Marco Polo Shipping Company Pte Ltd *v* Fairmacs Shipping & Transport Services Pte Ltd [2015] SGCA 44

Case Number	: Civil Appeal No 129 of 2014
Decision Date	: 21 August 2015
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JA; Steven Chong J
Counsel Name(s)	: Mathiew Christophe Rajoo, Cai Jianye Edwin and Viknesh Jeg Pillay (DennisMathiew) for the appellant; Tan Wee Kong and Poh Ying Ying Joanna (Legal Solutions LLC) for the respondent.
Parties	: MARCO POLO SHIPPING COMPANY PTE LTD — FAIRMACS SHIPPING & TRANSPORT SERVICES PRIVATE LIMITED

Damages – Assessment

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2015] 1 SLR 904.]

21 August 2015

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 This was an appeal against the decision of the High Court judge ("the Judge") reported as *Fairmacs Shipping & Transport Services Pte Ltd v Harikutai Engineering Pte Ltd and another* [2015] 1 SLR 904 ("the GD"). The case concerned a shipment of river sand that never made its way to the intended buyer, Fairmacs Shipping & Transport Services Pte Ltd ("the Respondent"). The matter first went before the Assistant Registrar ("the AR") who assessed damages at US$62,950 with interest at 5.33% from the date of the Writ of Summons. The Respondent appealed. After hearing parties, the Judge allowed the appeal, assessing damages at US$141,226 (with the same order as to interest). Marco Polo Shipping Company Pte Ltd ("the Appellant"), the second defendant at the time, appealed to this court.

2 Parties appeared before us on 8 July 2015. After hearing their submissions, we allowed the appeal and restored the AR's award, issuing the following brief grounds (which are elaborated upon in this judgment):

> Whilst we agree that it is not an essential requirement to have a market index in order to determine the market value of the cargo in question, the respondent has not adduced sufficient evidence of a relevant market for river sand in Port Blair during the first week of October 2011.
>
> In the circumstances, we allow the appeal and restore the assistant registrar's award of USD62,950, which reflects the sum that the respondent has paid in respect of the cargo.

Facts

Parties to the dispute

3 The Respondent was a company incorporated in India purportedly in the business of trading, importing and exporting construction materials. By a contract of sale dated 18 August 2011, the Respondent agreed to purchase river sand from Marine Alliance Group (Singapore) Pte Ltd ("Marine Alliance"). The sand was to be shipped from Myeik, Myanmar, to Port Blair, India, in three shipments. The shipment in question – the second shipment – involved 4,300 metric tonnes ("MT") of river sand.

4 The Appellant was the owner of the vessels that were used to transport the river sand. Harikutai Engineering Pte Ltd ("Harikutai"), a party to the proceedings below, but not before this court, was the contracting carrier.

Background to the dispute

5 The second shipment of 4,300MT of river sand was expected to reach Port Blair on 1 October 2011. It never did. On 3 October 2011, the commercial manager of the Respondent, Mr Sreenath Rajendhranath ("Mr Rajendhranath"), telephoned Mr Danads Wong ("Mr Wong"), a representative of the Appellant. In that conversation, Mr Wong informed Mr Rajendhranath that the vessels were on the last leg of their voyage and that the delay was caused by unfavourable weather conditions. Mr Rajendhranath thereafter wrote an email to Mr Wong to document their conversation.

6 On 18 October 2011, with no cargo in sight, the Respondent's solicitors from Legal Solutions LLC, who continued to represent them in proceedings before the court, wrote to the Appellant and Harikutai demanding: (a) information on the location of the vessels; and (b) delivery up of the second shipment.

7 On 15 December 2011, the Respondent filed its Writ of Summons. Its case was against both the Appellant (in the tort of conversion) and Harikutai (for breach of the contract of carriage). From the Appellant, the Respondent sought delivery up of the cargo or, alternatively, US$201,455 in damages. This figure was derived by multiplying 4,300MT with the alleged market price of the cargo at Port Blair at the relevant time, US$46.85 per MT.

