Rapiscan Asia Pte Ltd v Global Container Freight Pte Ltd
[2002] SGHC 72

Case Number : Suit 202/2001

Decision Date : 16 April 2002

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : S Palaniappan, N Sreenivasan and K Gopalan (Straits Law Practice LLC) for the plaintiff; Loo Dip Seng and Gerald Yee (Ang & Partners) for the defendant

Parties : Rapiscan Asia Pte Ltd — Global Container Freight Pte Ltd

Admiralty and Shipping – Bills of lading – Bills of lading as contract of carriage – Bill of lading not issued at formation of contract of carriage but issued later – Whether terms in bill of lading incorporated in contract of carriage

Agency – Third party and principal's relations – Contractual relations – Shipper's sister company negotiating contract of carriage with freight forwarder – Whether contract between shipper and freight forwarder

Contract – Contractual terms – Exclusion clauses – Contract of carriage – Whether exemption clauses exempt freight forwarder from liability for negligent misrepresentation – Application of Morton tests

Contract – Contractual terms – Implied terms – Contract of carriage – Whether term that freight forwarder needs to monitor shipment to be implied – Whether breach on freight forwarder's part

Contract – Contractual terms – Limitation of liability clauses – Contract of carriage – Whether limitation clauses limit freight forwarder's liability for negligent misrepresentation

Contract – Contractual terms – Standard terms – Freight forwarder making known to shipper that shipment subject to Singapore Freight Forwarders Association Standard Trading Conditions – Parties subsequently entering into oral contract of carriage – Whether contract subject to SFFA Conditions

Tort – Negligence – Remedies – Performance of contractual obligation in negligent way – Whether more appropriate to pursue remedy in contract or tort

Held, awarding judgment in favour of the plaintiff,

> (1) From the time the contract was being negotiated, Global knew that OSM was an agent of Rapiscan and was negotiating on behalf of Rapiscan. This was evident from the factual matrix as well as from the correspondence between Global and Rapiscan after the "mistake" regarding the shipment was discovered. The first time that Global sought to deny that Rapiscan was the contracting party was in the Defence filed in these proceedings. (29 – 31)
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> (2) The evidence clearly showed that the obligation to monitor the shipment and keep Rapiscan informed of its progress was an express term. It was also reasonable to imply such a term: see George Peereboom v World Transport Agency Ltd [1921] LLR 170. Global's negligence in monitoring the shipment was a breach of both the express and implied term of the parties oral contract of carriage. (6 – 9)
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> (3) Every page of the two quotations faxed to OSM by Global on 4 and 5 December 2000 had carried a qualification that all transactions entered into by

Global would be subject to the SFFA Conditions. In the circumstance, Global had made known to Rapiscan, before Global agreed to undertake the shipment, that the shipment was subject to the SFFA Conditions. Hence, the contract of carriage entered into was subject to those Conditions. (32)

(4) When parties enter into a contract of carriage with the expectation that a bill of lading will be issued to cover it, they enter into it upon those terms which they know or expect the bill of lading to contain : see Pyrene Co Ltd v Scindia Steam Navigation Co Ltd [1954] 1 LLR 321. In the present case, Rapiscan who had used the services of Global in the past, were aware that there were standard conditions attached to the bill of lading issued by Global. Hence, the terms in the bill of lading issued in this case formed part of the contract between Global and Rapiscan notwithstanding that the bill of lading had not been issued at the time the oral contract was entered into. (33 – 34)

(5) Whether the exemption clauses contained in both the SFFA Conditions and the bill of lading can be construed as exempting liability from negligence would depend on whether it succeeds on the three limbs of the "Morton test" : see Canada Steamship Lines Ltd v The King [1952] HL 192. In the present case, the exemption clauses which did not make any express reference to negligence or any synonym of negligence did not satisfy the first Morton test. The second test requires the court to consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the person whose favour it is made. The words used in the exemption clauses in question were wide enough to cover negligence. However, since the exemptions clauses in both the SFFA Conditions and the bill of lading were applicable to heads of claim other than claims based on negligence, the third Morton test was not satisfied. The exemption clauses would not therefore exempt from liability the claim against Global for the breach of contract arising from their negligence to monitor the shipment. (43 – 59)

(6) The same strict approach adopted by the courts towards exemption clauses does not apply to contracts containing limitation of liability clauses. Whether Global can rely on the limitation clauses contained in the SFFA Conditions and bill of lading depends on whether the clauses are sufficiently clear and unambiguous to receive effect in limiting the liability of Global for its negligence. Both cl 27 (b) of the SFFA Conditions and cl 6(4)(A) of the bill of lading, relied on by Global, limits liability for negligence only in respect of claims for delay. As such, the limitation of liability clauses could not limit Global's liability arising from its negligence in fulfilling its obligations to properly monitor the shipment of the X-ray machines. (60 – 65)

(7) Global's negligence in monitoring the shipment also made Global liable in tort. There is no need to consider Global's remedy in tort since Global has been found to be liable in contract which is the more appropriate remedy. (67 – 68)

(8) Global's failure to comply with its contractual obligation to monitor the shipment resulted in Rapiscan's loss of rental income from the Fei Fu contract which amounted to US$ 125,000. Rapiscan, by its abortive attempt to air-freight the X-ray machines to Macau was attempting to mitigate that loss. As the attempt would have been successful but for matters outside the control of

Rapiscan, Rapiscan was entitled to recover those costs amounting to US$ 29,056 from Global. Judgment for the sum of US$ 154,056 with interest was awarded in favour of Rapiscan. (69 – 72)

Cases referred to

Alisa Craig Fishing Co Ltd v Malvern Fishing Co Ltd and Anor [1983] 1 LLR 183 **(folld)**
Belships (Far East) Shipping (Pte) Ltd et al v Canadian Pacific Forest Products et al (1999) 175 DLR (4^{th}) 449 **(refd)**
Canada Steamship Lines Ltd v The King [1952] HL 192 **(folld)**
Darwish MKF Al Gobaishi v House of Hung Pte Ltd [1998] 3 SLR 435 **(folld)**
E Scott (Plant Hire) Ltd v British Waterways Board (1982, unreported) **(refd)**
George Peereboom v World Transport Agency Ltd [1921] LLR 170 **(folld)**
Marina Centre Holdings Pte Ltd v Pars Carpet Gallery Pte Ltd [1997] 3 SLR 625 **(folld)**
Pyrene Co Ltd v Scindia Steam Navigation Co Ltd [1954] 1 LLR 321 **(folld)**
Rutter v Palmer [1922] 2 KB 87 **(refd)**
Smith & Anor v South Wales Switchgear Ltd [1978] 1 ALL ER 18, 1 WLR 165 **(refd)**
Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank [1986] AC 80 **(refd)**

Judgment

GROUNDS OF DECISION

1. The plaintiff, Rapiscan Asia Pte Ltd ("Rapiscan"), is a Singapore incorporated company which markets/rents X-ray machines that screen for the presence of guns, knives and other such weapons. Such X-ray machines are found in airports and other public places. They are also used by organisers of public events. Rapiscan is a wholly-owned subsidiary of an American company, OSI Systems Inc, said to be one of the largest manufacturers of such equipment. Opto Sensors (M) Sdn Bhd ("OSM") is also a wholly-owned subsidiary of OSI Systems. OSM manufactures such X-ray machines and has its offices in Johor Baru, Malaysia. Rapiscan and OSM, being sister companies, were managed administratively as one group of companies. The defendant, Global Container Freight Pte Ltd ("Global") is a freight forwarding company incorporated in Singapore.

