

JUDGMENT : Mr Justice Langley: Commercial Court. 6th February 2002.

INTRODUCTION

1. The Claimant ("Fortune") is a Hong Kong Company. The share capital of Fortune is owned by an organ of the People's Republic of China (the PRC). Fortune claims under a Letter of Indemnity ("The LOI") dated 28 August 1997 issued by the Defendant ("Cosco-Feoso"). Cosco-Feoso is a Company incorporated in Singapore which carries on business as a trader in gasoil and fuel products. The LOI described Cosco-Feoso as the Seller and Fortune as the Buyer of a Cargo of 5000 metric tonnes of gasoil "pursuant to contract No. CF/PI 053/97 dated 01 August 1997 and shipped on board the vessel MY Freja Scandic at the Port of Pasir Gudang, Malaysia pursuant to B/L dated 03 August 1997".
2. The LOI was issued, on the basis that the Bills of Lading were not then available for negotiation, to obtain payment of the full price of the cargo, US \$915,000, under the terms of a Letter of Credit dated 26 August 1997 issued by the Yien Yieh Commercial Bank at the request of Fortune. The Letter of Credit named Cosco-Feoso as beneficiary and the Singapore branch of the Bank of China as the Advising Bank. It was expressed to cover shipment from Asian Seaport to Hainan, China, latest 10 September 1997.
3. Payment was made by the Yien Yieh Bank under The LOI through the Bank of China on 19 September 1997. The Yien Yieh Bank duly debited Fortune with the amount paid.
4. The gasoil was never delivered to Fortune. Nor were the Bills of Lading. The ultimate destiny of the cargo is unknown. Fortune had agreed with another Hong Kong Company, Pacific Fond Limited ("Pacific Fond") to finance the purchase of the cargo by arranging the issue of the letter of credit. The agreement ("The Financing Agreement") was dated 25 August 1997. Pacific Fond defaulted on the terms of the Financing Agreement.
5. Cosco-Feoso also issued a Letter of Indemnity dated 7 August 1997 to the owners of the Freja Scandic ("The Owners LOI") by which Cosco-Feoso requested the owners to deliver the same cargo of gasoil to Sinochem Hainan Co. Ltd at the Port of Sanya, Hainan, China without the production of the Bills of Lading and undertook to deliver the Bills to the owners as soon as Cosco-Feoso obtained them.

THE ISSUES

6. **THE LOI.** Fortune contends that Cosco-Feoso was in breach of the terms of The LOI in failing to transfer title and deliver the cargo to Fortune and in failing to "make all reasonable efforts" to obtain and surrender the Bills to Fortune.
7. **DECEIT.** Fortune also alleges that Cosco-Feoso is liable in deceit. The basis of this allegation is that by The LOI Cosco-Feoso represented that it had free title to and the right to possession of the cargo, that it was able to transfer title and possession to and effect delivery of the cargo and had the present intention of obtaining and surrendering the Bills of Lading to Fortune whereas in fact by reason of The Owners LOI Cosco-Feoso did not have free title to the cargo, nor a right to possession of it nor the capacity to transfer title in or effect delivery of it to Fortune, nor the present intention to obtain and surrender the Bills to Fortune.
8. **MONEY LENDING.** Cosco-Feoso contends that The Financing Agreement between Fortune and Pacific Fond was an illegal moneylending transaction within the meaning of the Hong Kong Money Lenders Ordinance (Chapter 163, 12 December 1980). On that basis it is contended that Fortune would not have been entitled to take delivery of the cargo or of the Bills or to become lawful holders of the Bills. On this issue expert evidence of Hong Kong law was given by Clifford Smith SC (instructed by Fortune) and Benjamin Chain, a Barrister (instructed by Cosco-Feoso).
9. **LOSS AND DAMAGE.** Fortune claims on two alternative bases. It claims, first, for the value of the cargo on the basis that it was entitled to the cargo or control of it and could have sold it or sued the shipowners for it in a claim to which there would have been no defence: *The Jag Shakti* [1986] 1 AC 337. The valuation has been a matter of expert evidence. Fortune relies on the evidence of Wang Hai Xia who is the head of consulting at the China Price Information Centre ("CPIC"). Miss Wang gave her evidence with the assistance of an interpreter. She speaks Mandarin. CPIC organises and co-ordinates price information published by the various pricing authorities in the PRC. Miss Wang's evidence was that the state-established wholesale price of gasoil at Sanya, Hainan during August/September 1997 was RMB 2,974 pmt (equivalent to US\$ 358.75) so that the wholesale price of the cargo would be 14,870,00 RMB or \$1,793,727.38 and that import duty, consumer tax, VAT and import agents fees would reduce the dollar value of the cargo to \$1,481,450.90. It is this sum which Fortune now claims. The figures as such are agreed with the exception of the agents fees which Miss Wang assumed to be 1% of the CIF value of the cargo, namely \$9150. The issues which arise on this claim are whether and if so how and at what cost Fortune (which did not have a licence to import gasoil into mainland China) could have sold the cargo and, even if it could, whether the state-controlled wholesale price is apposite. Cosco-Feoso relied on valuation evidence from Dr Paul McDonald, an oil market analyst and consultant.
10. The second way in which Fortune claims is for the sum reimbursed to the Yien Yieh bank namely \$915,000 paid by the Bank pursuant to the Letter of Credit.

