

Smart Modular Technologies Sdn Bhd and Another v Federal Express (Singapore) Pte Ltd
[2004] SGHC 139

Case Number : Suit 260/2002
Decision Date : 29 June 2004
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Goh Kok Leong, Gan Seng Chee and Anna Quah (Ang and Partners) for second plaintiff; Charles Lin Ming Khin and Twang Kern Zern (Donaldson and Burkinshaw) for defendant
Parties : Smart Modular Technologies Sdn Bhd; Sun Technosystems Pte Ltd — Federal Express (Singapore) Pte Ltd

Bailment – Bailees – Whether freight forwarder was bailee of goods

Carriage of Goods by Air and Land – Carriage of goods by air – Contracts of carriage – Identity of parties to contract for carriage – Whether contract for carriage made between account holder and freight forwarder

29 June 2004

Judgment reserved.

Judith Prakash J:

Introduction

1 When this action commenced, there were two plaintiffs. The first plaintiff, Smart Modular Technologies Sdn Bhd ("Smart"), is a Malaysian company which manufactures electronic components in its factory in Penang. These components include memory modules. The second plaintiff, Sun Technosystems Pte Ltd ("Sun Tech"), is a manufacturer of computer systems in Singapore and it regularly purchases memory modules for its systems from Smart.

2 The defendant, Federal Express (Singapore) Pte Ltd, carries on business in Singapore as a freight forwarder. It is a member of a group of companies headed by Federal Express Corporation of Memphis, Tennessee. Another member of the group which plays an important part in these proceedings, though it is not a party to them, is Federal Express Services (M) Sdn Bhd ("FedEx M"), which carries on the business of freight forwarding in Malaysia. FedEx M has a branch in Penang.

3 In August 2000, an employee of Fedex M picked up a consignment of memory modules from Smart's factory. The ultimate destination of the goods was Sun Tech's premises in Singapore. Hardly had FedEx M's van left Smart's premises, however, when it was hijacked and the goods stolen. They have never been recovered.

4 This action was brought to recover the value of the goods from the defendant. In the original statement of claim the defendant was alleged to be under a duty to both the named plaintiffs, Smart and Sun Tech, as carriers and/or bailees for reward and/or by virtue of a contract, to take reasonable care of the goods and deliver them to Sun Tech's premises in the order and condition they were received in. On the second day of the trial, however, Smart withdrew from the action after M/s Ang & Partners, the solicitors for both plaintiffs, indicated that they were applying to discharge themselves from further acting for Smart. The action then proceeded with Sun Tech as the only plaintiff.

Issues

5 The issues in this case as formulated by Sun Tech are as follows:

- (a) whether there was a contract for carriage of the goods between Sun Tech and the defendant;
- (b) if the answer to (a) is yes, was the defendant in breach of contract in failing to take reasonable care of the goods and deliver them to Sun Tech in Singapore;
- (c) if there was no contract, did the defendant owe Sun Tech a duty as carrier and/or as bailee for reward to take reasonable care of the goods and to deliver them to Sun Tech's premises;
- (d) if the answer to (c) is yes, was the defendant in breach of that duty; and
- (e) if the defendant was in breach of duty (either in contract or in tort), would the defendant be entitled to limit its liability to the sum of US\$20.38 per kilogram of the goods carried.

6 In this case, I think it is convenient to deal with issues (a) and (c) first and to discuss the relevant factual background against which those issues must be decided. After all, if the defendant did not owe Sun Tech a duty in relation to the goods any discussion of the facts and law relating to the alleged breach of such duty would be irrelevant.

Factual background relating to the carriage

7 Sun Tech had been buying memory modules from Smart from October 1999. In the normal course of events, whenever Sun Tech needed such components, it would send Smart a purchase order. The purchase order would specify the type of memory modules required, the unit price of the same, the quantity required and the expected delivery date. Smart would accept the order by sending Sun Tech an "order confirmation". The goods were always purchased on Free on Board ("FOB") terms with Sun Tech being responsible for the cost of transporting the goods from Smart's factory in Penang to Sun Tech's own premises in Singapore. The carrier of the goods was selected by Sun Tech.