8 On 28 December 2011, the Appellant applied for security for costs. In its affidavit in support of its application, which was filed that same day (*ie*, 28 December 2011) by Mr Azhari Bin Mohd Jadi ("Mr Azhari"), the Operating Manager of the Appellant, the Appellant explained for the first time what had happened to the cargo (see also the GD at [10]). Harikutai had defaulted on the payment of the charterhire. In response, the Appellant had withdrawn the vessels and sold the cargo on board, including the second shipment of river sand, to mitigate its losses. Mr Azhari did not state the price at which the river sand was sold save as to note "the Cargo is not valuable and is easily replaceable". In his subsequent affidavit dated 13 January 2012, Mr Azhari clarified that it was not the Appellant that had sold the cargo but, possibly, MP Shipping Pte Ltd, a wholly owned subsidiary of the Appellant (see also the GD at [10]).

9 On 20 February 2012, the Respondent applied for summary judgment against both Harikutai and the Appellant. During the hearing before the AR on 15 June 2012, all three parties were present. Harikutai was represented by Haridass Ho & Partners. The AR granted interlocutory judgment against both the Appellant and Harikutai with damages to be assessed, with interest at the rate of 5.33% from the date of the Writ of Summons (*ie*, 15 December 2011) to the date of payment. The Appellant appealed, but its appeal was dismissed by the Judge on 3 August 2012.

10 At the assessment of damages hearing, the Respondent sought US$201,455 which, it argued, was reflective of the market value of 4,300MT of river sand at Port Blair in the first week of October 2011 (the expected date of delivery was 3 October 2011). Harikutai was absent from this hearing.

From the onset, the amount of river sand converted was not in dispute. Neither was the point of law that market value was the first port of call in determining the value of the river sand converted. As such, the Respondent's main challenge (in making good its US$201,455 claim) was to prove that the relevant market value (*ie*, the market value of river sand at Port Blair in the first week of October 2011) was indeed US$46.85 per MT. It sought to do so by relying on the evidence of Mr Babuvenkatesh Loganathan ("Mr Loganathan"), General Manager of Fairmacs Trading Company Pte Ltd ("FTPL"). FTPL was the trading arm of the "Fairmacs group" of companies – a group to which the Respondent belonged.

11 In his affidavit, Mr Loganathan affirmed that there were "no published indices in Port Blair, India setting out the market pricing of river sand". For that reason, he adduced in his affidavit fourteen pages of invoices, delivery orders and receipts evidencing the sale of river sand by FTPL in Port Blair during the first week of October 2011 in a bid to amass figures from which he could discern a "market price". He tabulated the figures as follows:

No	Invoice No	Date	Name of Buyer	Quantity	Rate per MT in INR	INR to USD exchange rate	Rate in USD
1	SD012/10/11-12	3 October 2011	Sankar Contractor & Construction	7 MT	2242.86	49.4240	45.38
2	SD014/10/11-12	3 October 2011	Sturdy Developers & Builders	7 MT	2242.86	49.4240	45.38
3	SD025/10/11-12	4 October 2011	Sankar Contractor & Construction	7 MT	2242.86	49.2250	45.563
4	SD026/10/11-12	5 October 2011	Binu Kumar	7 MT	2357.14	49.1918	47.917
5	SD034/10/11-12	7 October 2011	Hamza	3.5 MT	2457.14	49.1355	50.007
Average pricing of river sand in early October 2011					2308.57	49.280	46.85

12 The AR was not persuaded by this evidence. In particular, he was concerned by three things: (a) the absence of a market index for river sand at Port Blair; (b) the lack of a breakdown of the proposed figure of US$46.85 per MT (in particular, how much of that figure constituted FTPL's profits); and (c) the fact that the rate of US$46.85 per MT was reached by comparing low-volume sales of river sand at no more than 7MT per sale (whereas, the AR's concern was that high-volume sales in the region of 4,300MT would likely fetch lower prices). Given his view that there was a lack of credible evidence, the AR was therefore unable to conclude that the market value of river sand was indeed US$46.85 per MT in Port Blair in early October 2011. He opted to assess damages on the basis of the cost that the Respondent had incurred for the river sand rather than market price. He arrived at the figure of US$62,950, the amount that the Respondent had actually paid for the river sand.

