Sherridon Exim Pte Ltd v India International Insurance Pte Ltd
[2001] SGHC 93

Case Number	: Suit 316/1998
Decision Date	: 15 May 2001
Tribunal/Court	: High Court
Coram	: Lai Kew Chai J
Counsel Name(s)	: Navinder Singh and Katherine Teo [Joseph Tan Jude Benny Anne Choo] for the plaintiffs; Belinda Ang Fong Saw Ean, SC and Anna Quah [Ang & Partners] for the defendants
Parties	: Sherridon Exim Pte Ltd — India International Insurance Pte Ltd

JUDGMENT:

Cur Adv Vult

Background & basic facts

The claims and counterclaim in this action arose out of, but are I hasten to add not based on, an All Risks marine insurance and shipment of 2x40 containers of electronic goods. On 15 December 1990 the goods were shipped from Singapore to Eilat (Israel) and they arrived overland on 2 January 1991 in Ashdod (Israel) after their discharge in the port of Eilat. On 3 January 1991 three individuals, namely Avi Cohen, Avraham Schumacher and Yosef Schwarz removed the two containers using a photocopied bill of lading and false gate pass. The goods were shortly thereafter traced to the nearby industrial town of Yavne (Israel) and seized by the Customs authorities in Israel.

2 Five months after the loss, the plaintiffs, who shipped the goods under a bill of lading, claimed against the defendants as underwriters for loss of the goods due to theft. Initially, the defendants took the position that it was a confiscation and was therefore not covered under the policy. Both parties took steps to investigate the circumstances of the loss. In December 1991 the investigating officer of the Israeli customs authorities, Yehuda Bachar, expressed the view that the plaintiffs were involved in the smuggling. The plaintiffs, rejecting any such complicity, pressed for payment by the defendants under the policy but the defendants wanted to investigate and in the meantime, as could be a practice in such cases, agreed to advance sums to meet legal and investigative expenses subject to the plaintiffs agreement to repay the advances "in the event that you (the defendants insurers) are legally entitled to repudiate all liability under the said policy." (The words within brackets are added). The plaintiffs signed the letter of indemnity dated 13 July 1991. I will set out the terms of the indemnity when I come to consider the counterclaim.

3 By October 1992 the plaintiffs had not been indemnified and parties began to explore how the plaintiffs could be paid the sum insured pending the outcome of the investigations and at the same time preserving the right of the defendants, as underwriters, to repudiate liability under the policy. Predictably, a time limit to the exercise of such a right of repudiation had to be put in place. By the agreement dated 15 December 1992 ("the Agreement") the defendants without prejudice to their rights under the policy agreed to advance to the plaintiffs the insured amount. They could repudiate liability within 3 years of the Agreement (that was by 15 December 1995) or "90 days from the date of the final judgment in the criminal proceedings" whichever was later. If the defendants did not give notice of repudiation within the contractual time bar, the sum advanced by them to the plaintiffs would constitute full and final settlement of the plaintiffs claims under the All Risks marine cargo policy. By the criminal proceedings parties were referring to the criminal proceedings then pending against Avi Cohen. Pursuant to the Agreement, the defendants advanced to the plaintiffs the sum of US$661,870.00. I will have to return to the Agreement for its full terms and effect.

4 On 20 April 1993 the verdict in the criminal proceedings against Avi Cohen was given. He was found guilty of several offences under the Israeli Customs Ordinance. The offences were assembly for smuggling, removal of dutiable goods and evading payment of duty. On the evidence led, he in fact did appeal against his conviction. PW3 Doran Shinar (a lawyer of the Israeli law firm who had represented the plaintiffs in Israeli proceedings and who was also retained by the defendants to get to the facts.)

told the court that he had appealed but was unable to assist further. The plaintiffs proceeded on the basis that he had appealed against his convictions. No evidence, however, was led by the plaintiffs on the course and outcome of the appeal of Avi Cohen, nor was there any evidence of the date of the decision of the appellate court to which Avi Cohen had lodged his appeal. As will be seen, the absence of evidence bearing on these facts in issue will have some unfortunate consequences for the plaintiffs.

5 The plaintiffs commenced proceedings in Israel for the return of the electronic goods. The Israeli customs authorities resisted. Through the investigation officer, Yehuda Bachar, they alleged that the plaintiffs were involved in the smuggling. It was based, amongst other assertions, on the changes of the numerous serial numbers of the electronic goods, which Bachar contended, could only have been done by the plaintiffs in Singapore. The smugglers, he opined, simply did not have sufficient time in the Ashdod area in Israel to complete those changes. On 29 November 1995, the Haifa District Court dismissed the plaintiffs claims against the Israeli customs authority for the return of the seized goods. It found that the plaintiffs were involved in the smuggling. About 3 years later, the Israeli Supreme Court in Session as Civil Appellate Court affirmed the decision of the Haifa District Court. These decisions and grounds, which were based on the evidence of Bachar, were seriously challenged in this court. Bachar gave evidence in this court and I will revert to them when I consider the question whether the plaintiffs had in truth and in fact participated and colluded in the smuggling.