8 Some time in late 1999, Sun Tech opened an account with the defendant. It was assigned account no 246228116. Thereafter, the defendant transported goods from Singapore to various parts of the world on behalf of Sun Tech. It also handled goods that arrived in Singapore for Sun Tech. In this connection, it paid customs duty on behalf of Sun Tech and delivered the goods to Sun Tech's premises. According to Mr Ramasamy Lokanathan, a director of Sun Tech, the defendant was selected as Sun Tech's usual carrier because of its secure and reliable services.

9 After the account was opened, Sun Tech's standing instruction to Smart was that once goods ordered by Sun Tech were ready for collection, Smart was to contact the defendant's counterparts in Malaysia to arrange for the collection of the goods for carriage and delivery to Sun Tech. Sun Tech gave Smart its account number and instructed the latter to use that account number when dealing with the carrier. Mr Lokanathan testified that the instructions to Smart were to contact the FedEx office in Penang. Sun Tech did not know at that time which FedEx company operated in Penang. He agreed that when Sun Tech instructed Smart to contact FedEx in Malaysia, it did not specifically instruct Smart to contact the defendant.

10 The defendant's evidence was that potential customers could apply to it for an account. Once the defendant approved such an application, the applicant would become a customer of the defendant. Thereafter, if the customer wished to engage the defendant's services to ship cargo, it could do so by either using its name or its account number. Assuming the customer was resident in Singapore, this procedure would apply both to shipments from the customer in Singapore to a foreign recipient, and to shipments from a foreign supplier to the customer in Singapore. In either case, the defendant would effect the carriage after being given the same account number by the customer. At the end of each calendar month, the defendant would send the customer an invoice for services rendered.

11 The situation in which a Singapore customer wanted to arrange for the transport of goods into Singapore from a foreign place like Penang was classed by the defendant as a "reverse pick-up arrangement". To effect such a carriage, the Singapore customer would have to telephone the defendant's call centre and instruct the defendant to pick up the shipment in Penang. The customer would have to inform the defendant of the name and address of the supplier, the weight of the shipment, the nature of the shipment and who would pay for it. He would also have to give the defendant the account number of the person that the defendant should bill for this arrangement. Once the call had been received, the information would be logged into the defendant's system, and a file would be created. The information in the file would then be routed automatically to the Penang office of FedEx M. The defendant would expect the Penang office to pick up the cargo based on the information provided by it, issue an air waybill and send the cargo to the defendant in Singapore for clearance and delivery to the Singapore customer.

12 Whenever a reverse pick-up was arranged, a record was generated in the defendant's computer system. This record stayed in the system in what was known as a "CER ARCHIVE". If the defendant needed to check whether any particular shipment had been the subject of a reverse pick-up, the customer service department checked by keying in the air waybill number for that shipment. The system would check the air waybill number against the CER ARCHIVE, and if that air waybill resulted from a reverse pick-up arrangement the CER ARCHIVE would show the full details of the shipment.

13 The defendant produced printouts of 44 screen captures from its computer system relating to deliveries to Sun Tech of goods emanating from Smart. The first printout showed the search result on the CER ARCHIVE for air waybill no 8218 2149 1554. As the printout showed, the result of the defendant's search on that air waybill was "AIRBILL NBR NOT AVAILABLE". The defendant's evidence was that this result meant that there was no record of air waybill no 8218 2149 1554 on the CER ARCHIVE and that there was no reverse pick-up arranged with the defendant in respect of that air waybill. The other 43 printouts were in respect of searches done on all air waybills for shipments from Smart to Sun Tech collected by FedEx M. These printouts showed that Sun Tech had never contacted the defendant to arrange for the reverse pick-up of any shipment from Smart.