The Fei Fu contract

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2. In December 1999, Macau was handed back to China by the Portuguese. In connection with the hand-over celebrations, Rapiscan rented some of its X-ray machines to an organisation in Macau called Fei Fu and the X-ray machines were shipped to Macau through the services of Global. In December 2000, for the First Anniversary Celebrations of the hand-over, Fei Fu again contacted Rapiscan for the rental of X-ray machines. A contract was entered into between Rapiscan and Fei Fu on 4 December 2000 for the rental of 13 such X-ray machines for use from 10 to 31 December 2000. It was subsequently agreed between Rapiscan and Fei Fu that it would be sufficient if Rapiscan had the X-ray machines operationally ready at the designated sites in Macau before 18 December 2000. The First Anniversary Celeberations were to commence on 19 December 2000.

The contract with Global

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3. Rapiscan had, in connection with the APEC Meeting held in Brunei in mid-2000, rented X-ray machines to the authorities in Brunei. These X-ray machines, which had also been shipped to Brunei by Global, were still in Brunei and Rapiscan decided to ship 13 of these X-ray machines to Macau. Towards this end, Paul Quek Jat Han ("Paul"), the Materials Manager of OSM, asked Sharimah bte Mohamed ("Sharimah"), an Administrative Assistant with OSM, to make enquiries from Global about their freight charges. Sharimah contacted one Jason Thng ("Jason") of Global. From the two quotations sent by Jason – the first on 4 December 2000 and the second on 5 December 2000 – it would appear that Sharimah had at first asked for a quote from Muara to Singapore and thereafter a quote from Muara to Macau.

4. Paul told the court that upon receipt of the quotations he had spoken on the phone with Jason and emphasized to Jason that the X-ray machines were for use in Macau in connection with the First Anniversary Celebrations and the shipment therefore had to be closely monitored in order to ensure that the X-ray machines arrived in Macau by 16 December 2000. Paul claimed that he told Jason that if Global could not confirm that the X-ray machines would reach Macau by then, Rapiscan would consider other methods of transport to meet the deadline. According to Paul, Jason assured him that he would monitor the shipment. He said that Jason also assured him that the X-ray machines would reach Macau by 16 December 2000 or the early hours of 17 December 2000 at the latest. Paul relayed this assurance to his senior management and, after obtaining their approval, reverted to Jason and gave the go-ahead to effect the shipment. Paul also informed Jason that Tamil Selvan ("Selvan") and Swaminathan ("Nathan") of Rapiscan in Singapore would liaise on the shipment details.

5. Jason's account of that conversation was somewhat different. Jason agreed that he was told by Paul that the shipment was urgent and required in connection with the First Anniversary Celeberations in Macau but maintained that Jason had not given 16 December 2000 as the deadline by which the X-ray machines had to be in Macau. Jason's evidence was that Paul told him that the X-ray machines had to be in Macau before 20 December 2000.

6. Mr S Palaniappan, counsel for Rapiscan, in his closing submission submitted that this oral contract entered into between Rapiscan and Global contained the following terms:

(a) that Global would ensure that the X-ray machines reached Macau by 16 December 2000;

(b) that the X-ray machines were to be carried on the "Kota Perkasa"; and

(c) that Global would promptly advice and accurately inform Rapiscan about the whereabouts of the shipment ("the need to monitor").

On the evidence, it is clear that Paul gave the go-ahead to Global to effect the shipment on 5 December 2000. It is also clear that on that date the details of the vessel to be used for the Singapore/Macau leg of the shipment had not been identified. This is apparent from an e-mail to Global's Brunei agent on 5 December 2000 in which Jason informed the agent that the customer wished to know the name of the mother vessel from Singapore to Macau and asked for the name. The Brunei agent responded by e-mail on 6 December 2000. In response, the Brunei agent named two possible vessels, namely:

"Kota Perkasa":	ETD Singapore 12.12.00.
	ETA Macau 17.12.00.
"Kota Jaya":	ETD Singapore 14.12.00.
	ETA Macau 19.12.00.

The use of the "Kota Perkasa" for the shipment of the X-ray machines was therefore not envisaged on 5 December 2000 when the contract was entered into.

7. In the above circumstances, it could not have been envisaged on 5 December 2000, when the contract was entered into, that the "Kota Perkasa" would be the vessel to be used. Assuming that the vessel "Kota Perkasa" had been identified at the time of the contract, it was hardly likely that Jason would commit himself to the X-ray machines reaching Macau by 16 December 2000 when the ETA Macau of the "Kota Perkasa" was 17 December 2000. I therefore reject Paul's evidence that Jason told him that the X-ray machines would reach Macau by 16 December 2000. I also find that it was not envisaged at the time the contract was entered into that the "Kota Perkasa" was to be used for the Singapore/Macau sector of the journey.

8. It now remains for me to consider whether the need to monitor the shipment was a term of the oral contract entered into. I accept the evidence of Paul that he had impressed on Jason that this shipment was urgent and needed to be closely monitored so that if there was any difficulty in meeting the deadline Rapiscan could make alternative arrangements. I find that the need to monitor and keep Rapiscan informed of the progress of the shipment was a term accepted by Jason at the time the contract was entered into.

9. This obligation to monitor was also pleaded as an implied term in the contract. In support of the submission that such a term could be implied, my attention was drawn to the case of *George Peereboom v World Transport Agency Ltd* [1921] LLR 170 where at 172 Roche J said:

> "I think it was hardly disputed that a person in the position of a forwarding agent is bound to give such information to his principal as is necessary for the principal to protect his interest in the goods. That is a duty which is entirely independent of whether the forwarding agent has actual possession of the goods or not. He is managing a certain transaction with regard to them, and if anything arises during the conduct of that transaction which affects the goods or their value or the interest of the plaintiff in them, it is impliedly the duty of the forwarding agent to tell his principal about it."

