TCL Industries (Malaysia) Sdn Bhd v ICC Chemical Corp
[2006] SGHC 88

Case Number : Suit 24/2005

Decision Date : 30 May 2006

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Simon Jones (instructed), Diana Ho and Yeow Shihua (Wee Swee Teow & Co) for the plaintiff; Mark Lim and Leong Kit Wan (Tan Peng Chin LLC) for the defendant

Parties : TCL Industries (Malaysia) Sdn Bhd — ICC Chemical Corp

Contract – Contractual terms – Express terms – Whether failure to fulfil contract beyond defendant's control – Whether amendment contract replaced original contact – Whether defence of force majeure applicable

30 May 2006 *Judgment reserved.*

Lai Siu Chiu J:

1 This was a claim for breach of contract by the plaintiff, TCL Industries (Malaysia) Sdn Bhd, against the defendant, ICC Chemical Corporation. As its name suggests, the plaintiff is a Malaysian-registered company. It is engaged in the manufacture of petrochemicals at its plant that is situated at Kemaman, Trengganu ("the plaintiff's plant"), on the east coast of the Malayan Peninsular. The defendant is an American company and is involved in the trading and distribution of chemicals. It is part of the ICC Industries Inc group of companies whose headquarters are in New York. The defendant's office is also in New York.

2 At the material time, the plaintiff had a representative in Singapore in a company called Ranson Pte Ltd whose director was Amirtham Mohan ("Mohan"). The defendant, too, had an agent in Singapore in a company called Moraka Pte Ltd ("Moraka") whose managing director-cum-shareholder was, and still is, Venkatesh Raman ("Raman"). Moraka ceased to be the Singapore agent of the defendant in end 2003 or early 2004. It was replaced by Chemlink Asia-Pacific, which was represented by KP Song.

3 The plaintiff's president, SVS Rama Raju ("Raju"), was the person who authorised Mohan to negotiate contracts on the plaintiff's behalf while the person who authorised Raman to negotiate contracts on the defendant's behalf was Chiragh Sareen ("Sareen"), who was/is the defendant's international product manager. As at September 2005 (when he affirmed his affidavit of evidence-in-chief), Sareen claimed to have had 14 years' experience in the trading of chemical commodities. Prior thereto, he had worked in Singapore for two to three years as a product manager for a petrochemical trading corporation.

4 Between December 2000 and 4 July 2003, Mohan and Raman negotiated a total of six contracts on behalf of their respective principals, for the supply of benzene ("the product") by the defendant to the plaintiff. The first five contracts encountered no problems. The sixth contract, which is the subject matter of this suit, was for the sale of 3,000mt ("the cargo") of the product by the defendant to the plaintiff at a price of US$387 per mt. The plaintiff's plant utilises the product to manufacture maleic anhydride ("MA") that is used to make paints, unsaturated polyester resins and certain food products. The plaintiff's plant produces MA both as solid briquettes and in its molten or

liquefied form.

5 According to the plaintiff, the sixth contract was concluded orally between Mohan and Raman on the evening of Thursday, 3 July 2003 and later evidenced in a sales confirmation dated 7 September 2003 numbered 3S4238 (the "disputed contract"). The plaintiff alleged that the defendant agreed to deliver the cargo at the port of Kuantan, state of Pahang, Malaysia, before the second half of August 2003. However, the defendant only delivered a shipment of 1,949.23mt of the cargo on or about 11 September 2003 leaving a shortfall of 1,050.77mt ("the balance cargo").

6 Protracted negotiations then took place between the parties. First, the plaintiff was promised that the balance cargo would be delivered. Subsequently (on or about 24 May 2004), the defendant promised to compensate the plaintiff for the balance cargo. Later, the defendant claimed that the balance cargo could not be shipped due to the unavailability of shipping space. The defendant also claimed the plaintiff had waived delivery of the balance cargo. Still later, the defendant alleged that the balance cargo had been subsumed in a new contract agreed between Mohan and Sareen on 19 August 2003, for 2,000mt of the product.

7 In October 2003, the plaintiff notified the defendant that the delay in delivering the balance cargo caused it to suffer production loss and it demanded delivery. The plaintiff's plant was allegedly shut down for eight days as a consequence of the non-delivery. In the event, the balance cargo was never delivered to the plaintiff. As the price of the product rose beyond the contract price after 25 August 2003, the defendant would have suffered a loss had it delivered the balance cargo.

The pleadings

8 In the statement of claim, the plaintiff alleged that it suffered a loss of US$539,045.01 as a result of the defendant's failure to deliver the balance cargo, based on the following computation:

	US$
Current price of 1,050.77 MT of Benzene calculated @ US$900.00 per MT	945,693.00
Less: Priced contracted with Defendants [@ $387.00 per mt x 1,050.77]	(406,647.99)
Loss suffered by Plaintiffs	**US$539,045.01**

The plaintiff also claimed damages.

9 The defendant's various defences have been briefly referred to earlier in [6] above. In the (re-amended) defence, it was alleged that the defendant was not liable for late delivery if the cause of the delay was wholly beyond the defendant's control and or not attributable to any negligence on its part. The defendant relied on cl 6 of the disputed contract for this defence. The clause stated that dates of shipment and delivery were approximate only. The defendant denied owing the plaintiff the balance cargo. The defendant further alleged that the plaintiff failed to mitigate its loss by not taking steps to procure the balance cargo from other suppliers, even though the market price was

comparable to the contract price. The defendant identified contract numbered ICC-3S42381A, dated 19 August 2003 ("the amendment contract") as the replacement for the disputed contract. As the amendment contract was for 1,900mt, the defendant claimed it had fully discharged its contractual obligations.