14 The shipment involved in this case was of 1,000 pieces of a particular type of memory module. The order for the same was placed by Sun Tech with Smart on 20 July 2000 and accepted by Smart the same day. The modules cost US\$860 each and therefore the total sale price was US\$860,000. The goods were ready for shipment to Sun Tech on 28 August 2000 and Smart therefore issued its invoice for US\$860,000 to Sun Tech on that day. The invoice stated that the sale was on FOB terms. The terms and conditions found on the reverse side of the said invoice provided *inter alia* as follows:

Shipment – All shipments made hereunder shall be shipped to Buyer FOB Seller's manufacturing facility. In the absence of written instructions from Buyer, *Seller shall select the common carrier*

but shall not thereby assume any liability in connection with the shipment, nor shall the common carrier be construed to be the agent of Seller. Transportation charges will be collected on delivery or, if prepaid, will be invoiced to Buyer. Unless otherwise specified, the goods will be shipped in such packaging as Seller deems appropriate. When special packaging is requested by Buyer the cost of same, if not set forth on the invoice, will be billed separately to Buyer and Buyer agrees to pay and to accept all responsibility and risk for such packaging. Except as otherwise provided in Section 13 herein, *title of the goods shall pass from Seller to Buyer when the goods are made available by Seller to the common carrier* or to Buyer if the goods are to be picked up by the Buyer, and as of and after that time, Buyer shall bear any and all risk of loss of or damage to the goods. [emphasis added]

15 At about 10.00am on 28 August, someone from Smart telephoned FedEx M's call centre in Kuala Lumpur to arrange a package pick-up from Smart's factory in Penang for delivery to Singapore. The Kuala Lumpur call centre transmitted a pick-up slip to the Penang station. Upon receipt of this slip, the despatcher at the Penang station instructed one of FedEx M's couriers, one Turairaj a/l Thigarajan, to pick up the package from Smart's factory. Mr Turairaj, who was driving a FedEx M truck, arrived at the factory at about 11.30am that morning. He was given two packages and an air waybill that had been completed by Smart's employees. After leaving Smart's premises, Mr Turairaj drove to the office of another company nearby. It was after he left that company that his truck was hijacked and the goods shipped by Smart were stolen.

16 The air waybill handed to Mr Turairaj was air waybill no 8218 2149 1554 ("the waybill"). It was a standard form air waybill used by the companies in the Federal Express group and it was headed "FedEx International Air Waybill". The details in the waybill had been completed by staff of Smart. The sender's name was stated as Annie Leong but the company name and address given were the full name and address of Smart. The "Sender's FedEx Account Number" was stated to be "2040-5900-4". Sun Tech was named as the recipient. In s 8a on the face of the waybill which dealt with payment, the box which indicated that payment would be by the recipient was ticked and below that next to the words "FedEx Account Number", the account number of Sun Tech was inserted. On the front of the waybill the last box, no 9, contained the following wording:

Required Signature

Use of this Air Waybill constitutes your agreement to the Conditions of Contract on the back of this Air Waybill, and you represent that this shipment does not require a US State Department License. Certain international treaties, including the Warsaw Convention, may apply to this shipment and limit our liability for damage, loss, or delay, as described in the Conditions of Contract.

This wording was followed by a space for sender's signature and the date. In this case, someone from Smart signed in the space provided and also wrote in the date as 28 August 2000.

17 On the reverse side of the waybill, below the heading "Conditions of Contract", a number of terms were printed. These included the following:

Definitions On this Air Waybill, "we", "our", "us" and "FedEx" refer to Federal Express Corporation, its subsidiaries and branches and their respective employees, agents, and independent contractors. "You" and "your" refer to the shipper and its employees, principals and agents. If your shipment originates outside the United States, your contract of carriage is with the FedEx subsidiary, branch, or independent contractor who originally accepts the shipment from you.

Agreement to Terms By giving us your shipment, you agree, regardless of whether you sign the front of this Air Waybill, for yourself or as an agent for and on behalf of any other person having an interest in this shipment, to all terms on this NON-NEGOTIABLE Air Waybill and as appropriate to all terms in any FedEx transportation agreement between you and FedEx covering this shipment, and in any applicable tariff, and in our Current Service Guide or Standard Conditions of Carriage, copies of which are available upon request. If there is a conflict between the Air Waybill and any such document then in effect, the transportation agreement, tariff, Service Guide or Standard Conditions of Carriage will control in that order of priority. No one is authorised to alter or modify the terms of our agreement. This Air Waybill shall be binding on us when the shipment is accepted; we may mark this Air Waybill with an employee number as our signature, or our printed name shall be sufficient to constitute our signature of this Air Waybill.