It is, in my view, reasonable to imply such a term.

Monitoring the shipment

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10. On 6 December 2000, Nathan faxed a draft of the bill of lading to Global's agent in Brunei for the Muara/Singapore sector of the journey. On 9 December 2000, Paul called Jason to ascertain if the X-ray machines had reached Singapore. Jason told him that the X-ray machines would reach Singapore on 10 December 2000 and that they would be trans-shipped without delay to Macau.

11. On 11 December 2000, Paul called Jason to enquire about the progress of the shipment. Jason assured him that the shipment was on schedule and will be trans-shipped from Singapore on 12 December 2000. On 12 December 2000, Nathan spoke with Jason. Nathan told the court that Jason told him that the X-ray machines had arrived in Singapore and would be trans-shipped on board the vessel "Kota Perkasa" due to leave Singapore on that day.

12. On 14 December 2000, Global faxed the draft bill of lading for the Singapore/Macau leg of the shipment to Nathan. The bill of lading was dated 12 December 2000 and named the "Kota Perkasa" as the vessel, Rapiscan as the shipper and Fei Fu as the notification party. On the same day, Global in a

shipping confirmation note faxed to OSM gave the ETA of vessel at Singapore as "on/about 12 Dec 00" and the ETA Destination as "17.12.00".

13. On 14 December 2000, Paul, as well as Selvan, called Jason to enquire about the progress of the shipment. It was the evidence of Selvan that he emphasized to Jason that many dignitaries, including the President of mainland China, would be attending the First Anniversary Celebrations and that it was absolutely crucial that the X-ray machines arrive in Macau latest by 17 December 2000. Selvan said that Jason assured him that the X-ray machines would arrive in Macau by 16 December 2000 or at the latest by the morning of 17 December 2000.

14. On 15 December 2000, Selvan received a fax from Jose Sin ("Sin") of Fei Fu expressing concern that the "Kota Perkasa" would reach Hong Kong only on 17 December 2000 and not on 16 December 2000. Selvan referred this fax to Nathan who then called Jason. Unable to get Jason on the phone, Nathan called Pacific International Line ("PIL") which owned the "Kota Perkasa" to enquire about the X-ray machines and was told that he would have to get details through Global. Thereafter, Nathan managed to contact Jason. Jason told Nathan that PIL would release information about the shipment only to the party that had booked the space on board the ship and again assured Nathan that the X-ray machines would reach Macau by 16 December 2000 or at the latest 17 December 2000. Nathan testified that he again told Jason that should there be any delay Jason should inform Rapiscan.

15. Soon thereafter Jason called Nathan and told him that the "Kota Perkasa" was delayed because of heavy storms but assured Nathan that the X-ray machines would reach Macau on 17 December 2000. Independently, Selvan had called Jason on the same day and was given the same assurance. Selvan, who was the executive in Rapiscan who had negotiated the rental agreement with Fei Fu, told the court that he accepted the assurance of Jason that the X-ray machines would reach Macau by 17 December 2000 and telephoned Sin to convey this assurance. Sin told Selvan that he (Sin) could ensure that the X-ray machines would reach Macau a few hours after the vessel arrived in Hong Kong.

The "mistake"

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16. On 16 December 2000, Sin, much to his dismay, learnt from sources in Hong Kong that the X-ray machines were not on the "Kota Perkasa" but on a different vessel – the "Kota Jaya" – which was not scheduled to arrive in Macau until 19 December 2000. This meant that the X-ray machines (and hence the security arrangements) could not be in place when the First Anniversary Celebrations commenced on 19 December 2000. He relayed the information and his concerns to Selvan. Selvan called Global's agent in Hong Kong and they confirmed that the "Kota Perkasa" would arrive in Hong Kong that night and that the X-ray machines in question were not on board the vessel. Selvan told the court that he was devastated when he heard this. Shortly thereafter, Jason called Selvan and confirmed the "mistake".

Mitigation of loss

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17. When Selvan learnt of this "mistake", it was already about noon on 16 December 2000: a Saturday. He discussed the matter with Nathan and Gurdip Singh, the Deputy Managing Director of Rapiscan and OSM and they decided that, with Fei Fu's consent, they would immediately air-lift similar

X-ray machines that Rapiscan held in Global's warehouse in Singapore, to Macau. Sin agreed provided the X-ray machines arrived in Macau on 18 December 2000 and were available for use at the required site when the First Anniversary Celebrations commenced on 19 December 2000.

18. The staff of Rapiscan worked frantically to arrange for the immediate air-lift of the X-ray machines from Singapore to Macau but were unable to get the necessary air-cargo space. Air-cargo space to Hong Kong was, however, available from Sepang International Airport, Kuala Lumpur. There were five similar X-ray machines stored in Johor Baru. It was decided that these five X-ray machines from Johor Baru and eight X-ray machines from Singapore be air-freighted from Sepang to Hong Kong. They managed to secure air-cargo space in Sepang and the eight X-ray machines from Johor Baru left Kuala Lumpur for Hong Kong on 18 December 2000. But, because of the weekend, Rapiscan encountered problems in getting the eight X-ray machines from Singapore to Sepang. Various documents had to be processed before the X-ray machines could be trucked out of Keppel Distri Park where the machines were stored. And when the X-ray machines reached the Johor Immigration point, further delays relating to customs clearance were encountered. In the event the trucks were able to cross into Johor Baru only on 18 December 2000. When the trucks were halfway to Sepang, Rapiscan received notification from Fei Fu that they were canceling the contract for the X-ray machines.

The post-mortem

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19. On 4 January 2001, Rapiscan wrote to Global complaining that Global had "bungled" the shipment of the X-ray machines and stating that Rapiscan took a serious view of the breach of the agreement between Global and Rapiscan. In that letter Rapiscan, inter alia, stated: "Had you at least conveyed the correct information to us on the 14th of December that the goods were lying in Singapore, we would have been able to avert our losses by air-lifting the machines immediately."

20. In their response dated 9 January 2001, Global gave the following explanation of what happened:

> "When said shipment was finally loaded onboard vessel from Muara, our Agent – Tri Star highlighted to 'PIL Muara' that this shipment is a 'Government Project' & needed to be connected to first available vessel to Macau, which was schedule to eta Macau 16/12/00 or 17/12/00. PIL/Muara also informed our Agent that the said shipment would be connected on vessel: 'Kota Perkasa' which was schedule to sail from Singapore on the 14/12/00.
>
> On 16/12/00, our agent in Hong Kong advised us that shipment was not on board vessel 'Kota Perkasa'. On learning the said news. We immediately contacted PIL Singapore to confirm the information whether the said shipment was indeed shipped onboard 'Kota Jaya' and they claimed that PIL Muara never informed them that the said shipment is urgently needed by consignee & therefore rolled over the said shipment to next sailing."

