Fal Oil Trading Co. Ltd. v. Petronas Trading Co. [2002] ADR.L.R. 08/01

JUDGMENT : His Honour Judge Hallgarten Q.C. QBD. Commercial Court. 1st August 2002.

1. In this case the claimants, whom I will call "Fal", seek to recover US $10,227,304.61, as the price of oil delivered, together with discharge port demurrage. The defendants, whom I will call "Petco", deny that any sum is due and say that they lawfully rejected the oil as defective, and that they have suffered loss and damage, quantified at some $7.5 to $8 million, by reason of such defective goods.

2. The application, which was made under Part 24, is in relation to the first of these claims. Fal say that there is no realistic prospect of Petco being able to say that the price should not have been paid because (a) there were no grounds for rejection, and (b) even if there were any such grounds, in any event, there was no or no effective rejection by Petco, so that Petco are reduced to advancing a claim in damages, something of no use to them at this stage, because the contract contained a "no set-off" clause.

3. The application was estimated for three hours, but this was never realistic and what happened was that issue (b) was taken first, and indeed that was all that there was time for during the course of a complete day. I should add that issue (a) might well have had to be adjourned in any case because of the late submission of a further witness statement by Petco.

4. Rather than solemnly recite the facts I am very happy to adopt the summary of the case in Part A of the case memorandum, which is deemed to be part of this judgment, with the proviso that para.4 of that case summary recites the facts really more fully than is perhaps strictly necessary for the purposes of the rejection issue.

5. As to the question of rejection, it is important that, taking issue (b) first, it assumes that the condition of or contamination to the oil meant that Petco had a right to reject it. They were able to exercise that power so as to avoid any responsibility in relation to the oil -- neither to pay for it nor to have any dealings with it.

6. It is illuminating to see Petco's pleaded case. They say that there was a rejection on the 17th to the 20th March, the price being due I believe (because of the 30 day clause) on the 27th March, that is to say, 30 days after the bill of lading.

7. Fal's pleaded case in relation to rejection is set out in the reply, basically in para.3 of thereof; it simply states that if Petco "*did in fact purport to reject the cargo, then they were not entitled to do so*". And then, more particularly, in para.8.2 of the defence to counterclaim, it is stated as follows*: "Alternatively, if, which is denied, the Defendants had a right to reject they had lost that right by not tendering redelivery of the cargo to the Claimants and/or by acting consistently only with an intention to retain title and/or risk and/or possession of the cargo, namely by dealing with it as owner."*

   And then there is a reference to matters which I will have to deal with in greater detail when I come to certain in rem proceedings.

8. The case as presented by Mr. Millett was rather different and more sophisticated. He accepted that Petco had in fact purported to reject, not, as alleged in the defence as early as the 17th to 20th March, but by two faxes sent on the 24th and 25th March, and argument before me proceeded on that basis. In so far as there was an earlier rejection, Mr. Akka, for Petco, did not seek for Part 24 purposes to rely on it either. Mr. Millett's argument was that, notwithstanding the messages sent on the 24th and 25th March, looking at the evidence overall, (a) the rejection was not valid, and (b) in any event Petco had affirmed the contract, which is I think the thrust of the passage from para.8.2 of the defence to counterclaim which I have just read. The moral strength of Fal's case is that the upshot seems to have been that Petco have got hold of what on paper were some $10 million-worth of Fal's oil and not paid a cent for it. I say "*on paper*", because of course for present purposes I must assume that the oil was contaminated by water in excess of 1 per cent.

9. Mr. Akka's answer to that is that if, as to which he makes no admission, Petco did retain or otherwise deal with the oil, Fal's remedy is in conversion, which Fal has not chosen to allege, possibly for two reasons:-- (a) jurisdictional difficulties under Part 11, or (b) tactical reasons, because any such claim would be subject to a potential set off.

10. I add in parenthesis that if Mr. Akka is right in this, Fal's claim may actually increase if framed in conversion because his case (see para.15(a) of the counterclaim) is that the market price was US$150 per tonne as against the contract price of US$135 per tonne, and so, framing the case in a different way, possibly Fal stand to recover a further $1 million or so.

11. I now turn to look at the facts. Taking the facts prior to the 24th March fairly quickly, the oil was to be discharged at Caltex's terminal in Singapore with 35,000 tonnes to Fal and 12,000 tonnes to Petco, and the remainder was to go to Pasir Gudang.

12. On the 17th March there was a claim by Petco in relation to water contamination, and blame was firmly ascribed to the vessel. It was said as follows, in a fax from Petco to Fal: *"In talking with the Terminal's marine manager, the Terminal has received an extremely bad report on the vessel. The vessel has three pumps of which one is working, one is shut down (as oil sprays all over the pump room when it is turned on) and the other has a mechanical seal leak."*

And then skipping a couple of paragraphs: *"We have just been informed by SGS that the shore tank 537 following transfer of cargo is giving a result of 6.6% volume percentage of water.*

"As indicated and evidenced from our earlier correspondences, the vessel has been responsible for this dreadful incident, and as the suppliers of this delivered cargo, we hold Fal Oil responsible for all costs and claims as a result of the high water content of the cargo."