6 Towards the end of 1995 the defendants demanded from the plaintiffs the return of the sum of US$661,870.00 by a letter of demand dated 29 December 1995. They further pressed for payment by a reminder dated 10 January 1996. By their letter of 15 January 1996 the plaintiffs returned the said sum "without prejudice", "reserving all rights under the policy". The second sentence of the main paragraph of the letter stated thus: "(b)asically, we feel it is in the interest of both parties concerned for us to repay the money to you first (with all rights under the policy reserved) *to avoid our having to bring claim whilst we are still considering our option*." (emphasis added). As was explicitly stated by the words emphasised, it was a conditional counter-offer by the plaintiffs to return the money in exchange for time to commence proceedings based on the marine cargo All Risks policy where the time bar might set in upon the expiry of 6 years from theft of the cargo on 3 January 1991. By offering to return the money on those terms the plaintiffs were telling the defendants that the contractual time bar under the Agreement would no longer kick in and that they would not lose their right to repudiate liability under the policy. The defendants The defendants accepted the tender of repayment but on 16 January 96 the defendants, in addition, demanded that the plaintiffs pay them interest in the sum of $88,676.79 in accordance with another term of the Agreement. The plaintiffs paid it to the defendants.

7 On 6 March 1996 the plaintiffs commenced this action under the All Risks marine cargo policy. No claim was made for any breach of any term of the Agreement. The defendants applied to strike out the action by reason of time bar. The Senior Assistant Registrar struck out the action. The plaintiffs appealed. The High Court allowed the appeal on condition that the plaintiffs abandoned all claims under the All Risks marine cargo policy and pursued their claims on the Agreement alone. Accordingly, issues of liability under the said policy were no longer live before this court for determination.

8 Very briefly the plaintiffs are claiming for damages for breaches of the Agreement. In the first place, they assert that the defendants right to repudiate liability under the policy had been extinguished. The reasons were: (i) they failed to give notice of repudiation within 90 days of 20 April 1993 when the Israeli District Court of Jaffa convicted Avi Cohen; and (ii) they failed to serve notice of repudiation within 3 years from 15 December 1992, that is by 15 December 1995. If these contentions were sustainable on a true and natural interpretation of the relevant clauses in the Agreement, the plaintiffs would have been entitled under the Agreement to keep the sum of US$661,870.00 paid to them. It would have been a mistake, at least on the part of the plaintiffs, to repay it plus the interest.

9 Their second claim for damages for breaches of the Agreement proceeds on the basis that the defendants right to repudiate liability under the policy still subsisted. In that event, they aver that the repudiation was wrongful for three reasons. They say that, firstly, no investigation were carried out in the form set out in the Agreement to enable the defendants to decide if they (as underwriters) were liable to indemnify the plaintiff for the loss. Secondly, the defendants letter to the plaintiffs dated 10 January 1996 demanding the payment of the said interest did not set out the grounds of repudiation as required by clause 3 of the Agreement. Thirdly, the plaintiffs maintain that the defendants did not have any evidence of the plaintiffs complicity in the smuggling and they (the defendants) had no evidence to prove the grounds of repudiating liability under the Agreement.

10 The plaintiffs are alternatively claiming the sums of US$661,870.00 and US$88,676.79, which were repaid and paid to the defendants as money had and received by the defendants to the use of the plaintiffs.

11 Alternatively, the plaintiffs assert that the defendants in the circumstances of this case were unjustly enriched to the extent of the two sums at the expense of the plaintiffs.

12 I now summarise very briefly the defences before I turn to the defendants counterclaim. First, the defendants contend that there was no common mistake. More specifically, they deny that the plaintiffs had returned the said sum of US$661,870.00 and paid the interest without realising that the defendants were contractually under the terms of the Agreement out of time in purporting to reject the claim under the marine cargo All Risk policy. Secondly, they contend that the loss was due to the wilful act of the plaintiffs in having participated in the smuggling as found by the two Israeli courts of competent jurisdiction in proceedings to which the plaintiffs were a party. Accordingly, they say that the plaintiffs are not permitted to maintain this action from so base a foundation as a matter of public policy.

13 Thirdly, they further contend that the plaintiffs are precluded from going behind the judgments of the two Israeli courts of competent jurisdiction on the issue whether they were involved in the smuggling of the goods, which resulted in the seizure and confiscation of the goods by the Israeli authorities. Under this defence the defendants point out the nature of the evidence which the plaintiffs are seeking to rely on in this case is "much wider" (in the words of the defendants opening) than those before the two Israeli courts and other than Bhojwanis explanation as why he did not give evidence in the plaintiffs action in Israel, namely the fear for his personal safety, no reasons had been advanced as to why the additional evidence could not have been adduced before the first of the two Israeli courts. In the fourth place, they submit that the Israeli judgment is a judgment in rem which binds the world including the plaintiffs.