13 The Respondent appealed to the Judge in Registrar's Appeal No 290 of 2013.

Decision below

14 The Judge allowed the Respondent's appeal. However, she did not award it the entirety of the US$201,455 sought. Rather, she assessed the damages at US$141,226 (plus 5.33% interest). She arrived at this figure in the following manner:

(a) First, she preferred US$39.82 per MT (as opposed to the Respondent's alleged US$46.85 per MT) as the appropriate rate. Although she accepted the Respondent's evidence that US$46.85 per MT was the market value (see above at [11]), she effected a 15% reduction to account for the customs (5%) and landing costs (10%) that the Respondent would have had to pay had the cargo arrived at Port Blair (the GD at [73] and [77]). Mathematically, this is represented as follows:

(i) US$46.85 x 85% = US$39.82.

(ii) US$39.82 x 4,300 = US$171,226.

(b) Secondly, she subtracted US$30,000 from the figure derived above to account for the freight that would have been paid by the Respondent had the cargo been delivered. Mathematically, this is represented as follows: US$171,226 – US$30,000 = US$141,226.

15 The Judge's reasoning as to why she allowed the appeal can be summarised in four main points. First, on the law, the Judge was largely in agreement with the AR. Like the AR, she proceeded on the basis that the value of goods should typically be determined by their market value at the place and date of the conversion and, in the case of goods converted at sea, the market value of the goods at the place and date of expected delivery (see the GD at [36]). This might yield to some other basis of valuation where, for instance, there was no market for the goods or where the market value could not be determined (see the GD at [26]). In this case, therefore, the value of the cargo should *prima facie* be based upon the market value of the cargo at Port Blair during the first week of October 2011 (see the GD at [37]).

16 Secondly, and this is fundamentally where the Judge disagreed with the AR's analysis, the Judge found that Mr Loganathan's table supported the existence of a market for river sand at Port Blair during the first week of October 2011 (see the GD at [39]). The Judge defined a market as a state of affairs where there is a willing seller and willing buyer after negotiations (see the GD at [40]). Having found as such, she noted that the Appellant bore the evidential burden to show, as it had asserted, the absence of a market (see the GD at [43]). To determine if it had met this burden, she turned to the two arguments advanced by the Appellant. The first was that there was no market price index in Port Blair. Although a market price index was indicative of the existence of a market, she noted that the lack of an index did not, on its own, prove the absence of a market (see the GD at [46]). The second was that it would take a minimum of 20 to 25 days for any seller of river sand to deliver the goods to Port Blair. This "20 to 25 days" figure came from Mr Loganathan's own evidence during cross-examination. In response, the Judge noted that immediate delivery was not a necessary condition for establishing a market (see the GD at [53]).

17 Thirdly, the Judge found Mr Loganathan's evidence persuasive and that it supported the proposition that the market value of river sand in Port Blair in the first week of October 2011 was US$46.85 per MT (see the GD at [64]). The Appellant did not adduce any countervailing evidence of its own. Its only attempt to do so through its Technical Superintendent, Mr Lau Chung Hon, who alleged that the price was between S$7 and S$7.50 per MT, was premised entirely on hearsay (see the GD at [62]).

18 Fourthly, the Judge dismissed the Appellant's rather belated argument that the Respondent

should have mitigated its loss by purchasing an equivalent volume of river sand after the conversion. This was for two main reasons. First, the Respondent had been kept in the dark about what had happened to the cargo, and was hence in no position to make a decision about whether to, for instance, source for a replacement (see the GD at [82]). Secondly, the Appellant's "mitigation of damages" defence had not been pleaded (see the GD at [81]).