It was clear from this response that Global was shifting the blame for the "mistake" on PIL. It was also relevant that Global did not, in this letter or at any stage prior to the commencement of this suit, challenge Rapiscan's assertion that the agreement was between itself and Global.

Jason's version of the "mistake"

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21. Jason's evidence as to the events that transpired during the second leg of the shipment was somewhat different from the version given by the witnesses for Rapiscan. Jason claimed that he knew on 15 December 2000 that the X-ray machines had not been loaded on the "Kota Perkasa" and claimed that he had given this information to Paul on 15 December 2000.

22. Whether the information regarding the "mistake" was conveyed to Rapiscan on 15 or on 16 December 2000 could be a matter of considerable significance to Global's defence to Rapiscan's claims. If indeed Rapiscan had been notified of the mistake on 15 December 2000 as claimed by Jason, then the fact that Rapiscan took no action until 16 December 2000 (a Saturday) to try and air-freight substitute X-ray machines to Macau would be a factor adverse to Rapiscan in considering whether Rapiscan had taken adequate steps to mitigate its loss. I therefore had to determine which of these two versions to accept.

23. Jason's version was inconsistent even with Global's position as stated in Global's letter of 9 January 2001 referred to above where Global stated that they discovered that the X-ray machines were not on the "Kota Perkasa" but were on the "Kota Jaya" on 16 December 2000. I accept that letter as reflecting the truth of the matter. I find that Global, in common with Sin and Rapiscan's executives, came to know about the "mistake" on 16 December 2000.

24. Jason in his evidence also denied having misled Rapiscan into believing that the X-ray machines were on board the "Kota Perkasa". Jason's evidence was that, in their telephone enquiries, all that the staff of Rapiscan had asked was the ETA of the "Kota Perkasa" in Macau. He said that he had, in response, given accurate information about the ETA of the "Kota Perkasa". Jason maintained that he had not been asked and therefore had not told Rapiscan anything about the whereabouts of the X-ray machines.

25. The fact that Jason was aware that this was an urgent shipment is clearly seen from an internal e-mail of 19 December 2000 sent by Jason to Global's agent in Brunei where Jason, in instructing the agent to stop the shipment (that was then on the "Kota Jaya") at Hong Kong, stated:

> "Please question her why they did not inform 'PIL-SIN' that this shipment is of 'TOP URGENT' and was government project require for their handover anniversary on 20 Dec and MUST BE LOADED ONBOARD vessel 'Kota Perkasa V.PKS062' as according to your booking ???"

Global had also informed Rapiscan that the X-ray machines had on 12 December 2000 been loaded on the "Kota Perkasa". This is evident from the draft bill of lading faxed by Jason to Rapiscan on 14 December 2000 wherein the name of the vessel carrying the X-ray machines was given as "Kota Perkasa".

26. In the circumstances, it must have been obvious to Jason – even if the staff of Rapiscan had only enquired about the ETA of "Kota Perkasa" in Macau – that Rapiscan's only concern was to ensure that the X-ray machines reached Macau on time. In those circumstances, for Jason to inform Rapiscan that the ETA Macau of "Kota Perkasa" was 17 December 2000 was tantamount to telling them that the X-ray machines would arrive in Macau on 17 December 2000. I am satisfied however that, in making those enquiries, the employees of Rapiscan had specifically asked Jason about the arrival time of the X-ray machines in Macau. Jason's failure to properly ascertain the whereabouts of the X-ray machines before answering those queries resulted in Rapiscan being misled into believing that the X-ray machines would arrive in Macau in time for use in the First Anniversary Celebrations. This negligent misrepresentation about the whereabouts of the X-ray machines was a breach of the term of the contract (both express and implied) that Global would monitor the shipment and keep Rapiscan informed about its progress.

The defence

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27. Global, in its defence, denied that there was any contract between Global and Rapiscan: it was Global's case that the contract that was entered into was between itself and OSM and that being so Global was liable to OSM – not Rapiscan.

28. In the alternative, Global relied on certain exemption/limitation clauses in the Singapore Freight Forwarders Association Standard Trading Conditions ("SFFA Conditions") and in the bill of lading to deny/limit liability. Rapiscan disputed the applicability of the SFFA Conditions and the bill of lading terms to the contract in this case and argued that in the event those clauses were held to be part of the contract, they were ineffective in exempting/limiting the liability of Global.

Was there a contract between Rapiscan and Global

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29. In support of its defence that there was no contract between itself and Rapiscan, Global relied on the fact that up to the time the contract of carriage was concluded the only persons who communicated with Global were Sharimah and Paul – both employees of OSM. Counsel for Global, Mr Loo Dip Seng, submitted that there was no evidence before the court that in entering into the contract, OSM was acting as an agent of Rapiscan.

30. Paul had testified that, in negotiating the contract with Global, he had told Jason that Rapiscan wanted the goods shipped to Macau. Paul had also testified that he told Jason that Rapiscan would monitor the progress of the shipment. In the light of Paul's evidence, the submission by Mr Loo that there was no evidence before the court was not quite correct. It is in this context relevant that Global did not refute Rapiscan's allegation – in its letter to Global after the "mistake" was discovered – that Global had an agreement with Rapiscan. Not only did Global not refute that claim, Global went on to give detailed explanations to Rapiscan about how it came about the X-ray machines were not on the "Kota Perkasa" as scheduled. This correspondence is consistent with Rapiscan being the contracting party in respect of that shipment. The first time that Global sought to deny that Rapiscan was the contracting party was in the Defence filed in these proceedings.

31. I accept the submission of Mr Palaniappan, counsel for Rapiscan, that Global's claim that their contract was with OSM and not with Rapiscan was a mere afterthought. I find, on the evidence, that from the time the contract was being negotiated, Global knew that OSM was an agent of Rapiscan and was negotiating on behalf of Rapiscan. I therefore find no merit in this defence.

The SFFA Conditions: Did they apply?

32. Every page of the two quotations faxed to OSM by Global on 4 and 5 December 2000, had printed on it the following qualification:

> "All business and transactions entered into by or on behalf of the Company is subject to the Singapore Freight Forwarders Association Standard Trading Condition ["the SFFA Conditions"], copy available upon request."