14 Fifthly, the defendants contend that to reopen the issue as to their complicity in the smuggling would be an abuse of the process of the court.

15 Sixthly, they go on to contend that the plaintiffs by their director and representative, Hiro Bhojwani ("Bhojwani") had made several fraudulent or negligent misrepresentations, which were untrue in relation to their denial that they were involved in smuggling. But for these misrepresentations the plaintiffs would have known the truth and would not have advanced the loan and the legal expenses under the Agreement and the letter of Indemnity. Therefore the defendants submit that the Agreement should be rescinded and rendered unenforceable. As an alternative remedy, the defendants claim damages in the form of the repayment of the sum of US$661,870.00 advanced under the Agreement together with interest thereon.

16 In relation to the plaintiffs contractual claim under the Agreement, in so far as it relied on contractual time bar, the defendants contend that their letter of 29 December 1995 was a proper notice. It had made reference to a communication of 7 December 1995 and it was a proper notice of repudiation duly served within the contractual time limit. In this specific context, the defendants further go on to rely on the equitable defences of waiver by election, waiver by estoppel and the doctrine of approbation and reprobation.

17 The defendants counterclaim is for the sum of US$103,441.00. The defendants aver that by reason of the misrepresentations made by the plaintiffs to the defendants prior to the entering of the July indemnity the defendants are entitled to rescind the July indemnity and to the repayment of the said sum together with interest thereon. Alternatively, they claim damages equivalent to the said sum with interest thereon. Their last alternative basis is that the High Court had ruled that any claim under the marine cargo All Risks policy was time barred and that accordingly the plaintiffs are liable to repay the said sum and interest under the terms of the July indemnity.

Central issue of smuggling

18 I turn now, first and foremost, to the central issue whether the plaintiffs had, as the defendants had alleged, participated or

colluded in the smuggling or were they in any way implicated in the smuggling. The resolution of this issue will dispose of the issues whether the plaintiffs are precluded from suing on the Agreement on the ground of their illegal act as a matter public policy and on the question whether the Agreement could be rescinded by the defendants on the ground that the plaintiffs, who had been implicated in the smuggling, had fraudulently or negligently made material misrepresentations to the defendants which induced the defendants to enter into the Agreement with them. As mentioned earlier, the defendants under this defence seek the alternative remedy equivalent to the sums and interest paid back. If the finding of this court is that the plaintiffs had not participated, colluded or were not in any way implicated in the smuggling, then it follows that the plaintiffs are not precluded from suing under the Agreement; they will then not be affected by any wilful misconduct or illegal and public policy considerations do not arise. It will also follow that the defendants are not entitled to rescind the Agreement or keep the damages to set off the claim for the return of the sum and interest repaid. In my view, the Israeli judgments were in personam and not in rem which the defendants could rely as a bar. Further, the contest of the issue of smuggling is not an abuse of process. It is the defendants who are alleging that the plaintiffs were implicated in the smuggling. They make it central to their case before this court.

My Findings

19 Having heard the evidence, both documentary and oral, and after carefully evaluating them, I have come to the conclusion that in truth and in fact the plaintiffs had not participated or colluded in the smuggling and they were not, in my judgment, implicated in any way in the smuggling: see the requirement for higher evidentiary standard proof in *Yogambikai Nagarajah v Indian Overseas Bank* [1997] 1 SLR 258, *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 SLR 735 and *Ong & Co Pte Ltd v Quah Kay Tee* [1996] 2 SLR 553. The plaintiffs did not adduce evidence of a compelling and convincing nature. I believe Bhojwani was telling the truth.

20 The plaintiffs are part of the well-known Shankar Group of companies. In Singapore, the Group is one of the leading exporters of electronic goods. They are broadly speaking part of the businesses of the Bhojwani clan, which were set up in 1946. For almost 40 years the plaintiffs, their predecessors in commercial substance, and their Group have insured with the defendants who were previously known as United India Insurance. Since 1981 the plaintiffs have traded primarily in consumer electronic goods in the world markets and they cover Asia, Middle East, Africa, the Mediterranean, the Caribbean, the C.I.S., U.S.A and Latin America. In the course of their trade they receive orders from their worldwide contacts. One of them, who feature in the transaction in question, is Frontscope Limited ("Frontscope") of United Kingdom. Frontscope had gone into liquidation. Their managing director, Shandip Popat ("Popat"), dealt with Bhojwani in the transaction in question from beginning to end. He gave evidence before me. The plaintiffs traded with Frontscope in a variety of ways so far as payment for the goods was concerned: payments could be by letters of credit, documents against payment (DP terms) basis or on an open account basis. The last mode of trading and payment, I understood, meant that they kept a running account between them in relation to their transactions. Remittances sent by Frontscope would be appropriated wholly to a transaction or a combination of transactions. This mode of payment also allowed for a requirement of upfront payment if Bhojwani thought it necessary to protect the interest of the plaintiffs.