Responsibility for Payment Even if you give us different payment instructions, you will always be primarily responsible for all charges, including transportation charges, and possible surcharges, customs and duties assessments including fees related to our pre-payment of the same, governmental penalties and fines, taxes, and our lawyers' fee and legal costs, related to this shipment. You will also be responsible for any costs we may incur in returning your shipment to you or warehousing it pending disposition.

Pleadings

18 In the final form of the statement of claim as re-amended in November 2002 after the trial had started, Sun Tech averred that in August 2000 an agreement had been made between it and the defendant as bailee for reward in which the defendant agreed to undertake "transport and/or carriage and/or custody and/or delivery" of the goods from Smart's premises to Sun Tech's premises. Sun Tech pleaded that this agreement was contained in and/or evidenced by or was to be inferred from the defendant's document described as international air waybill no 8218 2149 1554 dated 28 August 2000 and the fact that the charges for transporting the cargo from Smart's premises to Sun Tech's premises were to be paid for by Sun Tech to the defendant. Secondly, the agreement was contained in or to be inferred from the previous course of dealing between Sun Tech and the defendant in that transportation charges for cargo carried from Smart's premises to Sun Tech's premises were invoiced by the defendant to Sun Tech's account with it and Sun Tech paid the defendant these charges.

19 In its original defence filed in May 2002, the defendant had pleaded that it had been contacted by Sun Tech sometime in August 2000 to collect the consignment from Smart and to deliver the same to Sun Tech. The defendant also admitted receiving the cargo from Smart on 28 August 2000. In its amended defence filed in October 2002, a month before the trial started, the defendant deleted these admissions and instead denied that there was any agreement between it and Sun Tech relating to the carriage of the goods. The defendant then averred that any contract for the carriage of goods from Smart to Sun Tech was entered into between Smart and FedEx M and that the contractual terms on which FedEx M had received the cargo were as set out in the waybill. The defendant also pleaded certain terms of the waybill on which it relied. The defence was further amended in November 2002 in response to Sun Tech's amended statement of claim. The new pleading was that Smart had instructed FedEx M by cll 8a and 8b of the waybill that payment for the contract of carriage between Smart and FedEx M was to be collected from Sun Tech. A previous course of dealings between these two parties would show that FedEx M had carried out Smart's payment instructions *via* the defendant who was FedEx M's agent for the collection of payment due from payers in Singapore.

20 In their closing submissions, both parties maintained their pleaded positions. Sun Tech asserted that the contract of carriage was between itself and the defendant whilst the defendant

maintained that the contract of carriage was between Smart and FedEx M. It should also be noted that on the same day as this action was commenced, Sun Tech commenced Suit 259 of 2002 against FedEx M claiming for the same loss as is claimed by this action. In Suit 259 of 2002, Sun Tech has pleaded that the contract of carriage was between itself and FedEx M.

Analysis of the contractual position

21 If the waybill is looked at in isolation, then it would appear clear that the contract evidenced by the waybill was between Smart and FedEx M. This is the natural result of a strict construction of the terms of the waybill. The definitions clause states that the words "you" and "your" refer to the shipper and that if the shipment originates outside the United States, "your contract of carriage" (ie, the contract made by the shipper) would be with the Federal Express company which accepted the shipment from "you". That means the contract of carriage would be between Smart which had identified itself on the front of the waybill as the sender and FedEx M whose employee Mr Turairaj had accepted the packages from it. One of Smart's employees had also signed the front of the waybill in the space provided for the "Sender's Signature".