THE FACTS

11. **FORTUNE AND MR SHENG.** The only witness of fact who gave evidence for either party was Mr Sheng Hua who is and was at the relevant times a Director of Fortune. Mr Sheng can read English. He gave his evidence with the

assistance of an interpreter. His first language is Mandarin. What follows is based on the documents and Mr Sheng's evidence.

12. Fortune carried on business as importers and exporters and in 1997 was engaged in particular in the purchase of goods overseas for import, usually through Hong Kong, into mainland China. Various goods were concerned such as electrical products, cars and cosmetics. The goods did not however include petroleum products. Mr Sheng's duties were to find and develop business opportunities for Fortune and to supervise the operation of the company.
13. **PACIFIC FOND AND MR YU.** Mr Sheng had known a Mr Yu Jianbin when Mr Yu had been Head of Department in the Ministry of Foreign Trade and Economic Corporation of the PRC and the superior of Mr Sheng. Mr Sheng said, and I accept, that he regarded Mr Yu as a good friend and trusted him. Mr Yu became a Director of Pacific Fond in about 1997. In the summer of 1997 Mr Yu told Mr Sheng that Pacific Fond was in business as an oil trader and had the opportunity to buy oil from Cosco-Feoso which it could sell at a reasonable profit in the PRC, but Pacific Fond did not have enough banking facilities and had cash flow problems which meant it might not be able itself to complete the deal. Mr Yu asked whether Fortune would help by arranging a letter of credit for the price of the oil.
14. To quote Mr Sheng's witness statement (paragraph 11): "*since Mr Yu was my good friend, I wanted to help him solve his problem. Furthermore, I considered that helping Mr Yu could be a good opportunity for Fortune to enter into the oil trading business*"
15. **THE FIRST FINANCING AGREEMENT.** Mr Sheng obtained the agreement of another director of Fortune to the transaction and insisted on a formal agreement between Pacific Fond and Fortune. That agreement was dated 28 July 1997. It was the first financing agreement between Fortune and Pacific Fond and the immediate predecessor of and identical to the Financing Agreement which gave rise to the present claim.
16. Mr Yu also gave Mr Sheng a copy of a Sale Agreement dated 28 July between Cosco-Feoso as seller and Pacific Fond as buyer in order to satisfy Mr Sheng about the transaction. This Agreement was for the sale of 5000 mt + or - 10% of Gasoil at a price of US\$ 183 pmt CIF Hainan China.
17. The relevant obligations of Pacific Fond pursuant to the 28 July Financing Agreement were:
 - a) To pay 20% of the value of the Letter of Credit in advance as a deposit before the Letter of Credit was opened.
 - b) To remit the balance of the amount of the Letter of Credit two days before the Letter of Credit was paid and in default Fortune was "entitled to forfeit the deposit and the cargo under the said Letter of Credit as well as claim damages from" Cosco-Feoso.
 - c) To pay 2½% of the value of the Letter of Credit as "agent fee".
18. Under this first agreement, Pacific Fond paid the 20% deposit and a further substantial sum on 25 August leaving a balance due of some US\$ 37,000 at that date.
19. **THE SECOND AGREEMENT AND THE LETTER OF CREDIT** Mr Yu then sought help from Fortune with the transaction which has led to these proceedings. The Financing Agreement dated 25 August was completed in the same terms, and the next day the Yien Yieh Bank issued the Letter of Credit. Mr Yu asked Mr Sheng if the 20% deposit could be paid later. Mr Sheng agreed as payment of the large part of the first agreement had just been made. The Letter of Credit had as an attachment to it the form of the Letter of Indemnity required from Cosco-Feoso in the event that the original Bills of Lading were unavailable for negotiation.
20. **THE LETTER OF INDEMNITY.** The LOI dated 28 August was signed by Cosco-Feoso and addressed to Fortune. It provided (so far as material) that:

"We refer to a cargo of 5,000.000 mt of gasoil sold by us to you pursuant to contract No. CF/PI 053/97 dated 01 August 1997 and shipped aboard the vessel MY Freja Scandic at the port of Pasir Gudang, Malaysia pursuant to B/L dated 03 August 1997.

Although we have sold the cargo to you, we have been unable to provide you with the original Bills of Lading and the shipping documents covering the said sale.

In consideration of your paying to us the full purchase price of US\$ 915,000.00, we hereby warrant that we have title free and clear of any lien or encumbrance to such material and having the full right and authority, we herewith transfer such title and to effect delivery of same to you.

We further agree to make all reasonable effort to obtain and surrender to you as soon as possible the original Bills of Lading and other shipping documents and to indemnify, protect, and hold you harmless from any all cost ... claims, losses, damages, demands and any consequences or expense which you may suffer, incur or put to as a [re]sult of not having received such document or breach of the warranties given above, including but not limited to any claims and demands which may be made by a holder or transferee of the original Bills of lading or by any other third party claiming an interest in or lien on the cargo or proceeds hereof.

This Indemnity shall be governed and construed in accordance with the laws of England and to the exclusive jurisdiction of the English High Courts.

This Letter of Indemnity shall expire automatically and simultaneously with your receiving the original Bills of Lading and other shipping documents in full conformity with the Letter of Credit"

21. **THE BILL OF LADING.** The papers include a copy of an original Bill of Lading for a cargo of 5000 tonnes of gasoil loaded on the Freja Scandic dated 3 August 1997 and for destination Sanya, Hainan. Cosco-Feoso is named both as Shipper and Consignee. Cosco-Feoso was also the Charterer of the vessel under a charterparty dated 23 July 1997.
22. **THE OWNERS LOI.** The Owners LOI dated 7 August covered the same cargo and a further 5196.768 mt of gasoil shipped on the Freja Scandic. It requested the owners to deliver the cargo to Sinochem Hainan Co Ltd at Sanya, Hainan, and Cosco-Feoso agreed:
"As soon as all original Bills of Lading for the above goods shall have arrived and/or come into our possession to produce and deliver the same to you whereupon our liability hereunder shall cease."
23. **THE THIRD AGREEMENT.** Also on 26 August Mr Sheng agreed to a third transaction of substantially the same nature.
24. **THE LOAN.** On about 15 September Mr Sheng agreed at Mr Yu's request to lend Pacific Fond HK\$ 3,350,000. Mr Yu offered to repay the money with interest on 18 September. Mr Sheng declined to accept any interest.
25. **PAYMENT BY FORTUNE.** Cosco-Feoso did not present the Bills but the signed LOI under the Letter of Credit. Mr Sheng and his assistants (together with the Bank) considered the LOI and on 19 September the Bank made payment and debited Fortune US\$ 915,000 accordingly. No Bill of Lading was ever provided to Fortune in accordance with The LOI.
26. **PAYMENTS BY PACIFIC FOND.** Pacific Fond made various payments to Fortune in December 1997 and January 1998. The amount and allocation of the payments is not in dispute. They were sufficient to pay the outstanding balance under the First Financing Agreement, The Loan, and part of the 20% deposit (HK\$ 912,494 or US\$ 117,000) under the Second Agreement. Mr Sheng said that Mr Yu agreed at the time of the January payment that if Pacific Fond did not pay the outstanding sums shortly the payment towards the deposit would be confiscated. The Financing Agreement provided that Fortune had a right to forfeit the deposit.
27. Mr Sheng was unable to contact Mr Yu from and after about July 1998. No further sums were paid. The present proceedings were commenced at the end of July 1998.
28. **THE SINGAPORE PROCEEDINGS.** Pacific Fond made no payments under the Third Agreement. The cargo was loaded on the "Neptra Premier" and was discharged at Sanya on 15 September 1997 without production of the Bill of Lading. Cosco-Feoso presented a LOI to obtain payment under the Letter of Credit. Fortune did subsequently receive the Bill of Lading for this cargo but could not take delivery of it as it had been delivered to a third party. Fortune brought proceedings against the shipowners in the High Court of Singapore. The shipowners joined Cosco-Feoso as a Third Party claiming under a LOI in their favour. It was in the course of disclosure in these proceedings that the Owners LOI and the fact that the cargo concerned in the present proceedings had been delivered to Sinochem on 7 August 1997 came to Fortune's notice.
29. The claims were heard in Singapore by Kan Ting Chiu J. Judgment was delivered on 15 August 2001. Counsel for the shipowners stated that he could see no defence to Fortune's claim made as holders of the Bill of Lading. Cosco-Feoso, however, disputed both its own and the owners' liabilities on a number of grounds including the same moneylending defence as it relies upon in these proceedings. The Judge gave judgment for Fortune against the owners and the owners against Cosco-Feoso. He decided that Fortune was not carrying on a moneylending business within the meaning of the Ordinance and in any event would have been entitled to succeed because within the meaning of section 23 of the Ordinance it would be inequitable to deny Fortune recovery. The decision has been appealed.