10 In its reply, the plaintiff contended that the defendant had admitted that it only commenced looking for a vessel on or about 9 July 2003, at which date it did not have the cargo for shipment. Even then, the plaintiff had accepted the defendant's nomination of the motor tanker, *Madonna* ("the *Madonna*"), as the carrier for part of the cargo. The plaintiff averred that the amendment contract was never sent by the defendant or communicated to the plaintiff in any way. The plaintiff alleged that the amendment contract was neither genuine nor a contemporaneous document.

The evidence

The plaintiff's case

11 Both Raju (PW2) and Mohan (PW1) testified for the plaintiff. Raman also testified but not for the plaintiff; it was the defendant that subpoenaed him. Sareen (DW1) was still in the witness box being re-examined when the trial was adjourned. Sareen chose not to return to Singapore to complete his testimony before the defendant closed its case, despite the court's attempts to accommodate his schedule.

12 Mohan delved into the history of the five earlier contracts to show the pattern of trading between the parties and to counter the contentions raised by Sareen on the defendant's behalf. In his first affidavit (filed to support the defendant's application to stay proceedings in Singapore which was unsuccessful) Sareen had alleged that although they were representatives of the plaintiff and defendant respectively, neither Mohan nor Raman were authorised to conclude contracts. Sareen deposed that Raman could not conclude contracts without the express written consent of the defendant in New York.

13 Mohan rebutted Sareen's claims, pointing out that in four of the five previous contracts, he and Raman dealt exclusively with one another and concluded oral contracts, without any input from the plaintiff's or the defendant's representatives (including Sareen). Mohan referred to correspondence (e-mail exchanges) between himself and Raman to support his testimony.

14 Mohan recalled only one occasion (in October 2002) when he spoke to Sareen over the telephone while Raman and Sareen were in Seoul, South Korea. Other than that, Mohan had neither spoken to nor corresponded with Sareen in relation to concluding contracts between the parties. That telephone conversation was the only time Sareen was involved in negotiations; Mohan recalled Sareen obtained an increase from him of US$0.50 in the price of US$359 per mt for 3,000mt of the product under the fifth contract. Mohan met Sareen once, when Raman brought Sareen to Mohan's office in Singapore for a courtesy call. Mohan denied Sareen's claim that Sareen had telephoned him to object, on at least three to four occasions after the plaintiff had returned to the defendant the signed sales confirmations, to substituting Singapore law as the applicable law and Singapore for New York as the venue for arbitration. Mohan added that because of the late arrival of the shipment under the fifth contract (arriving in Kuantan on 30 December 2002 instead of 12 December 2002), the plaintiff delisted the defendant from its suppliers' list for the first six months of 2003.

15 For each of the five previous contracts, the plaintiff issued purchase orders to the defendant and these were followed by the defendant's sales confirmations (which the plaintiff signed and returned) for the third, fourth and fifth contracts. These three sales confirmations had as a footnote

the words:

> Please sign and return one copy immediately. Failure to do so may at Seller's option invalidate this contract.

The significance of the above words will become apparent later.

16 Mohan detailed the chronology of events leading to the conclusion of the disputed contract. In late June or early July 2003, Raman contacted him when Mohan was sourcing for alternative suppliers of the product. Raman offered Mohan a parcel of 3,000mt at US$389 per mt. Mohan advised Raman to obtain a letter from the defendant explaining the reasons for the delay in shipment for the fifth contract.

17 Mohan received via e-mail at 1625 hours that afternoon, Raman's offer of the cargo at US$389 per mt valid up to 1200 hours Singapore time. Mohan negotiated with Raman that same evening and eventually reached an agreement as reflected in Raman's e-mail dated 4 July 2003 to Mohan, which was received at 9.01am. The price was stated as US$387 per mt with delivery being made some time between 15 to 25 August 2003.

18 By an e-mail dated 4 July 2003 to Raman (which was copied to the plaintiff), Mohan confirmed that the shipment schedule would be 15–20 August 2003 but indicated 10–15 August 2003 would be preferred. Mohan reminded Raman to secure from the defendant the letter (which Raman had indicated would not be a problem) explaining the delay in shipment of the fifth contract.

19 On 10 July 2003, Mohan received an e-mail from Moraka's staff (Ms Santhi) with an attachment which was the defendant's sales confirmation numbered ICC-3S4238 ("the sales confirmation") followed by a facsimile copy that same morning signed by the defendant. Mohan refaxed the facsimile copy in turn to the plaintiff. On 11 July 2003, the sales confirmation duly signed by Raju was faxed by the plaintiff to Moraka, with certain amendments. Next to the shipment schedule, Raju had written the words, "Every effort will however be made for ETA Kuantan 10 to 15th August 2003." Next to the word "benzene", Raju had written "ASTM D 2359". ASTM referred to the American Society of Testing and Materials standard. Raju had cancelled out "New York" and replaced it with "Singapore" as the governing law under cl 14 of the sales confirmation.

20 The letter from the defendant explaining the delay in the fifth shipment never materialised. Indeed (according to Mohan), the defendant subsequently attempted to use the plaintiff's request for such a letter as an excuse to cancel the disputed contract. Instead, Mohan took it upon himself to write to the plaintiff on 7 July 2003 requesting that the defendant be restored as a supplier of the product.

21 To Mohan's surprise, he received an e-mail on 11 July 2003 from Raman stating that Raman's "management" did not wish to proceed with the disputed contract for the reason that the plaintiff had refused to sign the defendant's contract. Mohan telephoned Raman pointing out that there had been no real delay with regards to the sales confirmation and that the signed sales confirmation (which Mohan had sighted) would be faxed to Raman immediately that day.