The parties' cases on appeal

The Appellant's case

19 The Appellant's case before this court was essentially a reprise of the arguments it had raised (successfully) before the AR and (unsuccessfully) before the Judge. First, it argued there was no market for river sand in Port Blair in the first week of October 2011. In doing so, it implicitly accepted that the first port of call in assessing damages in cases like this was the market value of the goods. It also agreed that the market in question was that in Port Blair as at the first week of October 2011. Its only point of contention was that, contrary to the Judge's finding, there was no such market in Port Blair during this period. At best, it argued, there was an *oligopolistic* market, which did not count as a market for the purpose of assessing the market value. The oligopolistic nature of the market was evinced by the difficulty faced by the Respondent in ascertaining the prices charged by its competitors as well as the fact that goods had to be imported from overseas markets.

20 Secondly, the Appellant argued there was no ascertainable market value. Mr Loganathan's table was of no probative value. In support of this assertion, the Appellant seemed to rely once again on the arguments it made to rebut the existence of a market. In this respect, it seemed that its second argument was not a distinct one.

21 Thirdly, the Appellant argued that the "general market rule" should in any case not be relied upon as to do so would result in a windfall accruing to the Respondent. The Respondent was essentially acting as a middleman in the transaction involving river sand and in such cases, as was held in the Supreme Court of Victoria Appeal Division decision of *Furness v Adrium Industries Pty Ltd* [1996] 1 VR 668 ("*Furness*"), the damages recoverable should be "assessed by calculating the cost of replacing [the] stock at the date of conversion" (at 678). The difference between US$62,950 (the AR's award, which represented the "cost price") and US$141,226 (the Judge's award) was a substantial amount (*ie*, US$78,276). This likely represented the amount of profits that FTPL would obtain in conducting *its* business. Implicitly, and necessarily, the Appellant was arguing that these were profits that the Respondent would never have made in the course of its (rather different) business.

22 For completeness, the Appellant also raised a further – and alternative – argument that if the court were to assess damages on the basis of the market value, the currency should be in Indian Rupees, not US Dollars, as this was the currency typically used in the Respondent's sale transactions. As we allowed the appeal, this argument was irrelevant and we say no more about this.

The Respondent's case

23 In response to the Appellant's main arguments, the Respondent first argued that there was an available market for river sand in Port Blair in the first week of October 2011. It defined "market" as "a state of affairs where there are sufficient traders who are in touch with [one another]", citing *Benjamin's Sale of Goods* (Michael G Bridge, gen ed) (Sweet & Maxwell, 8th Ed, 2010) at para 16-066, and argued that the invoices adduced by FTPL (as represented in Mr Loganathan's table reproduced above at [11]) evinced such a state of affairs. Further, it criticised the Appellant's assertion that the

market was oligopolistic as: (a) unsupported by evidence; and (b) premised on an incorrect understanding of the term "oligopoly".

24 Secondly, the Respondent argued that the market value at the material time was indeed US$46.85 per MT based on the evidence of Mr Loganathan. Thirdly, the case of *Furness* involved different facts. *Furness* dealt with a claim by a company – Adrium Industries – that manufactured and imported novelty items which it sold to wholesalers. The appellant/defendant, Furness, was the owner of the factory in which Adrium Industries operated. Adrium Industries left some of their manufactured goods – the subject of their conversion claim – behind in the factory after they left the premises. Furness sold those items. In *Furness*, it was doubtful as to how many of the novelty items could have been sold and Adrium Industries had failed to call in any evidence which pointed to a higher cost at the date of the conversion to replace the goods. Here, however, the Respondent argued, it had adduced evidence to demonstrate what the market value was.

Issues

25 There were two main issues before this court. First, was the Judge correct in finding there was a market for the converted river sand at Port Blair in the first week of October 2011 ("Issue 1")? Secondly, was the Judge correct in finding that the market value of the converted river sand was US$46.85 per MT ("Issue 2")?