It was submitted, on behalf of Global, and I accept that submission, that in view of the fact that it was made known to Rapiscan, before Global agreed to undertake the shipment, that the shipment was subject to SFFA Conditions, the contract of carriage that was entered into was subject to those Conditions.

The bill of lading terms: Did they apply?

33. Rapiscan did not dispute that Global would, in the ordinary course of business, issue a bill of lading for the shipment of the X-ray machines. It was also not in dispute that a bill of lading was not issued at the time the contract with Rapiscan was entered into but that it was issued after the Fei Fu contract had been aborted. The issue that arises for consideration is whether the terms attached to a bill of lading that had not been issued at the time the contract of carriage was entered into, can be incorporated in the contract of carriage.

34. That question was considered in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 1 LLR 321 where at 329 the court held:

> "When parties enter into a contract of carriage in the expectation that a bill of lading will be issued to cover it, they enter into it upon those terms which they know or expect the bill of lading to contain."

In this case, Rapiscan (and its agent OSM through whom this contract was entered into) had also used the services of Global in the past and would be aware that there were standard conditions attached to bills of lading issued by Global. I find that the terms in the bill of lading issued in this case formed part of the contract between Global and Rapiscan. The relevant exemption/limitation clause in the bill of lading is cl 6(4)(A).

35. I will deal first with the arguments relating to the exemption clauses before dealing with the arguments dealing with the limitation clauses.

The SFFA Conditions

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36. The provisions of the SFFA Conditions relied on by Global were the following:

> Clause 14
>
> : (the delay clause)
>
> Unless otherwise *previously agreed in writing* that the Goods shall depart or arrive by a particular date, the Company accepts no responsibility *for departure or arrival dates of Goods*.
>
> Clause 26
>
> : (the exemption clause)
>
> (a) …
>
> (b) Subject to Clause 14, the Company shall not *in any circumstances* be liable for loss or damage however caused to property other than the Goods themselves, indirect or *consequential*

loss or damage, loss of profits, loss of market *or the consequences of any delay* or deviation.

Clause 27

: (the limitation clause)

Except insofar as otherwise provided by these Conditions, the liability of the Company *howsoever arising and notwithstanding that such liability shall have arisen from the neglect or default of the Company*, shall not exceed

(a) …

(b) in respect of claims for delay where not excluded by the provisions of these Conditions, the amount of the Company's charges for the services in respect of the Goods delayed.

(Emphasis added.)

Delay in shipment

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Clause 14.

37. Clause 14 provides that the company accepts no responsibility for departure or arrival dates of goods unless it has been agreed in writing that the goods shall depart or arrive by a particular date. There was, in this case, no such written agreement. I have also rejected Rapiscan's claim that there was an oral agreement to that effect. In the circumstances, Global can be under no liability to Rapiscan merely from the fact that the goods arrived (or would have arrived) at the destination at a date later than expected. I would add that had there been a written agreement that the X-ray machines had to arrive in Macau by a specified date and there was a breach of that agreement, Global would be liable to Rapiscan in damages but the measure of those damages would, by reason of cl 27(b) of the SFFA Conditions relied on by Global, be limited as provided therein.

Negligence in monitoring

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38. Global's negligence in monitoring the shipment resulted in Rapiscan being misled into believing that the X-ray machines were on board the "Kota Perkasa" which would be arriving in Macau on 17 December 2000. This was a breach by Global of its express and implied obligation to properly monitor the shipment. Had Global kept Rapiscan properly informed of the whereabouts of the X-ray machines – in particular if Global had informed Rapiscan whilst the X-ray machines were in Singapore that they had not been able to load the X-ray machines on board the "Kota Perkasa", or failing that even if Global had timeously informed Rapiscan that the X-ray machines had been loaded on board the "Kota Jaya" – Rapiscan would have been able or better able to save its contract with Fei Fu by air-freighting substitute X-ray machines to Macau. I say "better able" because one can never be certain whether, at such short notice, air cargo space could have been obtained for the X-ray machines to arrive in Macau in time for the First Anniversary Celebrations. I am prepared, however, to find that if Global had, even as late as 15 December 2000, informed Rapiscan that the X-ray machines were not on board the "Kota Perkasa" but on the "Kota Jaya", alternative arrangements to air-freight substitute X-ray machines in time for use in the First Anniversary Celeberations could have been successfully effected.

39. Prima facie, therefore, unless this claim of negligent misrepresentation fell within an exemption/limitation clause, Rapiscan would be entitled to damages in full for the said breach. I will deal first with the exemption clauses in the SFFA Conditions and in the bill of lading before considering the limitation clauses.

The exemption clause in the SFFA Conditions

.

Clause 26(b).

40. Mr Loo submitted that even if Global had in breach of its contractual obligation negligently misrepresented to Rapiscan that the X-ray machines were on board the "Kota Perkasa", such breach fell within the exemption contained in cl 26(b) of the SFFA Conditions and Global would not be liable in damages. Clause 26(b), he submitted, should be read as follows:

> "Subject to clause 14, the Company shall not *in any circumstances*, be liable for:
>
> (a) loss or damage however caused to property other than the goods themselves;
>
> (b) indirect or consequential loss;
>
> (c) loss of profits;
>
> (d) the consequences of any delay or deviation."

The words "*in any circumstances*", he submitted, were wide enough to exempt Global from any liability for loss of profits or any direct or consequential loss suffered by Global as a result of that negligent misrepresentation.

41. Where a party to a contract seeks to exempt himself from liability for the breach of his contract (or for that matter from liability in tort), it is incumbent on that party to set out that exemption in clear language. If language that is ambiguous is used, the contract will be construed against the proferens, ie the party seeking to incorporate that exemption clause (Halsbury's Laws of England (4th Ed), paragraph 370). This is known as the "contra proferentem rule".

42. Relying on the contra proferentem rule, Mr Palaniappan submitted that cl 26(b) should be read with due regard to the phrase "subject to clause 14" appearing therein. He submitted that, thus read, the exemption of liability in cl 26(b) would extend only to liability arising out of any delay in the shipment. That liability for delay (if there was agreement in writing that the goods would arrive by a particular date), would then be subject to the limitation imposed by cl 27(b). Clause 26(b), he submitted, would not exempt Global from liability – such as that which arose from Global's failure to adhere to its contractual obligation to keep Rapiscan properly posted on the whereabouts of the X-ray machines – that did not arise from delay.

43. I was unable to accept the construction placed on cl 26(b) by Mr Palaniappan. The reference to cl 14 did not, in my view, derogate from the force of the words in cl 26(b) that the company shall not "in any circumstances" be liable for loss of profits, etc. Prima facie those words are wide enough to include claims in negligence. That, however, does not conclude the matter. The courts have, over the years, adopted a cautious approach in determining whether an exemption clause can be construed as exempting liability from negligence. Clause 26(b) will have to be construed bearing those decisions in mind.