13. The upshot, pursuant to a fax sent on the 20th March, was that Petco planned to discharge part of the cargo, 35,000 tonnes, to shore tanks, back discharging whatever had been already discharged, and then discharging a further 12,000 tonnes into that very tank, presumably after cleaning. That plan came to nought, not least because the vessel was now rejected by Caltex as a pollution risk. The upshot was that Petco gave revised instructions now to go straight to Pasir Gudang and to discharge 28,000 tonnes to FEOTO terminal, the balance to await instructions.

14. The vessel arrived on the 23rd March and started to discharge at the FEOTO terminal, but discharge was stopped at 0955 on the 24th, it being said by Petco in a fax sent that day as follows*: "This is to notify FAL OIL that on March 24th 2001 at 0955 hours, we instructed the Terminal to stop the discharge of fuel oil into our shore tank at FEOTO Pasir Gudang."*

And then skipping a paragraph*: "On March 24/01 at 1550 hours the samples from tanks 102 and 108 were drawn by SGS in the presence of Saybolt and the P&I Club representative, is on the way to SGS laboratory in Singapore. If the result is unacceptable, the terminal will be instructed to unberth the vessel. PETCO will only pay for cargo discharged at FEOTO, Pasir Gudang less water (difference between load port tested and shore tank at FEOTO) minus all costs associated with the Devon. Also, we are awaiting FAL's plan on the upliftment of cargo at Caltex, Tanjong Penjuru".* (I am not sure that I picked up that previous reference, if there was one.) *"Please note that PETCO is not liable for any demurrage costs on the ' Devon'. PETCO holds FAL OIL fully responsible and liable. All costs and claims resulting from the delivery of the contaminated fuel oil on the MT 'Devon' will be deducted from Fal's account."*

15. That brings me to the first of the rejections which are, as I said, admitted as being appropriate or at any rate arguable rejections for the purposes of these proceedings.

16. The first was a further fax of the 24th March, and I do not think I need read more beyond a single sentence from that fax: *"We reject the cargo discharged at FEOTO, Pasir Gudang."*

17. That only went to part. As to the balance, that was dealt with in a somewhat more complicated fax sent on the 25th March, which is perhaps a somewhat more equivocal document, but I will just read from a couple of passages. In the third paragraph it was stated*: "PETCO has acted in good faith and had every intention of honoring the arrangement in line with the contract. However, inconsistencies on the quality which has a direct impact on the quality cannot allow for the transfer of the title and risk at the port of loading."*

And then three paragraphs from the end, after a reference to the amount of alleged contaminated oil, it was stated: *"Should we fail to hear from Fal Oil by March 27/1700 hours Malaysian time, we will take the necessary steps to consolidate the two contaminated fuel oil parcels to allow for cleaning/re-use of tanks. All costs and expenses will be for Fal's account."*

Then finally: *"We hold Fal Oil, as cargo supplier/time charterer of the 'Devon' fully liable for all costs which will be deducted from your account ..."* (I assume that the parties were in account) *"... for failure to deliver Yanbu Fuel Oil ..."*

18. The next thing that happened, just to take up the narrative, was the invoice that was rendered for payment of the price, if it was due. Then on the 28th March Petco reiterated that they were rejecting (that is a document out of place at p.219 of the bundle). Fal of course responded by repudiating any suggestion that there was an entitlement to reject.

19. Then on the 31st March there is a document at p.82, which I do not think was referred to in argument, but is certainly part of the narrative. It is a fax from Petco to Messrs. Websters, who were, I apprehend, underwriters' agents, saying: *"We refer to our insurance with your company."*

They go on to refer to having instructed solicitors to arrest the DEVON, and seek Webster's suggestions regarding the arrest, concluding as follows: *"In the meantime, please urgently confirm that all our losses from the shipment are covered by the insurance and that you will take over the conduct of the matter from hereon."*

That is a document which I think is only explicable in terms of title and risk being vested in Petco.

20. Then on the same day there was a somewhat complicated exchange, as can be deduced from a fax sent from the owners to Fal, in which they quoted a fax received from their own P&I Club, referring to a meeting with Messrs. Websters, representing cargo underwriters, and Rajah & Tann, the lawyers for Petco, making mention of cargo underwriters allegedly demanding security in the sum of about US$2.8 million. Having quoted the fax received from the P&I Club they then went on to ask Fal to attend and to give relevant confirmation to the master, and asked Fal to instruct their own P&I Club. Annexed to that document was a schedule which showed how Petco were calculating their $2.8 million, and it plainly was based upon Petco retaining the oil but seeking abatement in relation to costs in and about the contamination and the loss of value caused by such contamination. All of that of course can only have been based upon the assumption that there was a retention of title; certainly the loss of value can only have been based upon that assumption.