LIABILITY

30. Mr Russell was frank enough to acknowledge that Cosco-Feoso's defences to the claim were not overburdened with merit. In my judgment they are also wrong.
31. **DECEIT.** I accept of course that it would be wrong to find that fraudulent misrepresentations were made by Cosco-Feoso as alleged unless fully satisfied that such a case had been established. Further, in terms of the overall outcome, a finding of fraud would only be material if Fortune was to fail in its claim for an indemnity under The LOI. That is because Mrs Blackburn accepts, rightly in my judgment, that the only loss recoverable by Fortune as a result of the alleged misrepresentations made in the LOI is the amount (\$915,000) paid under the Letter of Credit. If those misrepresentations had not been made, the Bank would not have paid under the Letter of Credit and Fortune would not have become entitled either to the cargo or the bill of lading.
32. Mr Russell submits first that no representations were made by Cosco-Feoso but only Mr Yu. But I think they were by means of the LOI. Mr Russell submits, second, that on the true construction of the LOI, the representations alleged are not made out. He submits that the third paragraph of the LOI (which is not as clearly worded as it might be) is open to two possible constructions: (i) that Cosco-Feoso is effecting delivery of title to Fortune by means of the LOI or (ii) that Cosco-Feoso is warranting that it will deliver the cargo to Fortune. Despite his submissions, I think the first of his alternatives makes no sense at all either commercially or legally. "Title" is not "delivered" in any normal use of language. It can be transferred but the words of the LOI expressly provide for that. His second alternative is in my judgment plainly what was intended. The words can and should be read as a warranty to deliver the cargo to Fortune.

33. Mr Russell further submits (rightly) that by the fourth paragraph of The LOI Cosco-Feoso did not warrant that it would transfer the original bill of lading to Fortune but only that it would make all reasonable efforts to obtain and surrender them to Fortune. However, not only does the indemnity itself bite on losses incurred as a "(re) sult" of Fortune not receiving the bills (whether or not Cosco-Feoso had made "reasonable efforts" to get them) but I think by the warranty and the terms of the LOI as a whole Cosco-Feoso plainly did make the representations on which Fortune relies (paragraph 7).
34. Next Mr Russell submits the court should not conclude simply on the basis of the earlier Owners LOI that the representations were misrepresentations and known by Cosco-Feoso to be so. But the inevitable inference is that, with effect from 7 August, Cosco-Feoso not only granted rights in the cargo to others but had put the cargo beyond at least its immediate control. Moreover it had agreed to deliver the Bills of Lading to the shipowners as soon as it got them (paragraph 22). Mr Russell submitted that Cosco-Feoso could have met its obligations to the shipowners by Fortune tendering the Bills to them. But that is not what either LOI contemplates or requires.
35. In my judgment Fortune has made out its case. There is, of course, no evidence from Cosco-Feoso to gainsay it.
36. Finally Mr Russell submits there is no evidence that Fortune relied on the representations. That is indeed a remarkable submission. The LOI was Fortune's and Mr Sheng's security. The Letter of Credit would not have been paid without it. It was to obtain that payment that Cosco-Feoso issued the LOI. The Bank (and indeed Fortune) checked it as would be expected. The fact that Mr Sheng expected Pacific Fond to honour the Financing Agreement does not mean that Fortune did not rely on the LOI. It did.
37. Fortune is, in my judgment, and subject to the moneylending issue, entitled to succeed in its claim on this basis. The quantum of the claim (save that it cannot exceed \$915,000) and interest upon it is considered later in this judgment.
38. **INDEMNITY.** Subject also to the moneylending issue, Fortune is entitled to succeed in its claims under The LOI. Cosco-Feoso did not effect delivery of the cargo to Fortune and Fortune has suffered loss because it did not receive the Bills of Lading. In either case Fortune would have been entitled to the cargo or its value at the port of Sanya.