22 Meanwhile, as in the case of the five earlier contracts, the plaintiff issued a purchase order dated 12 July 2003 for the disputed contract, which was faxed to Mohan on the same day, who faxed it in turn to Raman.

23 On 14 July 2003, Raman e-mailed Mohan to state that as the plaintiff had changed the arrival

dates and arbitration venue, the defendant would not accept the disputed contract. Mohan felt that the defendant was attempting to renege on the disputed contract using the change of terms as a pretext, noting that the terms of the sales confirmation for the third, fourth and fifth contracts had been similarly changed by the plaintiff without objection from the defendant. Even so, Mohan decided he would not threaten the defendant with legal proceedings. Instead, he invited Raman for lunch and managed to persuade Raman to honour the disputed contract.

24 On 17 July 2003, Mohan received Raman's e-mail advising that "we will be delivering the cargo 2nd half of August" to which Mohan immediately replied, thanking Raman and emphasising that delivery at any earlier time would be most welcomed.

25 On 28 July 2003, Mohan was advised by Raman in an e-mail that he was still working to fix a vessel and that he had cargo in India or Korea. Raman suggested that Mohan buy another load of cargo for earlier arrival as the defendant's cargo would not be delivered by end August.

26 On 4 August 2003, Mohan sent Raman a gentle reminder that he (Mohan) was still waiting for the nomination of a carrier. Raman replied promptly that he was still working on the matter and inquired when the plaintiff would open a letter of credit for the disputed contract. Mohan replied that the letter of credit could only be opened after a carrier had been nominated; the requisite information for opening of the letter of credit included the port of loading and the estimated arrival date of the carrier. Raman reverted on 6 August 2003 to say he was waiting to hear from Reliance Industries Ltd ("Reliance"), a producer of the product from India.

27 After Mohan pressed him again for a vessel nomination, Raman advised on 8 August 2003 that Reliance would only supply 2,000mt of the product and that it would not be delivered until some time between 13 to 17 September 2003. Mohan reminded Raman that the balance cargo was still outstanding. Prices of the product had steadily risen since July 2003. The plaintiff had produced (at 1AB347) a Chemcross information report which showed that the price of the product free on board ("FOB") Korea was US$485 to US$500 per mt in September 2003. The defendant produced Platts reports which showed that the price of the product (depending on its source in Asia) hovered around US$435 to US$445 per mt for October 2003 for FOB shipments.

28 On 9 August 2003, Raman replied that he would let Mohan know about the nomination of a carrier and would revert on the balance cargo. Mohan e-mailed a reminder to Raman on the vessel nomination for the partial shipment of 2,000mt and inquired as to the balance cargo. Mohan did not receive a reply from Raman but on 14 August 2003 Raman's staff notified the plaintiff that the nominated vessel was the *Madonna*.

29 Around 18 August 2003, Raman informed Mohan that a Malaysian benzene manufacturer, Titan Trading & Chemical, may be able to supply the balance cargo. That supply never materialised.

30 The shipment of 2,000mt on the *Madonna* was discharged at Kuantan on 11 September 2003. The plaintiff alleged that the 11 days' delay caused its factory to shut down (between 2 to 11 September). In addition, the shipment did not comply with ASTM 2359 standards. Mohan testified that the plaintiff kept sufficient stock of the product to keep the plaintiff's plant running; there was no surplus. The plaintiff planned two to three weeks ahead on the stock of the product it needed. On 3 October 2003, Raju quantified the plaintiff's loss as US$220,711.70 which calculation he faxed to Mohan who passed it in turn to Raman.

31 On 17 September 2003, Mohan reminded Raman of the balance cargo. Raman replied on the same day that the defendant "wanted to ship with 2,000 mts new business". In view of the

substandard quality of the shipment from the *Madonna*, Mohan was unwilling to place another order for 2,000mt for the product. Instead, on 1 October 2003 he e-mailed Raman to ask for a quotation for 2,000mt which included the balance cargo. Mohan explained he was willing to order another 1,000mt of the product at market price so that the defendant could ship it with the balance cargo in order to reduce shipping costs.

32 On or about 9 October 2003, Raman quoted US$485 per mt to Mohan for the new contract for 1,000mt. Mohan replied that the price was too high.

33 On 31 October 2003, Raju e-mailed Raman to inquire when the balance cargo would be delivered. Raman replied that he was liaising with Mohan on the matter. On the same day, Mohan e-mailed to Raju copied to Raman, a summary of the entire matter, which included the fact that Raman had offered another parcel of the product as the defendant felt delivering the balance cargo alone would not be cost effective. Raman sent Mohan an e-mail asking for Mohan's help to resolve the matter, claiming the defendant had already lost US$150,000 for the *Madonna* shipment. Mohan understood from Raman that the defendant had sold off its stock earmarked for the disputed contract in order to make a short term gain.

34 Despite pressing him, Mohan did not receive a satisfactory proposal from Raman on the outstanding balance cargo. Eventually, Raman told Mohan in early 2004 that he/Moraka no longer represented the defendant. Mohan was advised to contact the defendant directly on the matter.

35 On 24 February 2004, Mohan requested and was furnished by Raman with the e-mail addresses of Sareen and William Brunger ("Brunger"), the defendant's president. On 2 March 2004, Mohan e-mailed a summary of the whole history of the disputed contract to Brunger, with a copy to Sareen; Mohan requested delivery of the balance cargo by end March 2004. Mohan did not receive Brunger's e-mail reply dated 16 March 2004 (copied to Sareen).