The construction of exemption clauses: the Morton tests

.

44. In *Canada Steamship Lines Ltd v The King* [1952] HL 192, the Privy Council, after an extensive review of the authorities, set down guidelines for determining whether an exemption clause encompasses liability for negligence. In that case Lord Morton stated at page 208:

> "Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarized as follows:
>
> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the proferens') from the consequence of the negligence of his own servants, effect must be given to that provision …
>
> (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens …
>
> (3) If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground other than that of negligence,' to quote again Lord Greene in the *Alderslade* case ([1945] KB 189, 192). The 'other ground' must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Green's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants."

The rationale for this cautious approach is that it is highly unlikely that the parties to a contract would have intended to exonerate from liability the party who performs his obligation under that contract negligently.

45. In *Marina Centre Holdings Pte Ltd v Pars Carpet Gallery Pte Ltd* [1997] 3 SLR 625, our Court of Appeal followed the guidelines enunciated in *Canada Steamship Lines* ("the Morton tests"). L P Thean JA, who delivered the decision of the Court of Appeal, summarised in the following passage the reasons for that approach:

> "The underlying reason for this approach is that the court starts with a presumption that parties to a contract do not normally agree to accept the consequences of each other's negligence, ie by way of an exemption clause, much less to shoulder responsibility for them, ie by way of an indemnity clause, and will not be taken to have intended to do anything so improbable, unless the contract does not admit of any other reasonable construction."

The Court of Appeal having adopted the Morton tests, I can only construe cl 26(b) in accordance with those tests.

46. In *Marina Centre Holdings Pte Ltd*, an air-conditioning water pipe within the false ceiling of a neighbouring unit had given way resulting in extensive damage to carpets stored by the respondents in a unit that they had rented from the appellant landlord. In resisting a claim in negligence, the appellant sought to rely on an exemption clause that purported to exempt the landlord from liability

"*for any damage to property or any consequential loss resulting from* … leaks from any part of the SHOPPING CENTRE *… unless caused by the wilful misconduct of the Landlord* or its officers, servants, employees or agents". In considering whether that exemption clause satisfied the first Morton test, Thean JA, after reviewing the authorities, held:

> "The clause does not *expressly* exempt the appellants from liability in negligence: *it contains neither the word 'negligence' nor any synonym for it*. In the absence of such an express reference to negligence or word synonymous with it, the clause clearly fails the first test."
>
> (Emphasis added.)

Amongst the authorities reviewed by Thean JA was *Smith & Anor v South Wales Switchgear Ltd* [1978] 1 WLR 165 and *E Scott (Plant Hire) Ltd v British Waterways Board* (1982, unreported).

47. In the *Smith* case, the clause that the court was called upon to construe read as follows:

> "In the event of the order involving the carrying out of work by the supplier [appellants] and its sub-contractors on land and/or premises of the purchaser [respondents], *the supplier will keep the purchaser indemnified against:* (a) All losses and costs incurred by reason of the supplier's breach of any statute, bye-law or regulation; (b) *Any liability, loss, claim or proceedings whatsoever under statute or common law* (i) in respect of personal injury to, or death of, any person whomsoever, (ii) in respect of any injury or damage whatsoever to any property, real or personal, arising out of or in the course of or caused by the execution of this order."
>
> (Emphasis added.)

Lord Fraser in dealing with the argument raised that the words "any liability, loss, claim or proceedings whatsoever under statute or common law" amounted to an express reference to negligence and therefore satisfied the first Morton test, said:

> "I do not see how a clause can 'expressly' exempt or indemnify the proferens against his negligence unless it contains the word 'negligence' or some other synonym for it and I think that is what Lord Morton must have intended as appears from the opening words of his second test ('If there is no express reference to negligence …')."

48. In *E Scott (Plant Hire) Ltd*, Oliver LJ, in applying the Morton tests, stated:

> "In my judgment *it is no longer possible*, in the light of *Smith v South Wales Switchgear* [1978] 1 All ER 18, [1978] 1 WLR 165, *to treat the undoubtedly wide words 'any damage whatsoever' or 'however arising' as a periphrasis of 'damage arising from negligence of the proferens'* and as either satisfying or by-passing the tests propounded by Lord Morton in relation to exclusion and indemnity clauses, for it has now been made clear by authority which binds this court that unless the clause concerned uses the word 'negligence' or some equivalent in unmistakable and unequivocal terms, its effect falls to be tested … by tests 2 and 3."
>
> (Emphasis added.)

In the present case, there was no specific or express reference to negligence or any synonym for negligence in cl 26(b). In the light of the authorities cited above such a clause will not satisfy the first Morton test. I therefore go on to consider the second test.

49. The second test requires the court to consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens; if a doubt arises at this point, it must be resolved against the proferens. As indicated earlier, the words in cl 26(b) are wide enough to cover negligence. I therefore go on to consider the third test.

50. The third test and last of the Morton tests requires the court to consider whether there are possible heads of damage other than that of negligence. The existence of a possible head of damage other than that of negligence is, to quote Lord Morton, "fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants".

51. Addressing the third test, Mr Palaniappan pointed out (by reference to cl 40 of the SFFA Conditions) that in this case Global was not only freight forwarders but had also assumed the role of bailee and carrier. In view of the various roles that Global had assumed, Mr Palaniappan submitted that the heads of damages covered by cl 26(b) would be multi-faceted in that liability independent of negligence can arise out of Global being the bailee, it can arise out of Global being the carrier and it can also arise under *The Hague-Visby Rules*.

52. In the context of those submissions, Mr Palaniappan referred to the case of *Rutter v Palmer* [1922] 2 KB 87. There Atkin LJ stated at page 94:

> "I accept the proposition that if a party to a contract would exempt himself from liability he must express himself in plain words. There is a class of contract in which words purporting in general terms to exempt a party from 'any loss' or to provide that 'any loss' shall be borne by the other party, have been held insufficient to exempt from liability for negligence. Those are contracts of carriage by sea or land. *The liability of the carrier is not confined to his acts of negligence or those of his servants; it extends beyond liability for negligence; therefore when a clause in the contract exempts the carrier from any loss it may have a reasonable meaning even though the exemption falls short of conferring immunity for acts of negligence*. That is the reason at the root of the shipping cases."
>
> (Emphasis added.)