MONEYLENDING

39. There is no dispute that the Financing Agreement concerned a "loan" by Fortune to Pacific Fond within the meaning of the Ordinance. The basic prohibitions to be found in the Ordinance are in sections 7 and 23. Section 7 provides that "*no person shall carry on business as a moneylender ... without a licence.*" Fortune did not have a licence. The Ordinance defines "moneylender" as a:
"person whose business (whether or not he carries on any other business) is that of making loans...."
40. Section 23 provides:
"No moneylender shall be entitled to recover in any court any money lent by him ... or to enforce any agreement made or security taken in respect of any loan made by him unless ... at the date of the loan ... he was licensed. Provided that if the court is satisfied that in all the circumstances it would be inequitable if a moneylender who did not satisfy it that he was licensed at the relevant time was thereby not entitled to so recover such money ... the court may order that the moneylender is entitled to recover such money ... to such an extent and subject to such modifications or exceptions as the court considers equitable."
41. Fortune also relied on paragraph 5 of Part 2 of Schedule 1 to the Ordinance which provides for certain loans to be exempted from the provisions of the Ordinance. Because of my other conclusions on the Ordinance I do not see the need to address that issue, albeit I would express reservations as to whether had it been necessary to do so it would have assisted Fortune.
42. I have, as stated, had the benefit of the expert opinions of Mr Smith and Mr Chain on this issue, albeit both acknowledged that the questions to which the Ordinance gives rise are substantially ones of fact for the court.
43. The first difficulty for Cosco-Feoso, however, is one substantially of law. It is well-established that a court will not concern itself with illegality affecting an underlying contract unless the Claimant has to rely on that contract or itself asserts illegality in support of its claim: *Bowmakers Limited v Barnet Instruments Limited* [1945] KB 65; *Tinsley v Milligan* [1994] 1 AC 340. Fortune does not need to rely on or allege any loan to Pacific Fond to make its claims against Cosco-Feoso. It relies on fraudulent misrepresentation and the LOI.
44. Further and in any event I am quite satisfied on the evidence and the authorities referred to by Mr Smith that Fortune was not carrying on business as a moneylender within the meaning of the Ordinance. Mr Smith quotes from *Newton v Pyke* (1908) 25 T.L.R. at 128 per Walton J:
"It is not enough to show that a person has on several occasions lent money at remunerative rates of interest; there must be a certain degree of system and continuity about the transactions"
45. The evidence is that Fortune caused to be issued three letters of credit and made one loan (at no interest) to one company (Pacific Fond) and no more. I accept Mr Sheng's evidence that his purpose was to help a friend and to obtain information about and introduction to oil trading as a potential source of business for Fortune. That, in my judgment, is not sufficient to establish that Fortune was carrying on business as a moneylender.
46. I am also satisfied that this is a case where, even if a court were to decide that Fortune was carrying on business as a moneylender and was otherwise in breach of section 23, it would, without hesitation, apply the proviso to

that Section to enable Fortune nonetheless to recover such losses as it could prove from Cosco-Feoso. The reasons are, I think, obvious. Mr Smith has stated them. Cosco-Feoso has received Fortune's money; not Pacific Fond. It has done so only in return for promises (The LOI) which I have held amounted to fraudulent misrepresentations. There has been no prejudice to Cosco-Feoso as a result of any moneylending. All parties negotiated on equal terms. There were no exorbitant charges; had the transaction been successfully completed Pacific Fond would have paid about \$23,000 (2½%) for Fortune risking \$915,000 over 30 days. There was no deliberate disregard of the Ordinance. It would in these circumstances indeed be inequitable if the Ordinance were to operate in favour of a third party such as Cosco-Feoso which has received value on the strength of its LOI.