36 Not having received Brunger's reply, Mohan couriered his e-mail message of 2 March 2004 to Brunger on 23 March 2004. By his letter dated 2 April 2004, Brunger forwarded a copy of his e-mail dated 16 March 2004 wherein he expressed surprise that Mohan was reviving the matter for the first time, six months after delivery. Brunger advised Mohan to discuss the matter with Sareen when the latter visited Singapore in May 2004.

37 Sareen met Mohan at Mohan's office on 24 May 2004 with KP Song. Mohan claimed that Sareen offered to compensate the plaintiff adequately for the outstanding balance cargo. Sareen denied this. However, Sareen also said he needed to discuss with his New York colleagues regarding the exact quantum. After Sareen left Singapore, Mohan sent an e-mail to Sareen on 25 May 2004 setting out what had transpired at their meeting. Mohan recorded his willingness to accept compensation even though he preferred the balance cargo to be delivered. Mohan sent one reminder on 7 June 2004 and another on 17 June 2004 when Sareen did not reply.

38 On 24 June 2004, Sareen finally replied to Mohan stating that the defendant did not recognise the plaintiff's claim due to the long delay before it was raised. The e-mail message was copied to KP Song as well as to the defendant's legal counsel, one Paul Falick ("Falick"). Despite furnishing his handphone and office numbers to Mohan in the message, Mohan could not contact Sareen. Mohan asked Sareen by e-mail on 29 June 2004 for a proposal. He followed up with (unsuccessful) attempts to contact Sareen by telephone. Between 20 July and 6 September 2004, Mohan continued to make fruitless attempts to raise the issue of the balance cargo with Sareen. Mohan also wrote to Brunger on 24 August 2004, *inter alia*, giving a summary of what transpired at the 24 May 2004 meeting, complaining of Sareen's lack of response to his many messages and

reiterating that the defendant still owed the balance cargo. He also communicated with KP Song but to no avail. Mohan concluded that the defendant was stalling for time and did not intend to settle the claim for the balance cargo.

39 On 22 October 2004 and on 9 November 2004, the plaintiff's solicitors, Wee Swee Teow ("WST"), wrote to the defendant demanding delivery of the balance cargo. WST received a reply dated 11 November 2004 from Falick, the defendant's New York legal counsel, denying that the defendant owed the plaintiff the balance cargo and raising (for the first time) the issue of the amendment contract being the applicable contract and that it had been performed in full.

40 It was the plaintiff's case that the amendment contract was a false document. Hence, its authenticity was disputed at the trial. Apparently, WST had made four requests between July to September 2005 to inspect the original document. In September 2005, the defendant's solicitors advised that the original contract was with the plaintiff. This was denied by the plaintiff and contradicted by Sareen's second affidavit wherein he claimed that he had personally faxed the document to the plaintiff in Malaysia. I shall return to this document in due course.

41 During cross-examination, Mohan revealed that besides the defendant, the plaintiff procured their supplies of the product from four to five Singapore companies such as ExxonMobil, Shell and Mitsui. Around August to September 2003, when the defendant failed to deliver the balance cargo, the plaintiff bought the product from these suppliers. Questioned why he and/or the plaintiff did not approach these companies to supply the balance cargo, Mohan explained that the product was not always available. In this case, he could not find an alternative source of supply. Mohan clarified that the purchases he made from the Singapore companies were "spot" cargoes. Mohan made an inquiry of ExxonMobil on 28 July 2003 for 2,000mt for delivery before 15 August 2003. Had the defendant delivered the *Madonna* shipment by August 2003, the plaintiff could have avoided a shutdown of the plaintiff's plant as it meant that it had a supply of 4,000mt of the product. (When he testified, Raju explained that locating a parcel of the product in the "spot" market was "not as simple as buying the material off the shelf from a shop. The availability of the parcel at any given time is not certain". (NE at p 174)). Delivery also depended on the availability of vessels.

42 I have referred to Mohan's evidence *in extenso* because cross-examination cast no doubts on his credibility. More importantly, Raman testified (NE at p 595) that Mohan was very prompt in putting every single thing in writing, as reflected in his many e-mails referred to earlier.

43 Raju's testimony dealt with the operations of the plaintiff's plant. He explained that a constant supply of the product was required to keep the plaintiff's plant operating on a 24-hour basis to produce about 33,000 tonnes of MA per year or 90 tonnes per day.

44 Raju was instrumental for the handwritten amendments on the defendant's sales conformation for the disputed contract. He testified that he had made the same amendments to the defendant's sales confirmation for the fourth and fifth contracts before he signed and faxed the documents to Moraka.

45 Raju testified that he had neither received nor signed the amendment contract and denied that the document superseded the disputed contract in relation to the balance cargo. Raju confirmed he would advise Mohan on the quantities of the product required by the plaintiff and the timing thereof. It was Mohan's duty to negotiate the price, quantity and delivery date. All other terms would be standard as used by the plaintiff for all its purchases. Thereafter, the plaintiff would follow up with the paper work on the contracts.

46 When cross-examined, Raju denied counsel's suggestion that the plaintiff's plant shutdown in September 2003 was due to statutory inspection requirements, maintenance and/or economic reasons and not due to the late delivery of the *Madonna* shipment. Raju explained that boiler inspection was carried out once every 15 months and the boiler inspection for the plaintiff's plant was scheduled for October 2003 after the previous inspection in July 2002. However, the plaintiff could (and did) apply for special permission (from the Malaysian Department of Occupational Safety and Health) to extend the inspection period. Sometimes, inspection was postponed because no inspectors were available. In re-examination, the plaintiff produced documents that showed the boiler inspection scheduled for October 2003 was eventually postponed to February 2004.

