigas*, a decision of the Wuhan Maritime Court. In her view, *Daphne L* could not tender NOR until she was within port at the discharging anchorage as joint inspection would be carried out there. To her, the term "customary anchorage" in Clause 6 meant the discharging anchorage and not the anchorage where vessels awaiting instructions would anchor.

55 Her views, in our judgment, were not supported by any of the sources referred to. In the two Chinese arbitration awards, the laytime provision in the charter (unlike Clause 6 in this case) expressly required compliance with port formalities before acceptance of NOR. The facts in *The Haigas* were also different and distinguishable. NOR was tendered even before the vessel arrived at the customary anchorage of Nantong port. Another argument centred on whether the NOR was received by the correct party.

56 In Si's opinion, the requirement by Chinese law that the vessel must within 24 hours declare her arrival and cargo was a mere formality and not a precondition to tender of NOR. The two Chinese arbitration awards supported Si's interpretation. He also made reference to a similar clause in another Chinese arbitration involving the vessel *Golden Kimisis.* Like the clauses in the other two Chinese arbitration awards, the laytime provision in the charter expressly required compliance with port formalities before acceptance of NOR. By agreement, laytime was to run only after completion of joint inspection. The clause specifically provided that NOR could only be accepted after completion of joint inspection and to that extent it was a prerequisite to a valid NOR.

57 In this case, Clause 6 required NOR to be tendered at the customary anchorage. If joint inspection had to be completed before NOR could be tendered, such a requirement could easily have been written into the charter. It was open to Persing and Faith to agree additional requirements that must be met before the vessel could be considered legally ready as was the case in some of the clauses referred to by Si and Wu.

58 Si said that under Chinese law there was no uniform school of thought as to whether the passing of joint inspection was a prerequisite to tendering a valid NOR. Each case on commencement of laytime was dependent on the applicable law, the terms of the charterparty and the facts of each case. In his view, the requirement of a joint inspection was a mere formality. More so after 1995 when joint inspection was usually on documents submitted rather than actual physical inspection on board the vessel except in special cases which did not apply here. He said it was a piece of administrative legislation intended to improve port facility. We accepted Si's views. If as he said inspection after 1995 simply involved an inspection of documents, and this was not disputed by Wu, that kind of inspection would conceivably not have taken long and would have been a mere formality having no appreciable effect on the commencement of laytime.

59 Si also added that if so required by the contracting parties, it was for them to write into the charterparty what may be a mere formality by giving it a different treatment. Whilst joint inspection might well be a formality, if the parties had agreed in the charterparty that formalities for entering port had to be passed in order to present a valid notice of readiness, the passing of formalities would become a condition precedent for the tendering or acceptance of NOR as the case may be. There was no such express requirement in this case and we accordingly held the NOR valid.

(b) Estoppel

60 On this issue two points were raised. Firstly, Faith's pleaded case on estoppel was on a somewhat different basis to the way in which the judicial commissioner decided it. Secondly, the elements of an estoppel by representation were not made out on the evidence.

61 Mr. Richard Kuek, Counsel for Faith, made the following submissions before the judicial commissioner:

> "The point of contention here is that Feoso is arguing that the "Daphne L" did not declare her arrival and the cargo to the Chinese authorities for joint inspection by the authorities although the vessel was at Huangpu anchorage for about 24 days. This fact is not in dispute but shipowners' had good reasons for not doing so. There was a confusion at that time as to what the nature of the cargo on board was; Feoso having unauthorised bills of ladings showing the cargo to be "Fuel Oil 3.5s" whereas shipowners' original bill of lading and all the ship's documents and load port documents on board described the cargo as crude oil slops. Further, there were substantial discrepancies between the two sets of shipping documents, especially the quantity of cargo said to be carried on board the Daphne L, that the shipowners feared that the cargo and the ship may be detained on suspicions of smuggling, or otherwise importing a restricted commodity under a false description. Faith/the master of the "Daphne L" had also been requested by charterers, not to disclosure the original shipping documents and loadport documents to the discharge port agents and the Chinese authorities, or to allow anyone to board the vessel to take samples until discharge. The without prejudice correspondence between Faith's and Feoso's lawyers also show that Feoso's lawyers, maintained that Feoso's position was that the cargo was "fuel oil 3.5s" and Feoso would only take delivery against bills of lading nos. 002, 003 and 004. They warned that Faith must not declare the cargo to the Chinese port authorities and Customs authorities as Crude Oil Slops or otherwise they (Faith) would have to bear the consequences. ..Accordingly, the shipowners did not declare the cargo and vessel to the Chinese authorities for the purpose of joint inspection. The discrepancies in the description of the cargo in the documents was caused by the charterers and Feoso while shipowners were an innocent party caught in the middle. Accordingly, the charterers and Feoso should not be given the advantage of the confusion and the obstacles that they had created which then put the vessel and cargo at the risk of detention by the Chinese authorities. It is therefore submitted that Persing and hence Feoso is estopped from maintaining that laytime did not commence because joint inspection had not been carried out.."