22 Relying on *The Interpretation of Contracts* (2nd Ed, 1997) by Kim Lewison at para 2.10, Sun Tech submitted, however, that, in construing any written agreement, the court is entitled to look at the evidence of the objective factual background known to the parties at or before the date of contract including evidence of the genesis and objectively the aim of the transaction. That is an unobjectionable principle though it relates to the interpretation of the wording of the contract rather than to the issue of the identity of the parties to the contract. Where the question is who the contracting parties are, the court must have regard to factual matters which are external to the language of the contract because the law recognises that in certain circumstances, primarily the situation in which at least one apparent party to a contract is in fact acting as an agent for an undisclosed principal, the actual parties to a contract may not be the parties named in the written document as the contracting parties. In such circumstances, the parole evidence rule has no application. This is also recognised by ss 93 and 94 of the Evidence Act (Cap 97, 1997 Rev Ed) which exclude parole evidence relating to the meaning of *terms* of documents but do not exclude evidence relating to the identification of *parties* to such documents.

23 In this case, for Sun Tech to establish that the contract for carriage here was between it and the defendant, it would have to show the existence of one of four situations:

- (a) that it made that contract directly with the defendant; or
- (b) that it made that contract directly with FedEx M who was acting as agent of the defendant; or
- (c) that Smart, acting as its agent, made that contract directly with the defendant; or
- (d) that Smart, acting as its agent, made that contract with FedEx M who was acting as the defendant's agent.

Sun Tech's submissions do not distinguish between these four situations. It does, however, appear from them that Sun Tech is not alleging that the contract arose from situation (b). Mr Lokanathan admitted that at the time the contract was made Sun Tech knew only that there was a FedEx office in Penang. It did not know that that office belonged to FedEx M, a separate company from the defendant. Sun Tech only learnt about the existence of a separate Malaysian company after this loss occurred. There was no direct contact at the material time between Sun Tech and FedEx M.

Accordingly, I need not consider situation (b) any further.

24 In its submissions, Sun Tech relies on various factual matters to substantiate the existence of a contract without categorising them as legal supports for any one rather than another of the situations identified above. I will briefly set out these submissions before I consider if any of them singly or together is capable of constituting situation (a), (c) or (d).

Sun Tech's submissions

25 First, Sun Tech says that the opening of its account with the defendant was the start of its contractual relationship with the defendant. This account was utilised for the shipment of the goods in that the account number was entered in the waybill as the account number to be used for payment of the carrier's charges. Sun Tech says the existence of the account was itself a clear indication that the contract of carriage was between itself and the defendant. Secondly, the sale contract between Smart and Sun Tech was on FOB terms. This meant that Sun Tech had to pay for the carriage. The terms of Smart's invoice provided that the transportation charges were to be collected on delivery or, if prepaid, would be invoiced to Sun Tech. Sun Tech cited observations from *The Proprietors of the Cork Distilleries Company v The Directors, &c, of the Great Southern and Western Railway Company (Ireland)* (1874) LR 7 HL 269 at 277 to the effect that in circumstances where goods are, with the consent or by the authority of the purchaser, consigned by the vendor as consignor, to be carried by a common carrier, to be delivered to the purchaser as consignee with the name of the consignee being made known to the carrier, the ordinary inference is that the contract of carriage is between the carrier and the consignee, the consignor being the agent of the consignee to make it. It was further stated there that when at the time of delivery there is a specific mention that the freight is to be paid by the consignee, the inference is almost irresistible that the contract for carriage is a contract at the cost and risk and under the control of the consignee.

26 Sun Tech pointed out in the present case, the goods were consigned by Smart to be delivered by the defendant to Sun Tech. Sun Tech was named as consignee in the waybill and its name was made known to the defendant at the outset when Sun Tech opened its account with the defendant. Sun Tech submitted that in these circumstances the ordinary inference would be that the contract of carriage was between the defendant (the carrier) and Sun Tech (the consignee) with Smart (the consignor) being the agent for the consignee to make it. In addition, at the time of delivery to the carrier there was specific mention that the freight was to be paid by the consignee (Sun Tech) to the defendant. Furthermore, in the previous course of dealing between Sun Tech and the defendant, the arrangement had always been that Sun Tech would pay the defendant. Thus, following further observations in the *Cork Distilleries Company* case, the irresistible inference must be that the contract for carriage was an ordinary contract for carriage at the cost and risk and under the control of the consignee.