21. Then a new chapter opens on the 5th April with a fax from Petco to Fal, which is headed, "***Without Prejudice: URGENT***", and it is accepted that that is to be construed -- or certainly for these purposes is to be construed -- as without prejudice to liability, but in fact there was also a without prejudice proposal which went into some detail about how matters might be resolved. I will not go into the full detail, but it is quite plain that it was intended genuinely not to prejudice either side's position. For instance, so far as Petco were concerned, the first of a number of sub-paragraphs read: *"We will agree to accept under protest and without admission of liability the balance approximately 45,000 metric tonnes ..."*

And so on. So there plainly Petco were putting up the suggestion that they might nonetheless be prepared to take the oil, but subject to fairly complicated terms, which I do not think it is necessary to spell out.

22. In any event, the proposal was resoundingly rejected by Fal in a fax also dated the 5th April. They took their stance, both in that fax and in a further fax of the 6th April, that title had passed and that Fal were therefore in no position to give appropriate orders in relation to the oil. One would therefore have had an impasse, as I see it, but it was ultimately broken, or proposed to be broken, by Petco, who made a proposal on the 10th April, saying *this "We note you would like us to issue instructions to you to shift the vessel. We are of the view that it is you who should issue the instructions. However, in view of your position, to mitigate our losses and on a without prejudice basis, we hereby issue you, as per your request, with instructions to shift the vessel to Singapore and/or Pasir Gudang, as may be advised by our expert advisers and surveyors to the owners of the vessel."*

Then I think I can skip to the very end, where they stated: *"We would only repeat that there was no proper quality survey of the cargo to prove that the cargo shipped was within specs as per the terms of our contract and that your surveyors, Saybolt, allowed loading to commence when there was no proper inspection of the DEVON's tanks. There is therefore no need for us to repeat all the points that have been made previously."*

What is I think implicit in that passage is Petco now blaming Fal either for allowing contaminated cargo to be shipped in the first place or, more probably, for allowing it to be shipped into a vessel which ought not to have been chosen by Fal as charterers in the first place. I add, in parenthesis, that I am not sure that the second limb of that potential defence is actually reflected in the defence as presently pleaded.

23. In any event, the proposal was rejected by Fal, which gave rise to a meeting which I was told was on Fal's initiative. in fact held the next day, on the 11th April, which, for present purposes, Mr. Millett accepts was on a without prejudice basis. This gave rise to an agreement, as recorded in a fax from Rajah & Tann, dated the 11th April, and the upshot was I think that the deadlock was broken and Fal were to give instructions to allow the cargo to be discharged from the vessel. Rajah & Tann began by referring to the meeting and went on to say: *"We are instructed that the meeting was productive and parties generally agreed that they must co-operate to resolve this matter. In this regard we are instructed that:*
(i) Fal agrees to instruct the vessel to shift to allow the cargo to be discharged from the vessel.
(ii) Fal agrees to instruct the vessel to release all the samples on board to Petco now."

24. Mr. Millett says that this was a critical turning point, and the way it was put in his skeleton argument was that, as a matter of common sense, it is impossible to see how Petco could have agreed to accept delivery while maintaining that they had rejected delivery and to be entitled to refuse to pay the price. I venture to disagree with this argument. Accepting delivery is reading too much into that particular fax. In any event, it seems to me that to take custody of goods in these circumstances is not inconsistent with rejection. Petco would prima facie hold the oil for whomever it might concern.

25. The next event was a very curious fax from Rajah & Tann, dated the 12th April, to Fal, which seems to pick up on a pre-meeting fax even though this is something which has been sent after the meeting. It, with respect, is not well expressed, and I will read the final of the three paragraphs: *"Our clients feel that your response to shift the vessel is in the right direction. However, you have also stated that any instructions issued by our clients are on the basis that they are 'final' responsible for any action or negligence on the part of the agents and presumably the Master of the vessel. Our clients are not able to agree to this."*

And then they went to say, and this is the more puzzling passage: *"As you know, the cargo is to be delivered by you pursuant to the contract of sale. Therefore, our clients are not required under the terms of the contact of sale to direct the vessel or the agents to deliver the cargo. Furthermore, they are not the charterers of the vessel and therefore cannot assume any liability for the acts or negligence of the agents or Master."*

It is a difficult fax but, for present purposes, I do not take the view, placing the matter in the context of the negotiations which were then in progress, that it does not unpick any rejection that had taken place, or indeed whatever may or may not have been agreed on the 11th April.

26. That then brings me to the 13th April, when there was another proposal by Petco to Fal, with Petco representing that they would agree to pay the price less $2 million, provided that there was a successful arrest of the DEVON in Singapore or Malaysia. Petco also reserved the right in relation to further losses, on the basis that Fal themselves were to renounce other claims, e.g. for an indemnity in relation to demurrage. The proposal was hugely favourable to Petco, and, not surprisingly, on the same day Fal rejected those terms, or indeed rejected any suggestion that they had agreed such terms.