21 The plaintiffs have a network of suppliers of electronic goods. Among them were Asia Matsushita, Philips, Singapore and World Audio, a local J.V.C. export agent. These suppliers obtain their supplies from the manufacturers directly and they sell to exporters such as the plaintiffs. As for stuffing the goods into containers and the tallying of the quantity of goods stuffed these jobs were sub-contracted by the plaintiffs to Anglo-Offshore Shipping ("AOS").

22 In early November 1990 Bhojwani received a call from Popat asking for the supply of a relatively large consignment of video cassette recorders and colour television sets of various description and make. As confirmed by Popat in evidence and by a fax erroneously dated 26 November 1990, when in fact Popat sent it out on 24 November, 1990, Popat informed Bhojwani that there was an Israeli customer who was willing to place a deposit of US$50,000 for the shipment. Upon shipment, the customer would pay in full and the plaintiffs were to forward the set of original bills of lading to Popat to take delivery. The goods were to be described as 2 x 20 ft or 1 x 40 ft container load of videos of National/Panasonic (N/P) of the stated descriptive details, and

televisions of 14" infra-red T.V. JVC, Sharp, N/P or Toshiba make.

23 On 26 November 1990 the plaintiffs confirmed in writing to Frontscope that the following stocks had been reserved for them:

"800 sets NV-L 15 Sen	800 sets/20 CTNR
600 sets HR-1540	600 sets/20 CTNR
700 sets C-1480M	350 sets/20 CTNR

24 Bhojwani phoned Popat and told him that plaintiffs had to confirm to their suppliers by 5.30 p.m. Singapore time. As stated in the plaintiffs fax of 28 November 1990 the order of the said goods was confirmed. The plaintiffs stipulated that they required the deposit of US$100,000 to defray banking charges, re-shipment costs, losses in foreign exchange and fall in the market prices of the goods in case the ultimate buyer failed to take delivery of the goods. This was a sensible and normal precaution where the consignment was on DP terms. Popat was himself based in London and not Israel and Popat was relying on a third party buyer who was unknown to the plaintiffs and Bhojwani.

25 On 27 November 1990 Frontscope wrote to the plaintiffs advising the remittance of DM41,000 (equivalent to US$28,000). On the following day, Bhojwani sent a fax to Frontscope stating that one Wrobel had placed with them US28,000 and not US$29,000 which Popat had earlier indicated to Bhojwani. I accept Bhojwanis evidence that he had no contact with Wrobel. He was, as confirmed by Popat in the witness stand, the one who approached Popat for the shipment. In this trade, it was usual and only to be expected that intermediaries do not disclose the identity and contact details of their intermediaries or customers. In response, Popat informed Bhojwani that his customer wanted the goods to be exported in containers that were purchased and shipment was to be via Trieste (Italy) through a non-Israeli shipping line. A few days later, Frontscope enquired about the price of two 40 foot containers, how long it would take to purchase them and to ship the goods. On 5 December 1990 the plaintiffs replied that each container cost US$2,100.00 and that the purchase and shipment could be effected immediately.

26 By a fax of 5 December 1990 sent to Frontscope the plaintiffs confirmed the purchase of the two containers and the shipment of the goods to Trieste (Italy). The Bills of Lading would state the plaintiffs as the shippers, that they are to be delivered to the order of the plaintiffs and the Notify Party was to be left blank. Frontscope was further informed that upon the arrival of the vessel in Trieste, their customer would have to make payment and take custody of the original bills of lading. Once the customer had paid for and received the original bills of lading, the customer could take the containers in Trieste and ship the goods to Ashdod at his convenience and prepare his documentation in a manner acceptable to him.

27 Bhojwani attended to two urgent matters on 6 December 1990. The plaintiffs had to take delivery of the goods and ship them by Sat/Sunday 7 or 8 December or substantial warehousing charges would be incurred. He also pressed for the remittance of US470,0000 being the balance of the deposit. When pressed, Popat said that he was himself waiting for instructions.

28 On 6 December 1990 Frontscope gave written shipping instructions. They wanted the shipment to Ashdod directly as soon as possible. They confirmed the purchase of the two containers which, however, were not to be an Israeli line. They asked the plaintiffs to pay the freight and bill it. The Bill of Lading should show quantity and model L15SEN, C1480 and HR1540. There was to be no mention of the TVs or Videos. There should be no value on the Bill of Lading. Popat instructed the plaintiffs to hold on to the Bills of Lading till he informed them.