62 The judicial commissioner agreed with Mr. Kuek's submissions which were consistent with Faith's pleaded case. Besides accepting the reasons given by Mr. Kuek for not declaring the vessel's arrival, the judicial commissioner also found that it was not reasonable, given the circumstances of the case, to expect Faith to have arranged for joint inspection. He based his reasons on the fax instructions of 16 December 1999 and 21 December 1999.

63 Feoso argued that the judge was wrong to reach this conclusion. Feoso did not know of the two faxes in question until discovery. We accepted Mr. Kuek's submission that Feoso had not said that they were unaware of or did not consent to the contents. The instructions were clearly associated with Feoso who was the only party interested in importing the cargo as fuel oil 3.5s into China and in taking up the switch bills containing the altered details required by Feoso. The cargo was described in the switch bills as fuel oil (3.5s) instead of crude oil slops. And the net weight of the cargo was stated instead of the gross and net weight to give the impression that there were no impurities in the cargo. It was a reasonable inference to make on the evidence.

64 There was also the letter from Feoso's lawyers dated 10 January 2000 to Faith's lawyers. Its effect was similar to and consistent with the earlier instructions not to declare the cargo of crude oil slops. The lawyer's wrote:

> "Our clients maintain that the cargo on board the vessel at Huangpu is a consignment of Fuel Oil (3.5s) as confirmed by Saybolt report. If your clients made the declaration to the port authorities or the customs differently, your clients would be responsible for all consequences arising therefrom."

65 Here, there were unequivocal representations as to a state of affairs by words and conduct. The crude oil slops could not be safely discharged from *Daphne L* at Huangpu. The whole situation in China was due to Feoso's attempt to import into China crude oil slops as fuel oil (3.5s). Feoso knew that the cargo documents on board the vessel were for a cargo of crude oil slops. The more Feoso insisted on delivery against presentation of switch bills, the more it must have been obvious that the vessel could not with the documents on board declare the vessel and cargo of crude oil slops. Faith relied on the unequivocal representations. The advice of Penavico and Faith's Chinese lawyers of a risk of detention of vessel and cargo by the Chinese authorities did not detract from the fact that Faith complied with the instructions not to declare the cargo as crude oil slops.

66 By refusing to take delivery under bill of lading no. KHA-001, Feoso had effectively placed Faith in a position that it could not deliver the cargo such that the vessel was left waiting with unclaimed cargo while incurring demurrage. Faith consequently suffered the detriment of the loss of use of the vessel as she was delayed at Gui Shan with cargo on board which she could not discharge. Undoubtedly, Feoso was seeking to benefit from its own instructions to Faith not to declare the cargo as crude oil. Feoso was also seeking to benefit from its own failure to present bill of lading KHA-001 to take delivery of the cargo.

67 The judicial commissioner found that the cargo on board *Daphne L* was not fuel oil and Feoso had known this all along. He rejected as untruthful the testimony of Mr. Fung Tze Tat ("Fung"), Feoso's business manager. He accepted the evidence of the Faith's expert John Tudor Williams. According to Mr. Williams the cargo could be described as weathered crude oil slops i.e. cargo of crude oil slops which had been exposed to the elements resulting in vaporisation of the more volatile hydrocarbons which are normally found in crude oil. The specifications attached to the sale contract were usual parameters used for testing fuel oil quality, but could not distinguish crude oil/crude oils slops and fuel oil. There was also the evidence of Mr. Ali Gahaffari whose testimony was admitted without challenge. Mr. Gahaffari's evidence was that there are no refineries on Kharg Island and, for many years only crude oil was exported from the oil terminals there. Mr. Sirous Alishapour, the then tanker division manager of Sea Express Co Ltd, the load port agent, testified that he was present at Kharg Island throughout the period when the vessel was being loaded between October to 21 November 1999. The cargo loaded on the vessel originated from storage pit where slops drained from crude oil storage tanks would be stored. The storage pit was not covered and was exposed to the elements. Mr. Alishapour confirmed signing a cargo manifest dated 21 November which described the cargo as "crude oil slops as per commercial invoice." He was shown a copy of another cargo manifest dated 30 November 1999 exhibited in the 3rd affidavit of Fung. That cargo manifest referred to the switch bills and described the cargo as fuel oil (3.5s). He denied having signed the cargo manifest of 30 November 1999. The judicial commissioner also took into account the fact that there was no reason for the original shipper to describe the cargo as heavy crude oil if in fact it was fuel oil.