27. In the meantime, also on the 13th April, Petco informed Fal by fax that they were planning to berth the vessel on the 15th April for discharge, and asked Fal to release certain samples. That document was headed *"Without Prejudice*". On the 15th April Fal responded as follows: *"First of all, issuance of discharge instructions which have been prefixed 'without prejudice' are not acceptable and consequently rejected."*

There was the reference to agency, and the final paragraph read*: "Therefore please send again your discharge instructions by deleting the prefix 'Without Prejudice' and also put vessel's agents in copy. If you do it, then agents will pass on your discharge instructions to the master for compliance."*

28. That was followed by another fax dated the 16th April, likewise headed *"Without Prejudice"*, which referred to the vessel being now in the process of discharging her cargo at the FEOTO Terminal, Pasir Gudang, and Petco went on to say*: "We would like to invite all interested parties to send their*

representatives ... in order to witness the taking of samples from shore tanks ... which have received cargo from the vessel on a 'without prejudice' basis."

29. Discharge seems to have been completed on the 18th April, as set out in a document at p.378 of the bundle.

So in relation to the completion of the discharge, this is how it was put by Mr. Millett in his skeleton argument as a matter of fact, and I do not think it has been sought to be rebutted by Petco: *"The cargo was physically delivered to Petco and was never seen again by Fal."*

30. It is fair to say that Petco's defence and counterclaim were completely silent about what happened to the oil, and, although I pressed Mr. Akka that Petco must have been instrumental in disposing of it, Mr. Akka was not in a position to assist me over this. At the very least, what one would have expected the counterclaim to do was to give credit for the value of the oil, but Petco do not even condescend to do that. Petco, as far as I can see, are prepared to take that stand on the footing that, in effect, and not to put too fine a point upon it, they have in fact misappropriated the oil and are not prepared to give any credit for whatever value it may have had.

31. But to revert to the narrative, there are two other strands. First, to take up an earlier strand, there are the proceedings which Petco in fact took in rem in Singapore against the vessel. The writ was issued on the 31st March, so Messrs. Webster obviously acted pretty speedily, but the statement of claim dated the 2nd June, without qualification, asserted title. There are one or two passages from the statement of claim that should be referred to.

32. First of all, there is a curious paragraph 17, which reads as follows: *"Pursuant to parties' negotiations, the Plaintiffs then agreed to and did accept under protest and in mitigation of their loss, the remaining quantity of cargo at Pasir Gudang."* (The reference to the parties I think must mean the defendants and the claimants to those proceedings, and is not a reference to Fal.) Then in para.19, having set out in great detail measurements of ullages and water content and so on: it is stated as follows: *"As may be seen from a comparison between the water content of the samples at loading and at the discharge ports, the cargo was contaminated by water during shipment. In the circumstances, the Defendants were in breach of their duties ..."*

"During shipment" I read as meaning during the course of the carriage rather than during the course of loading.

Paragraph 21, the reference to quantum, says that Petco have suffered loss and damage, and goes on to say: *"The Plaintiffs are still in the process of mitigating their losses and they reserve the right to provide further particulars of their loss at a later stage."*

The mitigation, in practical terms, if Petco are right, represents wrongful conversion of Fal's oil.

33. Then further information of the statement of claim was served on the 26th October, and there was no allegation in that or any document that title somehow reverted to Fal. It may be just as well that there was no statement of truth attached to either document, but there is absolutely no doubt at all that, vis-a-vis the vessel, Petco were saying the oil was theirs and remained theirs from the moment that it was received on board the DEVON.

34. So much for the claim against the ship. The second strand represents exchanges between solicitors in June and July of last year, beginning with a letter from Ince & Co., for Fal, which represents in effect a letter before action. After a brief recital of the vessel's movements to the 17th March, it was stated as follows: *"Thereafter, you rejected the cargo on the basis of the alleged high level water contents of the cargo samples drawn at Singapore."*

And they went on to make a point on the third page, which I am not sure is still being pursued, that: *"... according to the contractual terms, the determination of Saybolt was final and binding."*

35. Then they went on to say that, in any event, the cargo samples were consistent with the Saybolt result and that therefore, in so far as there was any problem, it arose on board the vessel, and they referred later on the same page to an alleged "*unauthorised rejection*" of the oil.

36. In any event, the upshot, as one would expect, is that Ince & Co. demanded the full price of $10.2 million-odd.

37. That gave rise to a response from Messrs. Rajah & Tann dated the 5th July, which reads as follows: *"We refer to your letter of 28 June 2001.*

We have taken our clients' instructions on the above matter and we are instructed to reply as follows:

(1) Our clients agree to make payment of US$10,227,304.61 for the fuel oil that was purchased under the contract of sale between our clients and your clients on the basis of the terms set out in this letter.

(2) Payment is made without prejudice to our clients' rights to claim against your clients in respect of the above fuel oil and contract of sale. As your clients know, the cargo was found at the discharge port to be in a damaged condition. Our clients have claimed against the owners of the carrying vessel. However, at this point in time, the owners continue to dispute liability and therefore there is a possibility that the damage may well be pre-existing at the time the fuel oil was shipped on the vessel, in which case our clients have a claim against your clients under the contract of sale. Our clients therefore reserve all their rights against your clients.

(3) Your clients will not claim against our clients for the alleged demurrage claim for US$628,895.07, which is denied in any event.