29 Bhojwani made his enquiries and found that the vessel to Ashdod was fully booked. The shipment was put on the waiting list. He also informed Frontscope that the shipping line required the consignee to be identified as the shipping line was suspicious of any bill of lading made out "TO ORDER" as this could suggest that the order had not been finalised and there was a risk of cancellation in a tight shipping market. Popat of Frontscope responded in writing and gave the details of the Notify

Party as "Alfa Electronic Arkon 15 Ramat-Gan Israel". It turned out that this was a non-existent entity. But there was no way for Bhojwani to know. For that matter, on the evidence, Popat took the word of one Wrobel for it.

30 On 7 December 1990 the plaintiffs wrote to Frontscope setting out the bill as US$597,500. It included the freight and they asked Frontscope for the details of the Telegraphic Transfer. Three days later, plaintiffs sent a chaser for the remittance of US$70,000 which was not received. Bhojwani was personally concerned by the lack of remittance and he pressed Popat who eventually agreed to be personally liable for the balance of the US$70,000. A week later, Frontscope sent the remittance of 30,000 and Popat indicated in a fax that it was for the deposit of US$70,000.

31 An error occurred in the issue of the plaintiffs invoice to Alfa Electronic. This was seized upon by the defendants as evidence of the linkage between the plaintiffs and the smugglers and their complicity. But there was in fact nothing in it. It was simply an error on the part of the clerk of the plaintiffs who typed the invoice erroneously thinking that the Notify Party was also the contracting party. This was in fact noticed and rectified when the bill amongst collection documents, including the bills of lading, could not be processed by the London bankers of Frontscope. Bhojwani was overseas at the relevant time and he was not consulted on the correct entries. The invoice to Frontscope was issued for US$538,838.00 to take into account the remittance of US$62,862.00 in US currency, which was the money of account. When the error was discovered a swift message was sent to Hambros Bank via the plaintiffs bankers, Banque Nationale de Paris ("BNP"). Much was made of this error by the defendants. Again, it was one of those errors that could happen and it did. So far as the remittance of the deposit was concerned, the contemporaneous documents proved the remittances of DM41,470 on 27 November 1990 and 30,000 were appropriated to the contract for the electronic goods. On 16 January 1991 Frontscope paid the further sum of 20,000 and this sum was appropriated in part for this contract and in part for other contracts.

32 I turn to the supply of the goods. The consignment of 700 cartons JVC televisions was loaded at World Audios warehouse at Ubi Road on 12 December 1990. An employee of AOS, Murugaya Manickam, told the court that the container was stuffed and sealed at Ubi Road under his supervision. The other consignment was loaded under the supervision of Lim Joo Kiang at Shankars Emporium warehouse at 80 Teck Guan Street. So far as the JVC videos were concerned they were received on 13 December 1990 and shipped out on the same day.

33 At all material times, the position of the plaintiffs was fully secured. They sent the shipping documents to BNP for collection and these were sent to Hambros Bank. Popat would only be issued the set of original bills of lading if Frontscope paid and the plaintiffs were credited by Hambros Bank. On top of that, they had the upfront deposit which was substantial, though not the entire sum. As explained by Popat, Wrobel had to turn up in London with his customer and him and hand over the cash to Hambros Bank who would release the shipping documents and the set of original bills of lading. Frontscope would accept the bills of the plaintiffs only if they had been paid the price and charges.

34 On 9 January 1991 Frontscope returned the shipping documents as they were not able to pay on the bills. They instructed Hambros Bank to return the original documents to BNP, the plaintiffs bankers. It was done. The plaintiffs telexed Zim Lines requesting the return of the containers. There was no response. Bhojwani informed Frontscope that the goods had not arrived safely. Popat at that stage told him that the customers name was one Dan E. Ycheskel ("Ycheskel") and that he owned Alfa Electronics. He passed on this information from Wrobel to Bhojwani. Later, Popat said that Wrobels customer was Avi Cohen whom he had never met. He had transacted with Wrobel previously.

35 By 16 January 1991 the plaintiffs had not received any news about the goods nor the balance of the price of the goods. They instructed Khattar Wong & Partners ("KWP") to act on their behalf. Israeli lawyers Messrs Zadok Striks ("Zadok") were instructed to handle the matters in Israel. Zadok reported the removal of the goods and the smuggling activities of the three individuals, including Avi Cohen, who were known as the "Polish gang". In response to lawyers enquiries the plaintiff had as early as 8 February 1991 stated that they sold the goods to Frontscope who sold them to a company in Israel. They further explained that the shipping line wanted the name of the Notify Party and on their enquiry Frontscope told advised them in writing that it was Alfa Electronics Ltd.