27 Sun Tech also relied on the fact that under the contract of sale between it and Smart, title to the goods was to pass from Smart to Sun Tech when the cargo was made available by Smart to the carrier. Thus, once the goods were handed over to FedEx M in the person of Mr Turairaj on 28 August 2000, title in them passed to Sun Tech. As owner of the goods, Sun Tech was the proper party to sue for their loss.

28 The next submission was that when FedEx M picked up the goods from Smart, it acted as agent for the defendant. Sun Tech contended that the defendant had represented to it that FedEx M was the defendant's agent and authorised to bind the defendant to a contract of carriage by accepting the cargo for carriage on behalf of the defendant. In cross-examination, counsel for the defendant had put to Mr Lokanathan that a pick-up of cargo in Penang was arranged between Smart

and FedEx M. Mr Lokanathan disagreed. He said the pick-up was done on Sun Tech's instruction and elaborated as follows:

We requested defendants to do this business for us. So they told us there is an office in Penang and our party, the supplier, should call them, ie, Penang office, to do this job for us and to do that Smart had to use their account number without which FedEx would not do the job because someone has to pay them.

Given that it was Sun Tech's understanding that it was contracting with the defendant, FedEx M could not have acted as anything other than the defendant's agent when it accepted and collected the goods from Smart and transported them until they were handed over to the defendant for delivery to Sun Tech. When Sun Tech instructed Smart to contact the FedEx office in Penang and hand the goods to FedEx M for carriage to Singapore, it did so on the understanding that FedEx M had the apparent or applied authority of the defendant to collect the same.

29 Sun Tech further submitted that the representation by the defendant that FedEx M had the authority to receive goods on its behalf was also established by the previous course of dealing between the parties. Many earlier air waybills had been put in evidence. In each of those cases, FedEx M had collected goods from Smart's premises in Penang and transported them on behalf of the defendant before handing them over to the defendant for transport to Sun Tech in Singapore. Sun Tech had on those occasions paid the defendant for the carriage of the cargo and the defendant had not indicated that FedEx M was acting otherwise than as the defendant's agent. Further, the defendant was by its words and conduct barred from denying that FedEx M was its agent.

Analysis

30 I now move on to consider whether the evidence referred to in the submissions or any other part of the evidence would establish the existence of situations (a), (c) or (d). Dealing with situation (a), what evidence is there that the contract for carriage was made directly between Sun Tech and the defendant? No one from Sun Tech's office instructed anyone in the defendant's office to pick up the goods from Smart and transport them to Sun Tech's premises. This fact is admitted by Sun Tech and is also supported by the absence of any record of a reverse pick-up arrangement in the defendant's computer system. The only fact that Sun Tech can point to as supporting a direct contract was the existence of its account with the defendant at the material time. That that account existed, however, did not *ipso facto* mean that each time goods were carried by any company in the FedEx group for delivery to Sun Tech the contract for carriage of such goods was made directly between Sun Tech and the defendant. The purpose of the account was to establish a relationship between Sun Tech and the defendant whereby the defendant would from time to time perform services for Sun Tech on credit terms instead of on a cash payment basis. Among the services would be the despatch of goods to third parties and the customs clearance of goods sent by third parties to Sun Tech. The provision of an account number also made it possible for Sun Tech to direct third parties to use services provided by the FedEx group when sending goods to Sun Tech at Sun Tech's cost. Whilst the establishment of the account did reflect a contractual relationship between Sun Tech and the defendant, that was not a contract for carriage. Separate contracts for carriage would be made each time that Sun Tech whether directly or through an agent requested the defendant to carry goods on its behalf and the defendant agreed to the same. Sun Tech did not give any evidence that the terms of the contractual relationship evidenced by the account encompassed each contract for carriage performed by the defendant on Sun Tech's behalf and at its request after the establishment of the account. In fact, Sun Tech's pleaded case was that the agreement for carriage was made in August 2000 (some time after the account was established) and was contained in, evidenced by or to be inferred from the waybill. Thus, the existence of the account was a separate

matter from the making of the contract for carriage. Situation (a) was not established.