(4) After payment is made, the bills of lading for the shipment on the 'DEVON' should be turned over. Please confirm that the bills of lading will be turned over to us as soon as payment is made. We assume that the same have already been endorsed previously.

Apart from the above matters, all other matters in your letter are not admitted. Please let us know how the US$10,227,304.61 is to be paid to your clients and please acknowledge payment after it is received by your clients."

It represented, in effect, a virtual admission of liability, which (a) seeking to reserve rights if something emerged in respect of the DEVON proceedings which might have an impact as far as Fal were concerned; and (b) requiring that the demurrage claim to be dropped.

38. Ince & Co. came back on the 16th July saying they were not in any position to accept the conditions attached by Rajah & Tann. Rajah & Tann responded on the 6th August maintaining their position and saying under item 3: *"The payments proposed in our letter of the 5th July are in full and final settlement of all claims against our clients arising out of or in connection with the contract of sale."*

And then they said: *"The payments are without prejudice to our client's rights."*

39. That exchange got nowhere, with Rajah & Tann's proposal being rejected by Ince & Co. In a fax which was sent on the very same day, the 6th August, Ince & Co. made the point -- perhaps a rhetorical point -- as follows: *"We are at a loss to understand what rights your clients are seeking to reserve*."

40. Those are I think the essential facts for present purposes, and I now turn to deal with the law, which is not altogether simple, but it may help if I start with what I see as first principles, although the question may well be whether those principles should yield to particular principles applicable in relation to the rejection of goods.

1. The assumption upon which I must proceed is that buyers are vested with a right to reject. If not, any rejection by them would be a wrongful rejection, which of course the seller might choose to treat as bringing the contract to an end. If the seller were to keep the contract open then performance might or might not resume, or be deduced as resuming, looking at the entire history of events.

2. Where there is a right to reject, that gives rise to a power in the buyer to elect whether to go on with the contract or to treat the contract as determined for the sellers' breach. Election must be clear and unequivocally made.

3. Where rejection is essentially in words, one has to place what the buyers say in its commercial setting. Examining the evidence of subsequent events and subsequent exchanges may assist the court in understanding whether the purported rejection was, to use a neutral term, "genuine".

4. Subsequent events and exchanges may also be relevant in determining whether the contract has been affirmed. That arises where the sellers refuse to accept the buyers' rejection as rightful, even though it is, and the buyers thereafter act in a manner inconsistent with maintaining this earlier rejection. In those circumstances, the matter can be also analysed in terms of offer and acceptance by conduct.

5. Such affirmation cannot, without more, be deduced from the circumstance that the buyers have acted inconsistently with the rights of the sellers, because the upshot of acting inconsistently may well be that the buyers are guilty of conversion rather than having attributed to them the adoption of the contractual terms.

41. The question arises whether that expression of first principles is one which conforms with the decided cases in relation to rejection. The most recent is the Court of Appeal authority which is, indeed, consistent with adopting, as I see it, a classic approach. (See per Lord Justice Auld in **Atari Corporation v. Electronics Boutique** [1998] Q.B.539, at pp.551 and 553.) Lord Justice Auld cited three authorities, however, and Mr. Millett relied on those authorities in order to support his proposition that Petco's rejection of the oil "was not in fact intended to be a once and for all rejection".

42. The first case is **Tradax Export S.A. v. European Grain & Shipping Ltd**. [1983] 2 Ll.Rep.100, which concerned a contract CIF Avonmouth, with the goods being paid for on the 22nd July 1974, discharge taking place on the 1st August 1974 and rejection, and the demand for refund being made on the 12th August 1974.

43. Having concluded that the Board of Appeal -- this being an appeal under the Arbitration Act-- had not treated the buyer's rejection as conditional or unequivocal, Mr. Justice Bingham (as he then was) went on to say as follows: *"A finding that the buyers clearly rejected the goods and claimed arbitration does not in my judgment conclude this question in their favour. It might emerge, as it did in **Chapman v. Morten** (1843) 11 M & W 534, that the buyers were saying one thing and doing another, so as to invalidate their written statements or throw doubt on the bona fides or the unequivocal nature of their rejection. Or they might act in such a way as to create an estoppel against themselves. Or they might enter into a new agreement with the sellers involving an express or implied withdrawal of their rejection or a retransfer of title to them. It does, however, seem to me quite plain that once the buyers have proved what, on its face, amounted to a clear and unequivocal rejection of the goods and claim for arbitration, it is for the sellers to prove, if they can, that the apparent effect of the buyers' conduct was destroyed by other conduct having a different and inconsistent effect and not for the buyers to establish the negative case that they did nothing subsequently to disentitle themselves from asserting their rejection."*

44. I have to say that I have difficulty in understanding the reference to bona fides because prima facie a person's state of mind is irrelevant when it comes to contractual communications. Mr. Justice Bingham does not analyse why there was a reference to bona fides, but I suppose that a rejection would not be bona fide if a buyer had already put it out of his power to have the goods revested in the seller, although prima facie that might be a matter governed by s.35 of the Sale of Goods Act. But, whatever the test, it seems to me that what has to be established is that, as at the date of rejection, there was no actual intention to allow the seller to regain control; it was simply a cynical move. That is something which, in due course, Fal may be able to establish but, in my view, there is nothing in the evidence which suggests that such was the overwhelming probability or, to put it in Part 24 terms, that any examination of after events establishes that any suggestion that the rejections of the 24th and 25th May were valid is merely fanciful.