36 As stated earlier, the plaintiffs claimed under the All Risk marine cargo policy but liability was not admitted. The customs

authorities insisted that they had a right to auction off the goods. The plaintiffs therefore applied to the Israeli court for an interim injunction. The hearing took place on 1 May 1991. Bhojwani testified. But Bachar had him detained for interrogation over two days. Amazingly, he was compelled to surrender the original bills of lading to the customs authorities. Up to the date of the hearing, the plaintiffs had not been able to recover those documents of title. Bachar took a long statement from Bhojwani. The plaintiffs failed to stop the auction and recover the goods because had informed the court of highly prejudicial but doubtfully probative materials involving what a "snitcher" had told him. According to established practice, I heard in confidence what he said to me to respect the wishes of his department that they should not disclose, directly or indirectly, their sources. I have to reject those evidence which I heard; they were of no probative value except that they were hearsay and double hearsay which were highly damaging against the plaintiffs who would not have a chance to cross examine and scrutinise the evidence. I have set out in a sealed envelope what he told me for the exclusive perusal of the Court of Appeal should this case go further.

37 Bachar placed a lot of emphasis on the changes to the numerous serial numbers of the goods. Many of them were poorly done. Later, he checked with the manufacturers and discovered that within each product was a mother board where the genuine number could be seen. From beginning to end, the plaintiffs and Bhojwani had consistently denied that they had carried out any of the changes to the serial numbers of the products. In this trial, the plaintiffs led evidence from independent witnesses and their evidence proved that the serial nos. of the JVC VCRs in 600 were not changed by the plaintiffs. I accept the evidence of Lim Joo Kiang, an employee of AOL who were at the material times the managers of Shankars Emporium Pte Ltd. He was involved personally in the loading at the plaintiffs warehouse at 80 Teck Guan Street of two consignments of electronic goods, viz 800 sets of National Video cassette recorders and 600 sets of JVC. Lim said any changes on that massive scale would have required a lot more space and a number of days. He did not see any such operations. I am satisfied that the plaintiffs did not tamper with the serial numbers of the goods in those two consignments.

38 In respect of the serial numbers of 700 cartons of CTVs supplied by World Audio they were changed. Bhojwani and industry witnesses have said that basically there were three reasons for changes in the serial numbers. First, a sole agent who has excess stock may want to clear his excess stock by selling the goods in places to which he may be prohibited under his contract to sell to. Secondly, agents may want to mask the serial nos. of the manufacturer to make it more difficult for buyers to make frivolous claims. Thirdly, changing of serial nos. will prevent detection of sales to unauthorised destinations. I accept that any one of these reasons could well have been the cause for the changes in the serial nos. of the CTVs. One central plank or primary fact on which Bachar and hence the Israeli court relied on was the inference that the plaintiffs must have changed the serial nos. They did not. Accordingly, one of the central planks grounding the finding that the plaintiffs themselves must have changed the serial nos. as part of the act of illegally assisting in the smuggling of the electronic goods was shown to be flawed.

39 Bachar also found "astonishing" that Bhojwani did not have the serial numbers of the 2,100 cartons of electronic goods. As was stated and reiterated by KWP at the early stage of the investigation, the plaintiffs exported 3,000 to 4,000 of the sets every month. It was impossible for them to do an individual computation of serial nos. on individual sets. I found this answer a perfectly credible explanation. Mr Athappan, the CEO of the defendants in Singapore, referred to a number of features in the transactions which he said were not told to him. One had to be fair; the plaintiffs were themselves finding out some of the features as they investigated further through their lawyers and by themselves. Indeed, the defendants had advanced the plaintiffs case to their re-insurers. It is wholly undesirable for defendants to speak from two ends of their mouth.

The claims under The Agreement

40 Notwithstanding the finding that the plaintiffs were innocent of any complicity in the smuggling, their claims under the Agreement for breaches will now have to be considered.

41 I set out the terms of the Agreement in its entirety:

> "AN AGREEMENT made between INDIA INTERNATIONAL INSURANCE PTE LTD (hereinafter called "the Company") of 64 Cecil Street, IOB Building, Singapore

0104 and SHERRIDON EXIM PTE LTD (hereinafter called "the Insured") of #06-04 High Street Plaza, 77 High Street, Singapore 0617.

Whereas a Marine Cargo Policy of Insurance No.C177905 (hereinafter called "the Policy") has been issued to the Insured and a claim has been made by the Insured thereunder the parties hereto have agreed as follows:

In consideration of the Company advancing a sum of US Dollar Six Hundred and Sixty One Thousand Eight Hundred And Seventy Only (US$661,870/-) being the insured sum under the Policy at the request of the Insured in respect of the cargo insured under the Policy carried in Vessel "Zim Piraeus" which sailed on or about 15th December 1990 on a voyage from Singapore to Ashdod (Israel) pending the outcome of investigations carried out by the Company in respect of the Companys liability to indemnify the Insured under the Policy and the cause and nature of the alleged loss under the Policy the parties to this Agreement hereby agree as follows:-

1. The said insured sum of US$661,870.00 under the Policy advanced by the Company to the Insured is made without any admission of liability whatsoever by the Company and without prejudice to any rights of the Company to repudiate its liability to indemnify the Insured under the Policy in the event that the Company is shown not to be liable to indemnify the Insured herein whereupon the Company reserves its rights to recover from the Insured the full insured sum of US$661,870.00 together with the interests and costs in respect thereof.