26 The Appellant's argument centring on the doctrine of mitigation of damages failed, in our view, at the threshold level for the reasons highlighted by the Judge. Not only did the Appellant not plead it as a defence, the argument itself lacked any factual basis. It was undisputed that the Respondent had only learnt of the whereabouts of the cargo at the eleventh hour – three months after the expected delivery of the cargo (see above at [8]). It was therefore in no position to decide if it should purchase a replacement shipment. Furthermore, it was not the case that the Respondent was simply taking a backseat throughout the entire episode. Not only was it (through Mr Rajendhranath) actively monitoring the progress of the voyage, it was in constant contact with the supplier, Marine Alliance, throughout the first week of October discussing how to proceed in relation to the missing cargo.

Our decision

27 After hearing arguments, we allowed the appeal. Although we agreed in principle with the Judge's view on the law (*ie*, that the market value should be the first port of call in assessing damages), we found that a clarification was necessary: the market value in question must pertain to a ***relevant*** market, that is, a market in which the claimant is in fact selling or intending to sell the goods. In this case, the Respondent was involved in a *very different* market – one further up the supply chain. There was no evidence adduced of this particular market, let alone the value at which goods were sold if such a market existed. To award the Respondent damages based on the prices typically charged by FTPL would amount to conferring upon the Respondent a windfall. Given the dearth of evidence of a ***relevant*** market, we found this an appropriate case where the primary basis of assessing damages (market value) should yield to the secondary basis (cost of replacement). We therefore restored the AR's award. We now proceed to give the detailed grounds for our decision.

Our grounds

The applicable principles

28 Before examining either of the issues set out above (at [25]), we state briefly the applicable

principles. First, at the broadest level of abstraction, the object of an award of damages is to compensate the plaintiff for the damage it has suffered (see the decision of this court in *Chartered Electronics Industries Pte Ltd v Comtech IT Pte Ltd* [1998] 2 SLR(R) 1010 ("*Chartered*") at [16]).

29 Turning more specifically to the issue at hand, we note there is, understandably, no universal rule for the assessment of damages (see the decision of this court in *The "Pioneer Glory"* [2002] 1 SLR(R) 232 ("*The Pioneer Glory*") at [47]). The typical approach, however, is to equate the damages with the value of the goods (see *Chartered* at [18]), *ie*, Damages = Value of the Goods. There may be cases where the plaintiff is also allowed to recover consequential losses such as loss of profits and losses incurred by being deprived of the use of the goods (*Chartered* at [19]), *ie*, Damages = Value of the Goods + Consequential Losses.

30 How, then, is the value of the goods determined? Typically, courts look to the market value (see *Chartered* at [18]). The most commonly cited justification for the market value rule is that it is the best approximate of the loss suffered by the plaintiff who has been deprived of his goods (see *Chartered* at [18]; Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) ("*The Law of Torts in Singapore*") at para 11.054; and Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th Ed, 2014) ("*McGregor on Damages*") at para 36-006). The market price is typically determined as at the date of conversion (see *The Law of Torts in Singapore* at para 11.055), or as in the present case, where goods are converted in transit, at the date of expected delivery (see the decision of the Privy Council (on appeal from the Singapore Court of Appeal) in *The "Jag Shakti"* [1985-1986] SLR(R) 448 at [13]). Needless to say, to determine a market value, one must first ascertain if a market exists. "Market" has been variously defined, as follows:

(a) There is a market if there is a willing seller and willing buyer after negotiations, notwithstanding that the circle of buyers and sellers may be small and/or that goods may not be immediately delivered (see the GD at [40] and [53]).

(b) There must be a sufficient number of traders who are in touch with each other. In other words, the availability of buyers and sellers, and their ready capacity to supply or to absorb the relevant goods is the basic concept of an "available market". There is no need to add to this the test of a price liable to fluctuations in accordance with supply and demand, as occurs in official exchanges or certain commodity markets (see *Benjamin's Sale of Goods* (Michael G Bridge, gen ed) (Sweet & Maxwell, 9th Ed, 2014) at para 16-066).