47 When questioned why the plaintiff did not maintain a stock of the product, Raju explained that it was because the plaintiff usually planned four to six weeks ahead of the exact requirement date. The plaintiff had protected itself with orders for the product for production in August and September 2003. In June 2003, the plaintiff placed an order for 4,000mt which was delivered the following month. 4,000mt of the product was enough to cover the plaintiff's production until mid August 2003. In July 2003, the plaintiff ordered 5,000mt of the product (including the 3,000mt under the disputed contract). With storage capacity of only 3,000mt at Kuantan port, it was impossible for the plaintiff to store two to three months' requirement of the product at any one time. It also took the plaintiff 15 to 20 days to transport the product out from the storage tank in order to make room for a new shipment to be stored.

48 Raju testified that had the cargo been delivered in August 2003 as scheduled, the plaintiff would have been able to cover their production requirements up to end September 2003. There was then a high demand for MA. In August 2003, the plaintiff's sales of solid briquette exceeded their production by 10%.

49 Raju explained that although the plaintiff sued for breach of contract in October 2004, it treated the disputed contract as being in force until 24 May 2004. Hence, the plaintiff used 24 May 2004 as the date for assessment of damages it allegedly suffered as a result of the breach.

50 The plaintiff's chief production manager, Gopalraj Nagarajan ("Nagarajan"), also testified. Essentially, Nagarajan (PW3) rebutted the defence of waiver raised by the defendant, relying on Nagarajan's e-mail of 14 August 2003 to Ms Shanti of Raman's office. In that message, Nagarajan had said:

> As the receipt of benzene in time is crucial for us, we are accepting the nominated vessel M.T MADAONA. However, we appreciate if you could reduce the [demurrage] charge as much as possible.

51 I do not agree that an acceptance of a vessel nomination (which was all that the above message said) is tantamount to waiver of the balance cargo. The plaintiff needed the product to continue production of MA; it had no alternative but to accept the defendant's partial shipment of 2,000mt despite the high demurrage charged by the *Madonna*. Otherwise, it faced a shutdown of the plaintiff's plant.

The defendant's case

52 Sareen (DW1) and Raman (DW3) testified for the defendant together with a shipbroker, R Suraj Ramasamy ("Ramasamy"), whom Sareen engaged to look for vessels to ship the cargo to Kuantan. As stated earlier in [11] above, Raman testified under subpoena for the defendant, although initially he was supposed to be the plaintiff's witness.

53 Sareen's testimony (under cross-examination) was roundly criticised by the plaintiff in its closing submissions (see paras 49 to 69, 82 to 104, 124 to 190) as contradictory, inconsistent and illogical. Having reviewed his evidence in its entirety, I agree with the plaintiff's assessment of Sareen as an unreliable witness. It may also explain Sareen's decision not to return to Singapore to complete his re-examination. It would further explain the opening paragraph in the defendant's closing submissions which stated:

> [E]nough facts are undisputed that this Court may determine most of the outstanding issues without weighing any conflicts in testimonial or documentary evidence.

I totally reject the above submission for reasons which will become apparent later.

54 Prior to filing his affidavit of evidence-in-chief on 7 September 2005 and his supplemental affidavit of evidence-in-chief on 3 October 2005, Sareen had filed two earlier affidavits. The first affidavit was filed on 25 February 2005 ("the first affidavit") while the second was filed on 24 March 2005 ("the second affidavit").

55 In his second affidavit, Sareen had deposed that the amendment contract superseded the disputed contract and the former (though not the latter) contained a New York arbitration clause.

56 The first and second affidavits were filed for the purpose of setting aside service by the plaintiff on KP Song (as the defendant's Singapore agent) and to obtain a stay of proceedings for this suit, on the basis that the defendant's standard terms and conditions applied to the defendant's sales confirmation and it included a New York arbitration clause. The defendant failed in its application for a stay below and its appeal to a judge in chambers against the assistant registrar's decision was also dismissed.

57 For convenience, I shall review Sareen's testimony in relation to the various defences filed by the defendant and where necessary, in conjunction with the testimony of the defendant's other witnesses.

The delivery date

58 The defendant contended that it was not liable for late delivery and for the consequential closure of the plaintiff's plant as the disputed contract did not have a firm delivery date. In its closing submissions (para 102b), the defendant argued that delivery by the *Madonna* (on 11 September 2003) was only 11 days after the contracted period (end August 2003).

59 In the course of cross-examination, however, and after some prevarication, Sareen admitted that he was aware that the plaintiff was an end-user of the product and that it was used to produce MA (NE at pp 238–240). Further, when Raman offered the cargo to Mohan in his e-mail dated 4 July 2003, item 4, which was "arrival", stated "15–25 August". The words "ETA" (estimated time of arrival) were omitted. Moreover, the plaintiff's purchase order numbered 6224 stated the delivery date to be "before 20/8/03". In addition, on the defendant's sales confirmation for the disputed contract, Raju had written the words "every effort will however be made for ETA Kuantan 10 to 15th August 2003" (see [19] above).

60 Sareen sought to explain away the omission of the words "ETA" from the disputed contract by claiming that cl 6 of the defendant's standard terms and conditions which applied to the disputed contract and earlier contracts did not guarantee arrival dates. Unfortunately, the plaintiff's past dealings with the defendant as evidenced in the third to fifth sales confirmation did not bear out

Sareen's testimony. Those contracts did not contain the words "ETA". I note, too, that on 17 July 2003, Raman had advised the plaintiff that the cargo would be delivered in the second half of August.