2. If at the conclusion of the Companys investigations herein it is found by the Company that the Company is not liable to indemnify the Insured under the Policy the Company shall notify the Insured of its repudiation of the claim under the Policy and shall furnish to the Insured on an entirely without prejudice basis the grounds thereof to enable the Insured to decide whether or not to commence legal proceedings against the Company to dispute the repudiation under the Policy; Provided always that such proceedings must be commenced by the Insured in the Courts of Singapore within three (3) months from the date of the repudiation herein; Provided also that the parties to the Agreement herein shall irrevocably submit to the jurisdiction of the Courts of Singapore and the Judgement of the Courts of Singapore as regards the Companys liability and quantum of the claim payable under the Policy shall be binding on the Company and the Insured.

3. If the Courts of Singapore were to adjudge that the Company is not liable to indemnify the Insured under the Policy or if the Insured fails to commence legal proceedings to dispute the Companys repudiation under the Policy as provided under the aforesaid Condition 2 of the Agreement

herein the Insured unconditionally undertakes to return the entire insured sum of US$661,870.00 paid by the Company to the Insured under the Policy together with interests payable at the average of the prevailing term deposit rates of the 4 major local banks ie. OCBC, UOB, OUB and DBS from the date of receipt of the said insured sum by the Insured and costs awarded by the Courts of Singapore in respect of legal proceedings, if commenced, and this payment of the said insured sum shall be made by the Insured to the Company within fourteen (14) days from the date of final judgement or upon the expiry of three (3) months from the date of the Companys repudiation hereof where the Insured had failed to commence legal proceedings to dispute such repudiation.

4. In the event that the Company is found liable by the Courts of Singapore to indemnify the Insured under the Policy the payment herein of the said insured sum of US$661,870.00 by the Company to the Insured shall be deemed to be full and final settlement of the Companys liability under the Policy. Notwithstanding this, the Company agrees to pay the costs awarded by the Courts of Singapore in respect of the claim herein.

5. In the absence of any written repudiation of the claim herein from the Company within three (3) years from the date hereof or upon the expiry of ninety (90) days from the date of final judgement of Israeli Courts in the criminal proceedings brought by the Customs Authorities in Israel in connection with the cargo insured herein, whichever is later, the Companys rights to repudiate the said claim shall be extinguished and the amount paid herein shall constitute full and final settlement of the Companys liability under the Policy.

6. This Agreement shall be governed by the laws of Singapore and shall be subject to the jurisdiction of the Courts of Singapore."

New Agreement

42 I refer to the defendants closing submissions in paras 146 to 151. The background leading to the Agreement, as pointed out, was the decision of the Haifa District Court implicating the plaintiffs in the smuggling. By their letter of 15 January 1996 the plaintiffs offered to terminate the Agreement by repaying the money in return for the advantage of not having to sue within what they thought was the 3 month time limit for bringing action for wrongful repudiation. It was obviously advantageous to the plaintiffs to have more time to consider what to do, whether to appeal and so forth. Bhojwani in evidence admitted that there were benefits to the plaintiffs to return the money without prejudice to their rights under the policy. The plaintiffs offer was accepted by the defendants by their subsequent conduct, which was to accept the tender of the money and to have asked and accepted the interest. I agree with the submission that on a correct analysis a new agreement was formed to revert to the

position under the original All Risks marine cargo policy. By the new agreement reached, it was reasonably clear that the intention was that the policy, and not the Agreement, would be the basis for any future legal action by way of claims under or repudiation of the policy. The plaintiffs did not sue under the policy but left it too late to do so. They could have protected their position by obtaining prior to 6 March 1998 an extension of time from the defendants. KWPs letter of 26 November 1997 was a trifling late in attempting to preserve the plaintiffs rights under the Agreement. Accordingly, in my judgment the plaintiffs claims under the Agreement are not maintainable.

43 I turn to the defences of waiver by election and the defence of approbation and reprobation. Both defences are, in my view, subsumed by my conclusion that a new agreement had replaced the Agreement. As was pointed out in *Evans v Bartlam* [1937] All England Law Reports Annotated p.646: "The foundation of the doctrine of approbation and reprobation is that the person against whom it is applied has accepted a benefit from the matter he reprobates." On any view, the plaintiffs had elected by offering quite clearly to revert to their rights under their All Risks marine cargo policy and had enjoyed among others the benefits of additional time that was received in exchange. They must now stand by their election and approbation; indeed the plaintiffs went further and agreed to revert to the rights under the policy. As for the defence of waiver by estoppel, this was not sufficiently pleaded with adequate particulars. It is therefore not considered.