31 The next alternative, situation (c), would be that Smart, acting as Sun Tech's agent, made the contract for carriage directly with the defendant. Assuming for the time being that Smart was Sun Tech's agent, there was no evidence that Smart had any direct contact with the defendant. The evidence was that when the goods were ready for shipment, Smart's office contacted FedEx M's call centre in Kuala Lumpur. Mr Lokanathan was asked whether Sun Tech had instructed Smart to use the defendant to transport the goods. His reply was that the way Sun Tech would have done it was to give Smart its account number issued by the defendant and to tell Smart to contact the FedEx office in Penang. He agreed that he had not specifically instructed Smart to contact the defendant. Smart followed those instructions in August 2000 by contacting FedEx M as it had on many previous occasions. It filled up an air waybill which stated that it was making a contract with the FedEx office to whom it delivered the shipment. It then handed the goods over to Mr Turairaj who was employed by and received the goods on behalf of FedEx M. Accordingly, none of the evidence supports the existence of a contract made by direct contact between Smart and the defendant.

32 The final situation in which a contract could exist between Sun Tech and the defendant would be if Smart acting as agent for and on behalf of Sun Tech made such a contract with FedEx M acting for and on behalf of the defendant. First, therefore, the evidence must establish that Smart was Sun Tech's agent. The relevant facts here as pointed out by Sun Tech are, one, that its purchase of the goods from Smart was made on FOB terms so that the cost of carrying the goods from Smart to Sun Tech was to be borne by Sun Tech and title to the goods passed to Sun Tech when the cargo was delivered to FedEx M, the ostensible carrier. Two, at the time of delivery to FedEx M, Sun Tech had been identified as the consignee or recipient and as the person who would pay the freight for the carriage. Three, Sun Tech had instructed Smart that when the goods were ready for shipment, Smart was to contact the FedEx office in Penang and ask it to carry the goods to Singapore. Four, Sun Tech had given Smart its account number with the defendant so that Smart could insert that account number in the waybill as the paying recipient's account number. On the principles enunciated in the *Cork Distilleries Company* case, on the above facts, there would be an almost irresistible inference that the contract of carriage was between the carrier and Sun Tech, the consignee, Smart, the consignor, being the agent of the consignee to make it.

33 In further support of its argument that Smart was acting as its agent in contracting for the carriage of the goods, Sun Tech cited s 32(2) of the Sale of Goods Act (Cap 393, 1999 Rev Ed). This provides that the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the circumstances of the case. It is, however, unclear whether that statute would apply to the contract between Smart and Sun Tech since the governing law of the contract is unknown. Smart's invoice, the terms of which Sun Tech relied on to prove that the contract was an FOB one, also provided that the sale contract was subject to the exclusive jurisdiction of the Superior Court of California for the County of Alameda or the Superior Court of California for the County of Santa Clara or the United States District Court for the Northern District of California.

34 I am, however, satisfied on the evidence that Smart was authorised by Sun Tech to act as its agent in making a contract for carriage with a carrier for the transport to Sun Tech of all goods sold by Smart to Sun Tech. There is no necessity to call in aid the provisions of s 32(2) of the Sale of Goods Act. The common law principles set out in the *Cork Distilleries Company* case ([25] *supra*) are plainly applicable to the facts of this case.

35 The next issue is whether Smart made the contract with FedEx M as principal or with FedEx M as agent for the defendant. On the basis of Mr Lokanathan's evidence recited in [28] above

Sun Tech submitted that the defendant had represented to it that FedEx M was the defendant's agent. Since Sun Tech's understanding was that it was contracting with the defendant, FedEx M could only have been acting as such agent when it accepted the goods from Smart. There are difficulties with this argument. First, in the statement of claim, it was not pleaded that the contract of carriage was made on the basis of a representation from the defendant that FedEx M was its agent. Instead, Sun Tech relied on the terms of the waybill, the fact that it paid the transport charges and the previous dealings relating to the carriage of cargo from Smart to Sun Tech. It is not open therefore to Sun Tech to raise this argument at this stage. The making of representations and existence of estoppel are matters that must be expressly pleaded.