(c) There must be a reasonably available supply of goods and a reasonably available source of demand for such goods (see *McGregor on Damages* at para 23-007, citing the English High Court decision of *M&J Marine Engineering Services Co Ltd v Shipshore Ltd* [2009] EWHC 2031 (Comm)).

31 We find that the gist across these definitions is, to borrow the Judge's words, that there is a *willing* seller and *willing* buyer *after negotiations*. This rules out command economies or monopolies in which there are no negotiations to speak of (although it may well be the case that the price which is fixed in either of *these* two particular contexts would not only constitute a "market" price of sorts but would also (and more importantly) be the price which the court has recourse to as a measure of replacement cost). However, that does not mean only completely free markets are relevant. It is trite that completely free markets (wherein there is unrestricted competition between sellers and buyers have perfect information) are almost non-existent in reality. Market imperfections may be tolerated so long as the core factors – willingness (of both buyer and seller) and the ability to negotiate – are present. Oligopolies, for instance, typically constitute such "imperfect markets". That said, we would caution against a preoccupation with labels. In the present case, for example, we note the Appellant's argument that the market was "oligopolistic" may have been predicated on a

misunderstanding of what an oligopolistic market in fact is. The crux is not what label can be ascribed to the market but, rather, whether the core factors referred to above are present.

32 To this, we add a further point: the market must be a ***relevant*** market. By this we mean that the claimant must show that it is a participant of – typically a seller in – that market. This is eminently sensible in the light of the compensatory aim of awarding damages. That is to say, a claimant should never be allowed to rely simply on "some other market out there" – typically somewhere much further down the supply chain – wherein goods are traded at a vastly more expensive rate. The simple reply to such an argument is that that particular market is *irrelevant* as the claimant would *never* be able to fetch that sort of price were it to sell the goods in the course of its business. In most cases, the dichotomy between successive "markets" within a supply chain would be easy to envision as each step in the supply chain would involve some form of "value adding" to the good which may manifest physically (such as repackaging the good into a more convenient form). That is not to say that where no physical change to the good takes place, the various markets collapse into one another. Rather, a supply chain might still be necessitated by the goodwill and networks of the various companies involved along the chain. For instance, those further up the supply chain simply source for the goods in bulk and transport them to those lower down the supply chain. The latter then leverage on their extensive networks of clients – clients presumably located where the goods are harder to come by – and sell to these clients at a significantly marked-up price.

33 Where the market price cannot be determined, the value of the goods can be determined, instead, by the *cost of replacement*, which is typically the price at which the goods were bought (see *Chartered* at [18]). Where no market exists in which to replace the goods, their value is to be fixed at what the plaintiff could get by sale to a solvent buyer (see *Chartered* at [18]).

Issue 1

34 We answered this issue in the affirmative. We found, with respect, that the Judge had erred in finding that there was a market for the converted river sand for two reasons. First, it was difficult to conclude, from Mr Loganathan's table alone (see above at [11]), that there was any market for river sand in Port Blair in the first week of October 2011. Secondly, even if Mr Loganathan's table sufficed, the market evinced was an *irrelevant* market.

35 Turning to the first point, we pause to acknowledge that this was a case in which there were crucial pieces of evidence missing. First, Mr Loganathan's table (see above at [11]) was incomplete in that it did not include sales of larger quantities of river sand (*ie*, in the hundreds or thousands of MT). The Judge did not appear perturbed by this as, she noted, Mr Loganathan "had, in his testimony, at least attempted to explain the reasons why there would be no significant pricing difference" between bulk purchases and smaller purchases (see the GD at [71]). In support of that proposition, the Judge referred (in a footnote) to a portion of the Notes of Evidence documenting the re-examination of Mr Loganathan, which reads as follows:

> Q: My Learned Friend brought you --- asked you why [FTPL] has not given the pricing of river sand from other sellers in Port Blair. Can you explain why?
>
> A: I cannot get details from other competitors.