A similar approach was taken in the Federal Court of Appeal in Canada in the case of *Belships (Far East) Shipping (Pte) Ltd et al v Canadian Pacific Forest Products Ltd et al* (1999) 175 DLR (4^{th}) 449. The exemption clause in that case (cl 8) read as follows:

> "Goods stowed on deck shall be at all times and in every respect at the risk of the Shipper/Consignee. The Carrier shall *in no circumstances whatsoever be under any liability for loss of or damage to deck cargo, howsoever the same be caused* except that, in the event of jettison of deck cargo, there shall in that respect be a right of contribution in general average in favour of any party interested in the adventure."
>
> (Emphasis added.)

In ruling that cl 8 failed the third Morton test, Stone JA said at page 460:

> "It would seem to me, as well, that *a carrier by sea at common law is exposed to another potential head of liability beyond that of negligence. I refer to the carrier's implied undertaking of seaworthiness*. That obligation has been held to attach at the time of loading and departure on the voyage and at all stages thereof to destination. Liability for its breach is imposed regardless of the carrier's negligence.

…

What is significant is that this implied warranty exposed the appellants to another potential head of liability that is quite apart from negligence. This, too, constituted a head of liability to which Clause 8 would apply."

(Emphasis added.)

53. I accepted the submission of Mr Palaniappan that cl 26(b) was applicable to heads of claim other than claims based on negligence. That being so, the third Morton test was not satisfied. Clause 26(b) would not therefore exempt from liability the claim against Global for the breach of contract arising from the negligent misrepresentation of Global as to the whereabouts of the X-ray machines.

54. Mr Loo, in his submissions, referred me to another clause in the SFFA Conditions which he submitted was relevant in determining whether cl 26(b) excluded liability arising from negligence. This was cl 35(a) which reads:

"The defences and limits of liability provided for by these Conditions shall apply in any action against the Company whether such action be founded in contract or tort or in whatsoever form."

Mr Loo submitted that as liability in negligence was a component in the law of tort, negligence (whether as a breach of contract or whether as a tort) would be expressly covered by cl 35(a) and, accordingly, cl 26(b) should be read so as to give effect to cl 35(a).

55. In determining whether cl 35(a) had the effect of including negligence within the purview of the exemption of liability in cl 26(b), one again applies the three Morton tests. In the *Smith* case (paragraph 47 above), although the indemnity clause covered "*any liability, loss, claim or proceedings whatsoever under statute or common law*", the House of Lords nevertheless held that the first test was not satisfied. What Lord Fraser said in that case bears repeating:

"I do not see how a clause can 'expressly' exempt or indemnify the proferens against his neligence unless it contains the word 'negligence' or some other synonym for it … "

If words such as "*any proceedings whatsoever under common law*" are insufficient for the purposes of the first test, I cannot see how the words in cl 35(a) which in effect seek to exempt liability for "*any action against the company whether such action is founded in contract or tort*" can be said to satisfy the first test. In the light of the authorities, nothing short of the express use of the word "negligence" or some synonym of that word would satisfy the first test.

56. The considerations relating to the application of the second and third Morton tests in respect of cl 35(a) of the SFFA Conditions would be identical to the considerations in respect of cl 26(b) of the SFFA Conditions.

The exemption clause in the bill of lading

.

57. The clause in the bill of lading relied on by Global in its attempt to exempt liability was cl 6(4)(A). Clause 6(4)(A) provided as follows:

"Save as otherwise provided herein, the Carrier shall *in no circumstances be liable for direct, indirect or consequential loss or damages caused by* delay or *any other cause whatsoever and howsoever caused*. Without prejudice to the foregoing, if the Carrier is found liable for delay, liability shall be limited to the freight applicable to the relevant stage of the transport."

(Emphasis added.)

The word "Carrier" was defined in the bill of lading to mean: "the Company stated on the front of the Bill of Lading as being the Carrier and on whose behalf their Bill of Lading has been signed". The bill of lading issued in this case stated that Global was the carrier. The bill of lading also had the following clause [cl 5(4)]:

"The defences and limits of liability provided for in this Bill of Lading shall apply to any action against the Carrier whether the action be founded in Contract or in Tort."

a clause similar in effect to cl 35(a) of the SFFA Conditions.

58. In my view, the exemption contained in cl 6(4)(A) of the bill of lading, even when read with cl 5(4), takes the position no further than cl 26(b) of the SFFA Conditions insofar as the first Morton test is concerned. Although worded widely, cl 6(4)(A) makes no express reference to negligence or any synonym of that word. I am of the view – for the same reasons as in respect of cl 26(b) of the SFFA Conditions – that cl 6(4)(A) will also not satisfy the third Morton test. In this respect, I would note that the exemption clause relied on in the case of *Belships (Far East) Shipping (Pte) Ltd* (paragraph 52 above) was couched in language about as wide as the language used in cl 6(4)(A).

59. For the above reasons, I hold that Global cannot rely on cl 6(4)(A) of the bill of lading to avoid its liability to Rapiscan for the negligent misrepresentations made by Jason.

Limitation of liability

.

(a) Under the SFFA Conditions.

60. Mr Loo submitted that even if Global was guilty of negligent misrepresentation and even if Global was not exempted from liability for such negligent misrepresentation under cl 26(b) of the SFFA Conditions, Global would be entitled to rely on the limitation of liability clause in the SFFA Conditions. The limitation of liability provision in the SFFA Conditions that Global invoked in its pleadings was cl 27(b).

61. The question whether the same strict approach adopted by the courts towards exemption clauses should be applied to contracts containing limitation of liability clauses was considered by the House of Lords in *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd and Anor* (the "Strathallan") [1983] 1 LLR 183. All five law lords who sat in that case unanimously agreed that the approach towards limitation of liability clauses should not follow the approach taken in respect of exemption of liability clauses. The rationale for this distinction as stated by Lord Wilberforce was:

"Clauses of limitation are not regarded by the Courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives, and possibly also the opportunity of the other party to insure."

Lord Fraser, in his judgment, dealing specifically with the Morton rules enunciated by the Privy Council in *Canada Steamship Lines* said:

> "There are later authorities which lay down very strict principles to be applied when considering the effect of clauses of exclusion or of indemnity – see particularly the Privy Council case of *Canada Steamship Lines Ltd v The King* …
>
> *In my opinion these principles are not applicable in their full rigour when considering the effect of clauses merely limiting liability. Such clauses will of course be read contra proferentem and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clauses*
>
> . The reason for imposing such standards on these clauses is the inherent improbability that the other party to a contract including such a clause intended to release the proferens from a liability that would otherwise fall upon him. But there is no such high degree of improbability that he would agree to a limitation of the liability of the proferens, especially when, as explained in condition 4(i) of the present contract, the potential losses that might be caused by the negligence of the proferens or its servants are so great in proportion to the sums that can reasonably be charged for the services contracted for. *It is enough in the present case that the clause must be clear and unambiguous*."
>
> (Emphasis added.)