61 The defendant had pleaded that it could not ship the cargo by the second half of August 2003 because of the unavailability of suitable vessel space. Despite its efforts, the defendant could only manage to find sufficient shipping space to ship 2,000mt. Therefore (relying again on cl 6 of its standard terms and conditions), the defendant was not liable as the cause of the delay in shipment was wholly beyond the defendant's control. (In its closing submissions, the defendant focused on the defence of *force majeure*, to the exclusion of all other defences it had pleaded.)

62 Sareen claimed that he had instructed Ramasamy (DW2) from Panasia Marine (Tankers) Pte Ltd ("Panasia") to spare no efforts to secure suitable vessels and that none could be found between mid July to mid August 2003, sailing from Korea and India to Kuantan. The search was extended to cover Taiwan and Japan. Sareen testified that he (and/or Raman) was in daily contact with Ramasamy in this regard.

63 During cross-examination, Sareen revealed (NE at p 374) that the shipment on the *Madonna* from Kandla port by Reliance was on a CFR basis (*viz*, costs and freight basis). Consequently, the cost of shipment was borne by Reliance. That being the case, Sareen was hard put to explain why he continued (as he claimed) to instruct Ramasamy to look for vessels until about 19 August 2003, without informing the latter that shipping space for 2,000mt was no longer required. At a later stage of his testimony, Sareen clarified that he told Ramasamy to look for shipping space generally, pointing out that the defendant had other customers in Malaysia (although not specifically in Kuantan).

64 It was also Sareen's testimony (NE at p 240) when questioned by the court, that at the time the disputed contract was concluded, the defendant did not have a specific cargo for the plaintiff nor an available vessel. He explained that the defendant had various "options" available but clarified he did not mean the word as understood in the "options" market. He claimed that he had requested Reliance to supply the cargo but was only provided with 2,000mt. In other words the defendant took a "short" position and sold the cargo to the plaintiff without having an available supply assigned to the sale.

65 When counsel for the plaintiff requested documents from Sareen evidencing his request for the cargo from Reliance, Sareen said that the documents/faxes were all in his New York office. Sareen suggested that if indeed the *Madonna*'s tanks had the capacity (as the plaintiff contended) to hold 2,500mt of the product, the reason for the vessel not carrying the additional 500mt was due to stability considerations, to keep the vessel in trim. As Sareen himself said, his answer was pure speculation (NE at p 380) and I dismiss it accordingly.

66 When questioned as to why the defendant did not procure the balance cargo from Singapore suppliers like ExxonMobil and Shell, Sareen claimed such manufacturers/suppliers had a policy of selling only to end-users and not to traders. I accept the plaintiff's submission that this explanation defies logic, especially coming from a man who had worked in Singapore previously as a product manager in the petrochemical industry.

67 The plaintiff's submissions at [53] above referred to numerous instances where Sareen's testimony was inconsistent or where his answers during cross-examination contradicted his written testimony or the defendant's pleadings. I have only referred to a few instances.

68 In Sareen's second affidavit, he had deposed (in para 27) that the defendant had some difficulty in obtaining the cargo under the disputed contract and hence only 1,949.23mt were

delivered. Realising this was not a valid defence to the plaintiff's claim for the balance cargo (so the plaintiff surmised), Sareen changed his evidence in the witness stand and claimed that the words he used in his para 27 should not be "3,000mt quantity" but "3,000mt vessel". I agree with the plaintiff's submission that the change of words made no sense in the context of Sareen's affidavit, as it meant the first sentence of para 27 reads as follows:

> The Defendants do not deny that there was some difficulty in obtaining the 3,000 MT ~~quantity~~ vessel under the original July contract, and hence only 1,949.23 MT was delivered.

69 In the same vein, Sareen corrected the first sentence in para 5(b) of the further and better particulars filed by the defendant for para 8 of the defence. He testified it should read as follows:

> The defendants were engaged in the process of trying to find a suitable vessel from on or about 9 July 2003 onwards until on or about 18 August for the ~~1,949.23 MT~~ 3,000 MT of benzene under the July Contract.

70 The first amendment Sareen made afforded the defendant no defence at law as difficulty in obtaining a vessel to ship the cargo does not amount to *force majeure*. The second amendment contradicted the undisputed evidence that had been adduced from Mohan. By 8 August 2003, the plaintiff was aware from Raman that the defendant would be shipping, through Reliance, 2,000mt of the product. Why then would the defendant be still looking for a vessel with a capacity for 3,000mt until 18 August 2003, when its obligation after 14 August 2003 (once the *Madonna* was nominated) was only to deliver the balance cargo?

The amendment contract

71 I next turn my attention to Sareen's testimony on the amendment contract which supposedly superseded the disputed contract.

72 The defendant produced its copy (P4) of the amendment contract claiming that the original had been sent to the plaintiff (which Raju denied). As the plaintiff asserted that the amendment contract was fabricated, the document and the circumstances in which the plaintiff supposedly agreed to this new contract merit closer scrutiny.

73 There were differences between the amendment contract and the disputed contract (Exh P1). The most obvious difference was that the plaintiff did not sign the amendment contract. Further, unlike the disputed contract and earlier contracts (including the May 2003 contract which was produced in court as Exh P2), the amendment contract did not contain the footnote referred to earlier in [15]. It was signed by Sareen on the defendant's behalf. I should point out that Exh P5 was another signed copy of the disputed contract. Raman (NE at p 630) confirmed that the document was faxed from the plaintiff in Malaysia (according to the transmission time and date stated thereon) on 11 July 2003 at 1428 hours to either the defendant in New York or to Raman's office. This was shortly after Raman's e-mail (timed at 1.50pm) to Mohan (at [21] above) indicating the defendant did not intend to proceed with the contract. Exhibit P5 rebutted the defendant's claim that the plaintiff refused to sign the disputed contract.