36 Second, the evidence adduced by the defendant did not support the thesis that FedEx M was acting as the defendant's agent even though payment for the carriage was to be made to the defendant. There was no evidence that the defendant had ever instructed FedEx M to pick-up goods from Smart on its behalf. On the contrary, the defendant's employees testified that it was the defendant who was acting as agent for FedEx M in each and every case when it received goods in Singapore sent by FedEx M from Smart's premises and consigned to Sun Tech. The charges for such carriage which it rendered to Sun Tech and which were included in its monthly statements to Sun Tech were the charges levied by FedEx M. The defendant collected these charges on behalf of FedEx M. These charges had originally been levied in Malaysian ringgit and the amounts billed to Sun Tech were the exact equivalents of the same converted into Singapore dollars for ease of payment by Sun Tech. The amounts collected were credited to FedEx M which in turn paid a small handling fee to the defendant for each consignment it received and delivered to Sun Tech. Evidence produced by the defendant showed that the freight revenues for the shipments from Smart to Sun Tech were recorded in FedEx M's ledgers. These revenues were not regarded or treated as the revenue of the defendant.

37 The defendant's evidence disclosed the existence of an elaborate system through which companies in the Federal Express group co-operate with each other to provide a seamless international transportation service to customers of the various companies in the group. The existence of the various companies and their dealings with each other did not, however, mean that where one company issued an air waybill on the basis that the payment for the carriage would be made to another company in the group by the recipient, the first company was acting as agent for the second. The system that the Federal Express group of companies adopted as shown by their use of the standard form of air waybill was that the contract of carriage was to be between the shipper and the particular company that took delivery of the goods for shipment from the shipper. It was not to be between the shipper and the Federal Express company that delivered the goods to the recipient nor between the recipient and the Federal Express company that delivered the goods. Whilst companies in the Federal Express group could not prevent the shipper acting as undisclosed agent for a principal, they could determine whether they would act as agents for each other in making contracts for carriage. It is clear that the decision was that this would not be the case. Instead, as stated in the waybill, the carrier under the contract for carriage would be the Federal Express company that "originally accept[ed] the shipment" from the shipper.

38 The fact that payment for the carriage might be made by the recipient rather than by the shipper and might be made to another company in the Federal Express group could not change the identity of the carrier. The form of the waybill provided that the shipper could indicate that payment for the carriage was to be made by a party other than the shipper itself. If that was the case, then the carrier would have to do its best to recover payment from the designated party. The waybill, however, also contained a clause providing that notwithstanding the third party payment instructions given, the shipper would nevertheless be liable for all charges including transportation charges and possible surcharges and customs duties and taxes. Such a clause is obviously enforceable.

39 It is Sun Tech's case that when it accepted the goods from Smart, FedEx M was acting as agent for the defendant. Sun Tech therefore has the onus of proving this. Sun Tech has not discharged this onus. On a balance of probabilities, I find that FedEx M was acting as a principal and as the carrier when it accepted the goods and agreed to transport them from Smart's premises to Sun Tech. The evidence that the defendant adduced relating to the relationship between it and FedEx M, ie, that in delivering goods consigned to Sun Tech by Smart, it was acting as the agent of FedEx M, has not been controverted.

40 As no contract between the defendant and Sun Tech for the carriage of the goods has been established, the next matter that I have to consider is whether the defendant was the bailee of the goods. This issue may be briefly disposed of. To be a bailee of goods, one has to have actual possession of them either by oneself or through an agent. In this case, the goods were lost before they came into the possession of the defendant. The goods were lost whilst they were in the possession of FedEx M. I have found that FedEx M was not acting as the agent of Sun Tech when it took possession of goods. Accordingly, at all material times, the defendant was not in possession of the goods. It was therefore never bailee of the goods.

Conclusion

41 Since I have found that there was no relationship between Sun Tech and the defendant either in contract or in bailment at the time of the loss of the goods, no duty was owed by the defendant to Sun Tech. It is accordingly not necessary for me to go on to consider the other issues raised in this case. Sun Tech's claim must be dismissed with costs. I will hear parties on whether any costs order needs to be made with respect to Smart.