62. The terms of the limitation clause in the "*Strathallan*" [special condition 2(f)] were as follows:

> " 2(f). If, pursuant to the provisions set out herein, *any liability on the part of the Company shall arise (whether under the express or implied terms of this Contract, or at Common Law, or in any other way*) to the customer for any loss or damage of whatever nature arising out of or connected with the provision of, or purported provision of, or failure in provision of, the services covered by this Contract, *such liability shall be limited to the payment by* the Company by way of damages of a sum … [alternatives are stated …]. "
>
> (Emphasis added.)

In considering whether special condition 2(f) would limit the liability of Securicor arising from its own negligence Lord Fraser said:

> "… the question remains whether in its context it is sufficiently clear and unambiguous to receive effect in limiting the liability of Securicor for its own negligence or that of its employees. In my opinion it is. It applies to any liability
>
> … whether under the express or implied terms of this contract, or at common law, or in any other way.
>
> Liability at common law is undoubtedly wide enough to cover liability including the negligence of the proferens itself, so that even without relying on the final words 'any other way', I am clearly of opinion that the negligence of Securicor is covered."

63. In the present case, the opening words of cl 27, without taking into account sub-cl (b) thereof, provides that the liability of the company,

> "…howsoever arising and notwithstanding that such liability shall have arisen from the neglect or default of the Company …"

shall not exceed the amounts stated thereunder. These words, following the approach adopted in the "*Strathallan*", are wide enough to limit liability arising out of the negligence of the proferens. But when one goes on to consider sub-cl (b) – the sub-clause relied on by Global in its defence – the broad sweep of cl 27 is whittled down considerably. Clause 27(b) provides as follows:

> "(b) in respect of claims for delay where not excluded by the provisions of these Conditions, the amount of the Company's charges for the services in respect of the Goods delayed."

On a plain reading of cl 27(b), the limitation of liability envisaged is a limitation of liability in respect of claims for delay. That clause could not therefore limit Global's liability arising from its negligence in fulfilling its obligations to properly monitor the shipment of the X-ray machines. Clause 27(b) is therefore of no avail to Rapiscan to the claim founded on negligent misrepresentation.

64. Mr Loo, in his closing submissions, adverted to other clauses in the SFFA Conditions that may have limited liability for negligence. These other clauses were, however, not invoked by Global in its pleadings and I agree with Mr Palaniappan that it would be prejudicial to Rapiscan for this court to consider defences that Global had not raised in its pleadings.

(b) Under the bill of exchange

.

65. The limitation of liability provisions in the bill of exchange is in the same clause that seeks to exempt Global from liability in respect of direct, indirect or consequential losses, namely, cl 6(4)(A) [paragraph 57 above]. The limitation of liability in cl 6(4)(A) is similar in scope to the limitation of liability under cl 27(b) of the SFFA Conditions. The relevant part of cl 6(4)(A) reads:

> "Without prejudice to the foregoing (ie exemption from direct, indirect or consequential losses howsoever caused), if the *Carrier is found liable for delay, liability shall be limited* to the freight applicable to the relevant stage of the transport."
>
> (Emphasis added.)

Again, the limitation of liability is confined only to liability for delay: it does not seek to limit liability for other breaches by the carrier. Clause 6(4)(A) by itself would therefore not limit the liability of Global arising from its breach of duty to properly monitor the shipment.

Damages for Global's breach of contract

.

66. I am satisfied that Rapiscan has, in these proceedings, sufficiently proved that Global breached its contractual obligation to monitor the shipment of the X-ray machines when Jason negligently misrepresented to Rapiscan and led Rapiscan to believe that the X-ray machines were on board the "Kota Perkasa". I am also satisfied that the exemption clauses and the limitation of liability relied on by Global do not exempt or limit the liability of Global for such negligent misrepresentation. I therefore find Global liable in damages for the breach of that obligation.

The claims in tort

.

67. Global owed a duty of care – particularly in the light of the fact that Global knew of the importance, purpose and urgency of the shipment – to keep Rapiscan accurately informed about the progress of the shipment. By misleading Rapiscan about the whereabouts of the X-ray machines Global failed in this duty of care and Rapiscan suffered losses as a direct result. The exemption clauses and the limitation of liability clauses relied on by Global, for reasons discussed above, do not constitute a defence or limit Global's liability in tort to Rapiscan for the negligent misrepresentation.

68. In a number of cases (*Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* [1986] AC 80 amongst others) the courts have expressed reservations about parties pursuing a remedy in tort when a remedy in contract was the more appropriate. In this regard, Mr Loo in his submissions accepted – based on what Selvam J said in *Darwish MKF Al Gobaishi v House of Hung Pte Ltd* [1998] 3 SLR 435 – that a party who performs his contractual obligation in a negligent way is in breach of contract and should be pursued in contract even though he could also be pursued in tort for negligence. I have found Global liable in contract and there is therefore no need to consider in detail Global's concurrent liability in tort.

The measure of damages

.

69. I am satisfied that it was Global's negligent conduct in misleading Rapiscan about the whereabouts of the X-ray machines that caused Rapiscan to lose the Fei Fu contract. If Global had, when the X-ray machines were in Singapore awaiting trans-shipment to Macau, informed Rapiscan that they had not been able to load the X-ray machines on board the "Kota Perkasa", Rapiscan would have been able to air-freight the X-ray machines to Macau and save the Fei Fu contract. Failing that, even if Global had timeously informed Rapiscan that the X-ray machines were on board the "Kota Jaya", I am satisfied that Rapiscan would have been able to get alternative X-ray machines to Macau to save the Fei Fu contract. Global's failure to comply with this contractual obligation resulted in the loss of the Fei Fu contract – a loss that amounted to US$125,000 in lost rental.

70. Rapiscan was under an obligation to mitigate damages. At the time Rapiscan embarked on the exercise of air-freighting other X-ray machines to Macau, there was a reasonable prospect that the exercise would be successful but that prospect, by reason of matters outside the control of Rapiscan, did not materialise. Rapiscan, in my view, cannot be faulted for this failed attempt. The expenses in connection with this exercise which amounted to US$29,056 were incurred as a direct consequence of Global's breach of its obligation to keep Rapiscan informed of the progress of the shipment and would be recoverable as damages.

71. In the circumstances, I award judgment with costs in favour of Rapiscan for the sum of US$154,056 with interest thereon at 4% per annum from date of writ.

Sgd:

S. RAJENDRAN
Judge