45. As I see it, one way of testing the matter is to ask the question what would have happened if Fal had in fact treated Petco's conduct as a repudiation and called Petco's bluff? Can it be shown that Petco would have done anything to prevent Fal dealing with the oil, whether on the vessel or discharged to shore tanks? In my view, there is only one significant piece of evidence, namely the way in which Petco asserted their claim against the vessel which at all times, in my view, unequivocally postulated that title to the oil had passed and remained vested in Petco.

46. The evidence which I recited to that end is, I think, powerful, but does it persuade me that Petco's case is so flimsy that nothing which could emerge at trial might affect my decision? I regret that, grave though my doubts may be, I am unable to reach that conclusion.

47. Further, certainly as to any inference to be drawn from the Singapore proceedings, my position is made difficult by reason of the circumstances that I have not heard Mr. Millett's or Mr. Akka's arguments on quality, and the position may be that by the time the statement of claim was issued Petco had formed the view, not that the Atari test applied, but that the condition of the oil did not in fact warrant a rejection, however clearly that rejection might have been intended and expressed.

48. I think that the same point can be made in relation to the Rajah & Tann faxes to Ince & Co. They come very close to an admission of liability, but it is impossible to deduce whether Petco's stance was based on reservations about validity of rejection or whether it was based upon the acceptance that there was no or no significant breach at all. It seems to me that it is most likely to have been the latter, which of course gives rise to the question whether, having regard to further investigations and analyses revealed in the extensive witness statements (which, because the quantity issue was left over, I have not been able to explore), Rajah & Tann may have been conceding too much.

49. As to dealings with the oil itself, there is nothing which suggests that at an early date Petco were already conducting themselves in a fashion inconsistent with rejection; that had Fal sought to test the position by saying, "*Very well, we treat the contract as repudiated by you, we will resell the cargo*", Petco would somehow have prevented them from so acting.

50. There are severe doubts about Petco's bona fides, in particular over their failure to say a word about what has happened to the oil. But doubts about Petco's bona fides are not sufficient for Fal to get home under Part 24. The only hard fact that one can get from the material is that the discharge to shore was done on a without prejudice basis, which plainly is not enough. I think that I have already dealt with Rajah & Tann's odd fax of the 12th April and I repeat that, although ill-expressed and muddled, I do not think that it can be regarded as something which withdraws a rejection that had previously taken place.

51. The second case that was referred to, and I think I have covered much of the ground in looking at the **Tradax** case, was **Chapman v. Morten** (1843) 11 M. & W.534. That case was referred to by Mr. Justice Bingham in **Tradax** but was not analysed by him. It was treated by Mr. Justice Evans (as he then was) in the **Graanhandel** case, that I will be coming to, as a case of affirmation. I think that it is right to say that Chapman is a difficult case. As far as I can discern from the report, there the buyers asserted that goods did not correspond to sample, delivery being in late 1841 and the goods being placed by the buyers in a public granary in December 1841. The buyers then wrote to the sellers in late January 1842 saying that the goods were at the sellers' risk and cost, asking them to take the goods back, but the sellers declined. The buyers then wrote saying that if no direction was given they would sell. The sellers responded again seeking payment of the price. Then, as late as July 1842 the buyers advertised and sold the goods in their own name to a third party. The way it was dealt with by Chief Baron Abinger, having recited some of the facts, is as follows*: "The utmost that can be said was that it was an equivocal act and we must therefore look to the whole of his [the buyer's] conduct for an explanation of it. We must judge a man's intentions by their acts and not by expressions in letters which are contrary to their acts. If the defendant intended to renounce the contract he ought to have given the plaintiffs distinct notice at once that he repudiated the goods, and that on such a date he would sell them to such a person for the benefit of the plaintiffs. The plaintiffs could then have called upon the auctioneer for the proceeds of sale. Instead by taking this course the defendant has exposed himself to the imputation of playing fast and loose, declaring in his letters that he will not accept the goods but at the same time preventing the plaintiffs from dealing with them as theirs."*

52. I have to say that that suggestion of preventing the plaintiffs from dealing with the goods as theirs is somewhat different from the way in which I read the facts. Mr. Justice Bingham in **Tradax** referred to **Chapman** as a case of saying one thing and doing another, which postulates simultaneous inconsistent acts, which I do not think really emerges, with respect, from the report of **Chapman**. But, in any event, our case, it seems to me, is distinguishable, because there at least, in so far as there was inconsistent conduct, it was in relation to the sellers themselves, whereas here the essential

inconsistency, as I see it, is vis-a-vis a third party, namely the ship owner. I am not persuaded that **Chapman** in the end really carried Fal's case any further.