74 I note that there was no mention by the defendant of the amendment contract until Falick's letter dated 11 November 2004 at [39] above. When questioned why (in his e-mail to Mohan dated 24 June 2004 at [38] above) he had not mentioned the amendment contract but only referred to the plaintiff's delay in making its claim, Sareen gave an unconvincing explanation. He claimed that there were then on-going amicable discussions and he did not want to hurt the other party's feelings.

Sareen admitted (NE at p 437) that there was no reference in the defendant's invoice and packing list dated 31 August 2003 for the *Madonna* shipment to the amendment contract even though the shipment came later.

75 The plaintiff's assertion that the amendment contract was fabricated found unexpected support from Raman when he testified. Raman had copies of the contracts he concluded with the plaintiff so that he could collect his commission from the defendant. However, he could not recall having seen the amendment contract previously. As far as Raman could remember, between September 2003 until early 2004 when his company ceased to act as the defendant's agent, the plaintiff and the defendant were still in negotiations to resolve the issue of the balance cargo outstanding.

76 I can only hazard a guess why the standard footnote in the defendant's sales confirmation was missing from the defendant's copy of the amendment contract in Exh P2. Sareen must have realised that without the plaintiff's signature, the inclusion of the footnote would mean the contract was not concluded.

77 In court, Sareen claimed to have personally faxed the amendment contract to the plaintiff in Malaysia, an important fact which was conspicuously absent from his second affidavit, wherein he had asserted that the document superseded the disputed contract.

78 It would be appropriate at this juncture to compare Sareen's testimony with Raman's. Although Raman was a reluctant witness, he nonetheless came across as honest and truthful. Raman explained that his reluctance to testify for either party was for the reason that he preferred to be neutral in a dispute which was two to three years old, he did not wish to side with either party nor did he want either party to capitalise on his evidence. Unlike Sareen, Raman did not prevaricate and there were no inconsistencies in his answers. Even though he had ceased to be the defendant's agent for the Asian market (for benzene, toluene and xylene products), Raman was not biased either in favour of or against the defendant. I noted that Moraka's appointment as the defendant's agent was evidenced in a representation agreement dated 4 August 2000 (see 1AB6–10).

79 Raman confirmed that the terms of any sale concluded on the defendant's behalf would be decided by Sareen. His discretion in negotiating the price would be limited to a small range (say between $343 and $345). If the buyer's counterproposal fell outside the stipulated price range, he had to revert to Sareen for fresh instructions. Raman testified that Sareen was involved in every aspect of his negotiations with the plaintiff. Further, the key terms of the disputed contract were concluded in Singapore.

80 Raman's evidence on the understanding of the words "ETA" contradicted Sareen's. Raman explained that for deep sea cargo (coming from Europe or Brazil) arrival could only be ETA and not guaranteed (NE at p 591). Deep sea cargo would be shipments of 30,000mt at least and the carrier would stop at many ports before it arrived in Asia. For those reasons, it was generally cheaper. For Asian cargo (like the *Madonna* shipment), Raman opined (NE at p 627) that the difference between ETA and actual arrival would be two to three days.

81 I also understood Raman's testimony to be that because of the plaintiff's urgent need for the cargo, the *Madonna* was nominated but the plaintiff had to pay the price by bearing the high demurrage charged by the vessel. Raman said he had the impression that the defendant incurred a loss on the *Madonna* shipment although it may not have been US$150,000 as reflected in his e-mail of 31 October 2003 to Mohan (1AB136), which figure he used as a bargaining tool with Mohan. He explained that he had asked for a "reasonable price" there so that the defendant would not lose

anything on the balance cargo outstanding. He revealed that the product was then in short supply in Asia whilst demand was conversely high. Questioned by the court, Raman agreed that the defendant may well have sold short on the disputed contract.

82 Raman also agreed that the defendant never delivered the balance cargo to the plaintiff because he and Mohan failed to agree on the price for the new contract of 2,000mt of the product, which included the balance cargo.

83 My favourable assessment of Raman as a witness cannot apply to Ramasamy, who could not have been more different. In his eagerness to help the defendant, Ramasamy sacrificed the truth.

84 Ramasamy testified that on Sareen's instructions, he had tried on a daily basis to secure any type of vessel for a shipment of 3,000mt of the cargo from mid July until mid August 2003. (This contradicted Sareen's testimony who claimed that he had asked Panasia to look for vessels well into September 2003). He was also asked to find vessels to ship 1,000mt to 2,000mt. He was tasked with finding vessels sailing from Japan, Korea, Taiwan and India and calling at Kuantan but not from Singapore, Malaysia or Thailand (which would not have been difficult). Ramasamy claimed to have spoken to 50 to 70 tanker owners without success. He testified that he spoke to Mohan on a regular basis to share shipping market information. He was able to recall a specific inquiry from Mohan for a 3,000mt vessel but when cross-examined, was unable to recall the text of his conversation with Mohan.

85 I am of the view that a shipbroker who handles 30 to 40 shipments every month is unlikely (as Ramasamy claimed) to remember an isolated unsuccessful inquiry he made on the defendant's behalf, particularly when his company did not keep records of failed cargo inquiries. If indeed Ramasamy was in daily contact with Raman and Sareen as he claimed, it is incredible that neither of them told him to stop looking for shipping space of 3,000mt, after the *Madonna* was nominated for the partial shipment of 2,000mt to the plaintiff.