47. Mr Chain's opinion to the contrary appeared to be founded on the view that the proviso allowed only for the Court to cater for cases where there was a slip on the part of the moneylender to renew a licence in time or other similar "innocent" mishaps. I see no warrant for such a restricted reading in the words of the Ordinance; to the contrary. Mr Chain also did not suggest there was any authority which supported his view and I reject it. It also follows that I respectfully agree with the judgment of Kan Ting Chiu J (paragraph 29).

LOSS AND DAMAGE

48. There are some dates and figures which are either agreed or indisputable on the evidence:
- a) The amount paid under the letter of credit and so debited to Fortune by the Bank was US\$ 915,000. That occurred on 19 September 1997. It was on that date also that Cosco-Feoso's obligations under The LOI arose.
 - b) The amount due from Pacific Fond under The Financing Agreement was US\$ 937,875 made up of \$915,000 and the handling fee of 2½%. Strictly those sums should also have been paid in full on or before 19 September. In the event only \$ 117,000 (paragraph 26) was paid against this amount.
 - c) The state-established wholesale price for gasoil of the relevant quality at Sanya, Hainan in August/September 1997 was RMB 2,974 pmt (US\$ 358.75). That price applied only after the gasoil had been imported into mainland China. In order to import it, import duty, consumer tax and VAT would be payable as well as agents' fees of 1% for "importing formalities". After payment of those obligations the net wholesale value of the cargo in US\$ would be 1,481,450.90. This is the sum which is the basis of Fortune's primary claim under The LOI.
 - d) The evidence of what may be called "the international price" of gasoil CIF Singapore or Malaysia is the agreed price of the cargo itself and the evidence of Cosco-Feoso's expert, Dr McDonald. Both support a price of \$183 pmt. It is an obvious but nonetheless significant comment that this price demonstrates that the state-controlled wholesale price in China was very substantially in excess of and almost double international prices.
 - e) Miss Wang's evidence was not very easy to follow. That was partly because of difficulties of interpretation and partly because, as she readily and properly made clear, she could not speak from her own experience on matters involving import licences and how an importer or cargo owner without a licence could go about obtaining and disposing of a cargo in China. She was reliant on what others had told her for such answers as she gave on those matters. What was clear, however, is that no one could import gasoil into China without a licence to do so (which Fortune did not have) and that the internal market was closely controlled by the State both by way of quotas and prices.
49. Beyond the matters which I have stated in the preceding paragraph there is some real uncertainty. Miss Wang's statements and the way Fortune opened its case suggested that the lack of an import licence could have been surmounted either by a sale by Fortune to a company which had such a licence or by re-exporting the cargo from Sanya. In his evidence Mr Sheng said that he could have sold the cargo "through" a company which had an import licence (on paying a management fee) and then sell it on at the controlled wholesale price. Miss Wang said Fortune could have sold it at the controlled wholesale price to a company with a licence. Whilst I do not mean to imply that I thought either Mr Sheng or Miss Wang were in any way being untruthful, I do not think either of them was qualified to express these opinions nor that when examined the opinions support Fortune's primary case. It would make no commercial sense for any company with an import licence and quota to pay Fortune a price in excess of the international CIF price for gasoil at Sanya when it could import itself at that price and sell on at a handsome profit. Equally I can think of no sensible reason why and no evidence has been adduced to show that such a company would assist Fortune to obtain that profit by use of its valuable quota and import licence in return only for a fee, let alone a 1% fee as Fortune submitted (but the evidence did not support). In recognition, I think, of this reality Mrs Blackburn suggested that the court should infer that one state organ (such as Sinochem) would for one reason or another have bailed out another state organ (such as Fortune) which found itself unhappily entitled to a cargo at Sanya but unable to import or sell it. There is no evidential basis on which I could draw such an inference and I decline to do so.
50. There are a number of relevant principles of law which can, I think, be shortly stated. They derive substantially from the decisions of the House of Lords in *Williams Brothers v Agius* [1914] AC 510 (in particular Lord Dunedin at page 523) and *The Texaco Melbourne* [1994] 1 Lloyd's Rep. 473 (in particular Lord Goff at page 479).
51. Mr Russell submitted that the sale by Cosco-Feoso referred to in The LOI and Invoice was a "sham" and the only loss in the reasonable contemplation of the parties likely to be suffered by Fortune was the loss of the money actually expended by Fortune. Alternatively he submitted that the same result followed from application of the principles said to be found in *Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 WLR 295 namely that whilst the prima facie measure of damages in conversion is the value of the goods at the date of conversion that does not apply where the claimant only has a limited interest in the goods. I reject both these submissions. The LOI

itself was plainly intended to acknowledge Fortune's interest in and title to the cargo. The decision in *Wickham Holdings* is I think limited to the peculiarities of hire-purchase. In the present context, *The Jag Shakti* leaves no room for its application.