53. An even more difficult case is the one to which I have already referred, **Graanhandel T. Vink B.V. v. European Grain & Shipping Ltd.** [1989] 2 Ll.Rep. 531 , a decision of Mr. Justice Evans (as he then was). The facts in that case were somewhat extreme. It was either a CIF or a C&F contract. The documents had been paid for and there was a rejection telex of the 2nd August 1984 (and I do not think that the task of anyone in our case was assisted by not having the precise text of the telex). There were then further communications between the 2nd and the 7th August, and on the 13th August the goods were sold on the instructions of the buyers. It would appear that the grounds for rejection that had been alleged on the 2nd August could be shown not to have been good grounds, and that emerged on the 10th August. But, notwithstanding that, it emerged ultimately that although the wrong grounds had been given, nonetheless a right to reject did genuinely exist -- but the facts substantiating that right only emerged on the 30th August in consequence of a further analysis of the goods.

54. The conclusion of Mr. Justice Evans is summarised in the headnote, where he said under (1*): "... with regard to the Aug. 2 telex of rejection it was not final if it was refused by the sellers (as it was) and if the buyers had further thoughts as disclosed either by their words or by their conduct, not necessarily communicated to the sellers ..."*

And then it is stated*: "(2) the facts found by the award justified the finding that the buyers by their resale affirmed the contract or conversely lost their right to reject the goods even if misdescription could be proved; there was no unequivocal rejection of the goods before Aug. 13; the buyers by their conduct in proceeding with the resale not having previously rejected the goods unequivocally must be taken to have affirmed the contract ..."*

55. I have to say that I found some passages in the judgment difficult to follow, in particular, obiter dictum, at p.533, in the left-hand column, which, as I see it, confuses, with respect, a wrongful with a rightful rejection. The reference to s.35 does not seem to me in fact to be helpful either, because, by its terms, s.35 introduces conduct, but, as far as rejection is concerned, it does not seem to me that conduct is necessarily part and parcel of what is in essence a contractual communication.

56. The judge then went on to examine the facts at p.534, and said this, in the right-hand column*: "The position with regard to the Aug. 2 telex of rejection in my judgment was this: that it was not final if, first, it was refused (as it was) by the sellers and, secondly, the buyers did have further thoughts as disclosed either by their words or by their conduct, not necessarily communicated to the sellers."*

57. I do not quite follow, with respect, why a rejection, if there was a right to reject, should not be final. As I see it, the sellers' refusal can only be material if there was a bad rejection. On the particular facts of that case it might be seen as a bad rejection because in fact the rejection was bad on its face but it was not, as it turned out, intrinsically bad, because on the facts, which only emerged from the later analysis on the 30th August, the buyers did in fact have a right to reject.

58. In that same passage Mr. Justice Evans referred also to "*words or conduct*" but then went on to reach his conclusion, based on affirmation and indeed based on s.35 and, for my part, I do not find s.35 necessarily to be a sound guide to whether there is or is not an unequivocal rejection of goods. Indeed there is an ambiguity in Mr. Justice Evans' judgment because if by conduct he is speaking of evinced conduct, in other words, putting the rejection in its correct commercial setting, as would be objectively appreciated by the seller, I have no problem. But those of course are not facts which are material to this particular case.

59. In conclusion, I have to say that I find that particular case one which it is not at all easy to understand, but I comfort myself, first of all, that this is a Part 24 application and I do not have to reach a final conclusion if I think that there are arguments available to Petco which have a realistic prospect of success when fully researched and deployed; and, secondly, I see no reason to strive for a solution in a way which I suspect the judge did in the **Graanhandel** case, having regard to the fact that it was an appeal from a final award of a Board of Appeal, because in this case there is always the logical alternative of seeking a remedy in conversion.

60. So far I think I have dealt with the case advanced by Mr. Millett on the basis of the rejection being a bad one, but, as I think I indicated at the outset, Mr. Millett also relied on **Graanhandel** not only to support his case of there being no unequivocal rejection but also to support his alternative case of there being an affirmation. Affirmation I am not sure figured largely, if at all, in his skeleton argument, but certainly it was something which was entirely consistent, with respect, to the pleaded counterclaim in the passage which I have already quoted.

61. Whilst I see the attractiveness of the line of argument based upon affirmation, I think that for Part 24 purposes much stronger facts would be needed. Really for the same reasons that I advanced in relation to validity of rejection, there is nothing which convinces me that any argument that Petco did not affirm the contract is to be regarded as fanciful. The unqualified assertion of title vis-a-vis the vessel could well be said to be warranted tactically. In my view, that is not enough. Maybe if goods are taken and then disposed of as one's own within a short timescale it is possible that such case can be brought within the ambit of the very strong facts of **Graanhandel,** but here there are no facts presented to me which suggest that the oil did not remain in shoretank and available to Fal if need be for some time. For my part, I regret that I do not feel it necessary to strive for an artificial result having regard to the circumstance that conversion represents an obvious alternative remedy.

62. The upshot is, assuming that there was a right to reject, in my view there are issues which are appropriate to be determined at full trial, the issues being, (a) whether the rejection on the 24th/25th March was valid, and (b) even if it was, the contract was affirmed by Petco so as to preclude Petco doing other than paying the full price for the oil.