The decision

86 It bears remembering that the disputed contract was concluded on the morning of 4 July 2003 when Raman e-mailed the following terms on the defendant's behalf at 9.01am, which Mohan accepted on the plaintiff's behalf at 9.57am, well before the deadline of 1200 hrs:

1) product: Benzene

2) origin: Asia/europe

3) qty: 3,000 mts

4) arrival: 15-25 august

5) price: us$389.00 cif kuntan

6) payment: l/c 30 days bl

…

The words "ETA" were not a term of delivery.

87 I find that the defendant was late in delivering the *Madonna* shipment. Even if I am wrong in my finding and the term "ETA" was incorporated into the disputed contract, the *Madonna* shipment did not arrive at Kuantan in the second half of August 2003 but on 11 September 2003. As the shipment was not deep sea cargo but Asian cargo from India, the defendant (according to Raman's testimony) only had an allowance of three days to make late delivery, *viz*, by 3 September 2003 (from 31 August 2003). Consequently, the defendant caused and is liable for the shutdown of the plaintiff's plant for the period 3–11 September 2003. The defendant's contention that the shutdown was due to statutory inspection requirements was not borne out as the inspection was postponed to February 2004.

88 Equally, the defendant was in breach of the disputed contract in failing to deliver the balance cargo. I reject its claim that the plaintiff had waived delivery of the balance cargo and had agreed to its replacement by the amendment contract. First, the plaintiff did not waive delivery of the balance cargo by accepting the *Madonna* shipment as it did so out of necessity in order to keep the plaintiff's plant running. I accept Nagarajan's evidence in this regard (see [50] above). At law, as pointed out in the plaintiff's closing submissions (citing *P&M Industrial Company Limited v Winner Bob (HK) Company Limited* [2000] 233HKCU 1), the defendant bears the burden of proving clear and unequivocal words or acts on the part of the plaintiff that it waived its right to damages or claims.

89 Second, I find that the amendment contract was indeed a fabricated document as the plaintiff contended. Its existence was not known to Raman and not made known to the plaintiff until Falick first raised it in the defendant's letter dated 11 November 2004, more than a year after it was supposedly concluded on 19 August 2003.

90 It would be appropriate at this juncture to look at the meaning of *force majeure* at law. *Stroud's Judicial Dictionary of Words and Phrases* (Sweet & Maxwell, 6th Ed, 2000) defined *force majeure* as having a more extensive meaning than "Act of God". The authors cited Bailhache J in *Matsoukis v Priestman & Co* [1915] 1 KB 681 who held that *force majeure* covered dislocation of business owing to (a) universal coal strike; (b) accidents to machinery, but not bad weather, football matches or a funeral. Clearly, the extended meaning has no application in this case.

91 Next, I turn to the *force majeure* clause under cl 6 of the disputed contract. It states:

> Seller shall not be liable because of late or non-delivery due to accidents, sabotage, strikes, lockouts, labour shortages or disturbances, fires, war, governmental action, requests or regulations (whether valid or invalid), failure of suppliers to deliver, inability to obtain or delay in obtaining packaging or transportation or any other condition or cause (whether similar or dissimilar) beyond Seller's reasonable control, or which is not attributable to the Seller's negligence …

In the light of my earlier finding at [64] above, that the defendant sold the cargo short and subsequently covered part thereof by the *Madonna* shipment, the *force majeure* clause can hardly apply. The defendant failed to discharge the burden of proving that the late delivery (of 1,949.23mt) and non-delivery of the balance cargo was beyond its reasonable control or was not attributable to its negligence, a prerequisite for the application of cl 6. I further note that when questioned by the court, Sareen admitted that this defence was first raised almost two years after the shipment, *viz*, on

13 May 2005. Yet, as stated earlier at [61], the defendant's closing submissions centred on this defence.

92 There is no doubt in my mind that the defendant failed to deliver the balance cargo and attempted to renege on the disputed contract because it was not prepared to sustain another loss in covering the contract at a higher price than the contracted US$387 per mt. The defendant had undoubtedly already suffered a loss for the *Madonna* shipment (albeit maybe not US$150,000 as Raman claimed). My belief is reinforced by the fact that Raman attempted to persuade Mohan to subsume the balance cargo in a new contract for 2,000mt of the product, at a price of US$485 per mt. Even if Chemcross's prices in [27] above are disregarded, the difference between the contract price (US$387) and US$485 is US$98 per mt for the balance cargo or a total of US$102,975.46 (US$98 x 1,050.77mt). When I inquired of Raman (NE 604) why the plaintiff would be so foolish as to agree to a new and higher price for an existing contract (which he acknowledged), he could not give me any reasonable explanation.

93 Finally, I reject the defendant's submission that the plaintiff failed to mitigate its loss. Raju had given a reasonable explanation why the plaintiff could not keep surplus stock of the product, due to storage constraints. The unchallenged evidence from Raju also showed that the plaintiff had difficulty obtaining an alternative supply from other sources.

Conclusion

94 Accordingly, I award interlocutory judgment to the plaintiff. I direct that damages for late delivery in the *Madonna* shipment and for non-delivery of the balance cargo by the defendant, be assessed by the Registrar with the costs of such assessment reserved to the Registrar. I am not prepared to accept the plaintiff's claim of US$539,045.01 in [8] above as the quantum of the damages it suffered nor that it should be based on the date 24 May 2004 used by Raju. The plaintiff must have its claim assessed in the usual manner based on the time-honoured principles in *Hadley v Baxendale* (1854) 9 Exch 341 and *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528.

95 On the first day of the trial, the plaintiff withdrew its claim (under prayer 14(b) of the statement of claim) for damages resulting from the inferior quality of the shipment on the *Madonna*.

96 Unless there were offers to settle made by one or the other party or both which will affect the order on costs, the plaintiff shall have its costs on a standard basis.