The portion cited did not seem to stand for the proposition that the Judge stated. Another portion of the transcript, which documents a segment of the cross-examination of Mr Loganathan, however, did seem relevant. It reads as follows:

Q: You are talking about ex yard. My question is, if someone were to buy 4300 MT ex ship at Port Blair, the price would be significantly lower than the one you quoted?

A: There would be a small difference.

Q: In other words, your price is for selling ex yard in small parcels?

A: Retail sales. Some wholesale also, 100MT, 200MT.

Q: Which you did not produce documents on.

A: Those are credit sales. We want to only show cash sale transactions to reflect the market rate.

36 On Mr Loganathan's account, the reason he did not provide figures for bulk sales was that they were credit sales, which were presumably at a lower price, as can be inferred from his reply "[t]here would be a small difference" to the question "the price would be significantly lower …?". However, this seemed at odds with what he stated during re-examination. When asked why he did not include documents on credit sales, Mr Loganathan responded that "[p]rices for credit sale would be 2 or 3% more. Because those are credit sales". Not only had Mr Loganathan not explained why bulk purchases were priced similarly to smaller purchases, his evidence was contradictory – first indicating bulk purchases were cheaper yet later stating they were "2 or 3%" more expensive. Furthermore, he did not clearly explain why bulk purchases were more (or less) expensive (unless it was the case that *all* bulk purchases were credit sales). Also, if it was the case that he had access to further records of sales of a similar volume to the converted river sand, notwithstanding that they were credit sales, it was highly peculiar that he had chosen not to include them in his evidence. Would it not have been far more convincing if he had included records of those sales and *then* explained them away as anomalies?

37 The second peculiar point about Mr Loganathan's table was that it only documented FTPL's transactions (wherein FTPL was the seller). The Judge found that the Respondent's (or FTPL's) inability to obtain further figures from other sellers was understandable given that "competitors would loathe cooperating with [the Respondent] by revealing their pricing" (see the GD at [71]). In support of this proposition, the Judge referred once again to the same portion of the Notes of Evidence documenting the re-examination of Mr Loganathan (see above at [35]). The closest Mr Loganathan came to explaining his inability to obtain prices from other competitors was his statement that "I cannot get details from other competitors" (see above at [35]). We found it difficult to discern from this single statement any indication that the industry was of such a competitive and secretive nature that competitors' prices were impossible to ascertain.

38 These two points mentioned thus far pertain to the difficulties we had with the evidence that was before the court. That said, we also had difficulty with evidence that was not before the court but, plainly, should have been. This included the following:

(a) The first difficulty pertained to the price at which the Respondent disposed of the *first* shipment of river sand. It was clear that the 4,300MT of river sand in question (which constituted the subject matter of the present proceedings) was the *second* shipment. No evidence was led to show whether the first shipment had been sold, and, if sold, to whom and at what price. In fact, Mr Loganathan's evidence seemed to imply that the first shipment had been sold to FTPL. However the price of this sale was not exhibited in evidence.

(b) The second difficulty pertained to the price at which the Respondent typically sold river sand on to FTPL. As stated by Mr Loganathan, FTPL typically bought river sand from the Respondent at Port Blair and would thereafter sell it on. Not only was there no evidence as to the price at which the Respondent sold river sand to FTPL, Mr Rajendhranath answered in the negative during cross-examination when asked if he had provided any documents to show the transactions between the Respondent and FTPL.

(c) The third difficulty pertained to the price at which the river sand was eventually sold by the Appellant's subsidiary. Not only was the Appellant's evidence rather confusing in that it first claimed it had sold off the sand before it took the position that the sand was sold off by its subsidiary (which bore a very similar name), it also failed to provide any information on the terms of that sale, save as to state that "the Cargo is not valuable and is easily replaceable" (see above at [8]).