52. The principles which are in my judgment applicable are:
- a) The measure of damages is such sum as will put Fortune in the position it would have been had the cargo of gasoil been delivered to it.
 - b) Fortune is therefore entitled to the value of the cargo at the time when and the place where (Sanya) it should have been delivered to it.
 - c) If there was then an "available market" for the cargo at Sanya that is the value to be taken. If there was no available market then the court must do the best it can to put a figure on the value on such evidence as is available to it.
 - d) The value at the port of discharge is to be reduced by any sums the claimant would have to pay in order to get the cargo so as to be able to realise its value.
 - e) The market value (where there is one) is to be taken independently of "circumstances peculiar to the claimant" and so, for example, independently of any contract he may have made to sell the cargo whether that be at a price greater or less than the market value.
53. It is Mrs Blackburn's submission that there was an available market at Sanya for gasoil which valued the cargo at the state-controlled wholesale price. She further submitted that Fortune's lack of an import licence was a "circumstance peculiar" to Fortune and so to be ignored. On the evidence I have grave doubts as to the first submission (see Benjamin's Sale of Goods, Fifth Edition, para 16-060) but the second is in my judgment wrong. The consequence of not having an import licence plainly relates to the position in which Fortune would have found itself had it obtained the cargo at Sanya and (on Fortune's own evidence) the costs it would have had to incur in order to be able to realise its value. The need for licences was a feature of the "market" not a circumstance peculiar to Fortune. The only "market" (even if such is an appropriate word) for Fortune would have been those (if any) who had a licence and who were either prepared to permit Fortune to sell "through" them or would buy the cargo from them. As I have already indicated, I am simply not satisfied on the evidence and Fortune has failed to prove that even if some such arrangement was possible it would have produced a sum for Fortune greater than the international CIF value.
54. In my judgment, however, the correct approach is, as Mr Russell submitted, to seek a value for the goods on the basis that Fortune had sought to obtain the very thing to which it was entitled, namely a cargo of 5000 mt of gasoil on board ship or held to the ship's order at the port of Sanya. That, I think, is the or the most relevant market. It is also the "place" where Fortune was entitled to delivery. The evidence is that such a cargo could have been acquired in the international market at the price of \$183 pmt. The result is therefore the same whichever measure is followed and whether Fortune's claim is made in deceit or under The LOI.
55. It follows that in my judgment the correct primary figure to take for Fortune's loss is US\$ 915,000.
56. There remains the question whether the payment of \$117,000 by Pacific Fond (paragraph 26) falls to be deducted from the \$915,000 as Mr Russell submits it should be. I do not think it should. Fortune was entitled to the cargo. Its arrangements with Pacific Fond were a "circumstance peculiar" to it in the same sense as on-sales. Those arrangements might have given rise to an obligation of repayment or to account; in fact they entitled Fortune both to the cargo and to forfeit the deposit. Either way I do not think Cosco-Feoso can benefit from them: see also *The Jag Shakti*.
57. **INTEREST.** Interest should run from the date Fortune were debited by the Bank namely 19 September 1997. Mr Russell wisely did not pursue the submission that because Mr Sheng said he was prepared to wait for Pacific Fond to pay the balance under The Financing Agreement interest should only run from January 1998 when his patience ran out.

CONCLUSION

58. Fortune succeeds in its claims. However approached the loss is US\$915,000 and interest is payable from 19 September 1997. Fortune is entitled to judgment accordingly and, unless agreed in advance, I will hear the parties on the rate of interest and the form any order should take when this judgment is formally handed down.

Mrs E. Blackburn QC and Mr T. Hill (instructed by Messrs Sinclair Roche & Temperley for the Claimant)
Mr J. Russell QC and Mr P. Ferrer (instructed by Clyde & Co for the Defendant)