Other claims of defendants

44 I further turn to the claims of unjust enrichment and for money had and received to the plaintiffs use. They do not arise for consideration in view of the new agreement. As stated earlier, the plaintiffs offered to return the money paid to them under the Agreement and later even the interest in return for their rights under the All Risks marine cargo policy. There is accordingly no unjust factor or enrichment; nor were there any wrongful repudiation of the Agreement by the defendants under those two heads of claims in restitution. Even if the defendants had demanded the return of the money following the decision of the Haifa District Court against the plaintiffs, the latter could have insisted on exercising their rights under the Agreement. They could then sue under the policy within the agreed time limit and in the meantime hold on to the money. Instead, they wanted and bought more time which, very unfortunately, was exceeded resulting in the time bar setting in against any claim under the policy.

45 Additionally, in respect of the plaintiffs claim for money had and received to their use they rely on the alleged common mistake. For them to succeed under this part of their case they have to establish unknown to both parties that the demand for the return of the money was made outside the time prescribed in clause 5.

46 Clause 5 of the Agreement reads:

> "5. In the absence of any written repudiation of the claim herein from the Company within three (3) years from the date hereof or upon the expiry of ninety (90) days from the date of final judgement of Israeli Courts in the criminal proceedings brought by the Customs Authorities in Israel in connection with the cargo insured herein, whichever is later, the Companys rights to repudiate the said claim shall be extinguished and the amount paid herein shall constitute full and final settlement of the Companys liability under the Policy."

47 The burden was on the plaintiffs to prove that the 90 days in clause 5 runs "from the date of the *final* Judgment of Israeli Courts in the criminal proceedings brought by the Customs Authorities in Israel." (emphasis added). As was foreshadowed earlier in this judgment, there is unchallenged evidence before this court that Avi Cohen appealed against the decision of Judge Gross. The judge himself referred to an appeal in para 7. It was unsustainable for the plaintiffs to maintain that 90 days would run from 20 April 1993 which was only the decision of the court of first instance. It was not a "final" judgment within the meaning of clause 5.

The counterclaim

48 At the request of the plaintiffs the defendants advanced to them the costs and expenses incurred and to be incurred in the Israeli proceedings. Athappan "was agreeable to the idea so long as the advances were without prejudice to policy liability and provided the plaintiffs agreed to repay the defendants if the claim was declined": see para 734 of defendants closing submissions. The defendants issued to them the July Indemnity. It reads:

> "In consideration of your agreeing to pay the legal expenses incurred up to now and undertaking the responsibility for future legal expenses in respect of the legal actions initiated by us against the Shipping Company, Port/Customs Authorities in connection with the goods confiscated or seized by the Customs Authority in Ashdod, and in respect of the consignment insured under your Policy No. C177905 consisting of 2100 cartons electronic goods (800 sets National NV-L-15EN, 600 sets JVC VCR HR-D1540A and 700 sets JVC CTV C-1480M) and insured for US$611,870 (the said policy) without first ascertaining the liability under the policy for the alleged loss, we Sherridon Exim Pte Ltd holder of the said insurance policy hereby guarantee to pay to you upon your written notice, the amount of legal expenses you have incurred in respect of the abovementioned legal actions including costs and expenses, on the condition that we shall be liable to pay to you the same *only in the event that you are legally entitled to repudiate all liability under the said policy*. (Italics added)
>
> This letter of guarantee is irrevocable and would remain in full force until the matter is fully resolved and will be valid even if we contest your repudiation of claim under the said policy until such time as a Court adjudges or it is agreed between the parties that the repudiation is valid."

49 The italicised clause sets out the intention that the defendants would be obliged to indemnify the plaintiffs if there is a successful repudiation of all liability under the policy. That the defendants were implicated in the smuggling, for example, would be a lawful repudiation of liability under the policy. But in this case, the fact of the matter was that unfortunately the plaintiffs lost the right to sue under the policy because of the time bar. The loss had nothing to do with the terms of and any repudiation "under the policy". No repudiation of the policy by the defendants was involved. The pre-condition in my view is not satisfied and the defendants are unable to claim on the July 1991 indemnity.

Conclusions

50 For these reasons, the plaintiffs claims and the defendants counterclaim in this action are all dismissed. I now turn to the question of costs. The evidence and arguments in relation to the defendants allegation that the plaintiffs were implicated in the smuggling took up a substantial part of the days allocated to this trial. The defendants failed on this issue. They also fail in their claim on the July 1991 Indemnity. On the other hand, the plaintiffs failed in all their claims. In the exercise of my discretion I would make no order as to costs.

Lai Kew Chai

Judge