MR. AKKA: *Your Honour, I have spoken to my learned friend outside court and, in view of the fact Mr. Millett is not here, there will be no argument in relation to costs.*

There is one outstanding matter, and that is Mr. Dann's witness statement and, my Lord, we ask for an order that that be served. We are told that that can be served by next Friday, and we ask for an order in those terms.

HALLGARTEN J: *I will have to go back -- I had completely forgotten about this. This relates to the quality issue?*

MR. AKKA: *That relates to the quality issue. A date has not been fixed yet, as I understand it, for determination of that quality issue, and that is in progress.*

HALLGARTEN J : *That is in response to the late witness statement from? Just remind who the gentleman was?*

MR. AKKA: *His name was -- I cannot remember.*

HALLGARTEN J : *You cannot remember either. Anyway –*

MR. AKKA: *Mr. Sardana apparently.*

HALLGARTEN J : *Is there a problem about that?*

MR. O'SULLIVAN: *No. The solicitors have already agreed that next Friday is acceptable.*

HALLGARTEN J : *I am very happy with that. And how are we going to deal with matters further?*

MR. AKKA: *My Lord, there are two outstanding matters. One is the Part 24 application on the quality issue, and one is the case management conference. I think the current thinking is that they will be listed together. I have not spoken to Mr. Millett in any detail about it. I think his estimate was something of the order of two hours. But I have to say that is not something I have given great consideration to yet, but I will do that, and that needs to be listed. There is some debate as to whether that can be listed in September or October at the moment. I think there are no other directions necessary in the meantime. It may be that in light of your Honour's judgment the parties seek to amend their respective pleadings before then.*

HALLGARTEN J : *Yes. I leave it to you. For obvious reasons, if it is just a half day application, I would rather sit here, but I can come to the Commercial Court if need be, and so I leave the parties to deal with the logistics of that. I know I am away from Monday, the 9th to Monday, the 16th September inclusive, otherwise I cannot say what my movements are.*

MR. AKKA: *I think there have been some toings and froings with Commercial listing, but thank you for that indication.*

HALLGARTEN J : *One way possibly is to transfer it to my court and then, in so far as I am in your favour and there should be a trial transferred back to the Commercial Court for the trial, then plainly it ought to be in the Commercial Court.*

MR. AKKA: *Yes, I am sure some deal can be struck with Commercial listing so the hearing can take place here, if appropriate.*

HALLGARTEN J : *Thank you very much. We can work out the form of order at the moment, or can we? We are at a kind of halfway stage here, are we not? I suppose all I can actually do is produce declaratory relief. On this issue you have got permission to defend, but that would be a bit arid if, on the other issue, you do not, so maybe the answer is simply to adjourn the drawing up of an order.*

MR. AKKA: *Yes. We have your Honour's judgment and so we know that in effect we have permission to defend on that issue, and perhaps it is right that the best thing to do is to wait until September or October and see what happens –*

HALLGARTEN J : *And also reserve the costs, it seems to me to be appropriate, on the same basis.*

MR. AKKA: *Either reserve the costs or simply adjourn the question of costs.*

HALLGARTEN J : *It comes to the same thing, I think.*

MR. AKKA: *Yes. I am instructed, or I will be instructed, to ask for my costs, but Mr. Millett will no doubt have something to say about that in due course.*

HALLGARTEN J : *Obviously there is going to be an argument both ways if you fail on the second issue.*

MR. AKKA: *Yes.*

HALLGARTEN J : *And in the absence of Mr. Millett I would not in any event encourage it to be argued now, so I think I will reserve the question of costs to be dealt with at the adjourned hearing, but I might on that occasion likewise reserve costs to the trial judge, or, if necessary, determine it once and for all on that occasion.*

MR. AKKA: *Yes, that may be right.*

HALLGARTEN J : *So at this stage no order, and I do not think we even need to draw up a no order order, but simply note that I have given a kind of interim judgment, which will be reflected in the order when it comes back to me.*

MR. AKKA: *Yes, save that we do ask for that limited order in relation to Mr. Dann's statement by next Friday.*

HALLGARTEN J : *You probably do not even need -- if you want a formal order, that is fine, but I imagine it is agreed between the solicitors.*

MR. O'SULLIVAN: *My instructing solicitors have agreed. We do not see any need for a formal order.*

HALLGARTEN J : *If you want it reflected in a formal order, fine.*

MR. O'SULLIVAN: *We will not object if that is preferred.*

MR. AKKA: *I think we do, my Lord. I am asked to ask for an order.*

HALLGARTEN J : *All right. So at this stage, no order save that any further witness statement from Mr. Dann is served latest 4 p.m. next Friday, the 9th August.*

Mr. R. Millett and Mr. D. O'Sullivan(instructed by Messrs. Ince & Co.) appeared on behalf of the Claimant.
Mr. L. Akka (instructed by Messrs. Holman Fenwick & Willan) appeared on behalf of the Defendant.