68 At that time, smuggling of oil cargo into China was rampant and the authorities were vigilant where such cargoes were concerned. Any discrepancy in cargo documents could attract customs intervention. In addition, the cargo on board could not be lawfully imported, as there was no import

licence for the cargo. Against this whole background of activities, the judicial commissioner found, and we agree with him, that there was a risk of the vessel being detained indefinitely in China on a suspicion of smuggling.

69 The judicial commissioner found that Faith had acted reasonably in trying to resolve the impasse with Feoso over the unauthorised bills of lading and was prepared to issue fresh bills of lading describing the cargo as fuel oil slops or fuel oil (off specification) subject to conditions, with a view to getting Feoso's cooperation in discharging and delivering the cargo at Huangpu. By so doing, Faith was trying to free the vessel of the cargo as quickly as possible.

70 Whilst all this was happening in China, Persing after it received the NOR, issued to Nordic on three separate occasions interim invoices for discharge port demurrage and also demanded payment of the same despite being aware that Nordic was refusing to pay demurrage because the vessel had not completed port formalities. This indicated that NOR was accepted by Persing as a valid tender so much so that in absence of collusion or fraud it would be difficult for Feoso to raise a contrary view.

71 Accordingly, we agreed with the judicial commissioner that Feoso was estopped from denying that *Daphne L* was an "arrived ship".

(c) Was sailing to Singapore reasonable and was the lien exercised in a reasonable manner?

72 The issue at hand was whether Faith acted reasonably in ordering the vessel to sail for Singapore. The judicial commissioner took into consideration the possibility of detention and investigation by Chinese authorities which was a factor that Faith reasonably took into account in deciding to leave China. The finding that there was a risk of indefinite detention of the vessel and cargo by the Chinese authorities turned primarily on the expert evidence on Chinese law, custom and practice. The judicial commissioner preferred the testimony of Faith's expert over Feoso's whom he found to be unrealistic.

73 The judicial commissioner said that under the circumstances, it was reasonable to sail for Singapore. Feoso contended that such a finding would in turn suggest that it was acceptable for the vessel to have omitted to give notice of arrival and breach Chinese law. The judicial commissioner rightly held that it was a factor that Faith was entitled to take into account in deciding what to do under the circumstances. It was necessary only to consider the position vis- a- vis the parties. It had nothing to do with endorsing or sanctioning the conduct of Faith to act contrary to Chinese law.

74 Faith chose to sail to Singapore as enquiries made in Hong Kong, Philippines, Vietnam, Taiwan and Indonesia showed that the cargo could not be landed in these places because there was either no storage facilities or import licence issues had to be overcome. When Van Ommeren Singapore advised availability of shore tank, it was almost near to the time the cargo was to be delivered to the new buyers under the court sale. Besides, the shore tank rental was close to the amount of the daily demurrage rate. There was likelihood of the discharge being completed in a few days, and it would have been unreasonable, under the circumstances, to have landed the cargo. The judicial commissioner found that Faith had exercised its lien in a reasonable manner. He also found that Faith acted reasonably in keeping the cargo on board the vessel in Singapore. He noted that Feoso had simply made a bare allegation on this point.

75 The judicial commissioner adverted to all the considerations he took into account and rejected the evidence of Feoso's witnesses called to deal specifically with these two subsidiary

issues. It is rarely appropriate to interfere with the conclusions of the judicial commissioner based as they were on the evidence (or lack of satisfactory evidence) before him. In our view that was the position in this case.

Other matters

76 We need not say more about the claim in conversion given our decision on the principal issues. Mr. Haridass accepted that if the judicial commissioner was right in holding that Faith was entitled to claim demurrage and was entitled to enforce that claim by asserting the lien against the cargo, the claim in conversion would fail.

Conclusion

77 For all these reasons, we affirmed the decision of the court below and dismissed the appeal on 21 May 2003. We also ordered Feoso to bear the costs of Faith. The security for costs, together with any accrued interest, were ordered to be released to Faith to account of its costs.