In short, there were significant lapses in the evidence adduced by both parties. These lapses not only went to the burden of proof but also significantly compromised each side's case theory. Nevertheless, we return to the point at hand – was Mr Loganathan's table (see above at [11]) sufficient to establish the presence of a market in Port Blair at the relevant time? For the reasons set out above – both the difficulties we had with the table and the meagre explanations proffered in relation to the lapses in evidence – we found it was not. On this basis alone, we found ourselves compelled to allow the appeal.

39 Nevertheless, even if it could be said that Mr Loganathan's table constituted sufficient evidence of *a* market, there was a more important point to note – it was, at best, evidence of an ***irrelevant*** market.

40 There appeared to be at least three different "markets" in the river sand industry in the context of the present case, at least as depicted by the limited evidence presented before the AR (and, by extension, before the Judge and this court). First, furthest up the supply chain, there was the "wholesale market". In this market, companies such as the Respondent purchase river sand from companies such as Marine Alliance. These sales occur in high quantities (hundreds or thousands of MT) at relatively low prices (S$6.50 per MT, excluding port and freight charges). Secondly, at the other end of the supply chain, there was the "retail market", whereby companies such as FTPL sell the river sand on to buyers (the likes of Sankar Contractor & Construction and Binu Kumar). These sales occur at low quantities (few or several MT) but at relatively high prices (US$46.85 per MT). Thirdly, there was the market that connected the retailers to the wholesalers. For instance, the Respondent typically sold the river sand it purchased (from parties such as Marine Alliance) to FTPL. The sale would take place at Port Blair. However, as noted above, no prices were disclosed in relation to such sales. The overall supply chain can be described as follows:

Original seller – The Respondent – FTPL – Eventual customer

41 The relevant market in this case was the one connecting those in the position of the Respondent to those in the position of FTPL. Not only had no prices been disclosed in relation to transactions in *this* particular market, there was no evidence at all that such a market even existed. In fact, the Respondent's sale of sand to FTPL might just have been a practice unique to the Respondent and FTPL, whereby the Respondent simply acted as a carrier of goods. Not only did this seem apparent from the Respondent's name, Fairmacs *Shipping and Transport* Services Pte Ltd (as contrasted with FTPL's name, Fairmacs *Trading* Company Pte Ltd, and the latter's role as the trading arm of the "Fairmacs group" of companies, see above at [10]), Mr Rajendhranath seemed to imply as much during cross-examination. The relevant portion of the transcript reads as follows:

Q: Can you confirm that [the Respondent] has been dealing in sand for many years before this shipment?

A: No. [The Respondent] may have been dealing as a carrier, not a buyer. [The Respondent] has been bringing sand from mainland India for many years only as a carrier, not as a buyer.

…

Q: So [the Respondent] could have bought sand from other sellers in Port Blair?

A: [The Respondent]? No. [The Respondent] has not bought sand previously. What I am trying to say, earlier shipment from mainland India, [the Respondent] was only the carrier to bring the cargo which may belong to other parties including [FTPL].

42 The portion cited above hinted that the Respondent was simply a carrier of the river sand (as opposed to being a part of the supply chain). What was confusing about Mr Rajendhranath's evidence just quoted above was his seeming denial that the Respondent had ever bought river sand (and that the river sand seemingly belonged – at all times – to FTPL). Leaving this aside, the point we wish to make is that the Respondent could ***never*** have sold the 4,300MT of river sand converted at the price of US$46.85 per MT. This much was even readily accepted by counsel for the Respondent during the oral hearing. Any transaction involving the river sand in question may have constituted a different stage of the supply chain or it may not even have been part of the supply chain. The *burden of proof* was on *the Respondent* to establish a ***relevant*** market, and (in so doing) its role in the supply chain. It failed to meet this burden. This was sufficient to dispose of the matter. But to complete the picture, we observed further that the only evidence the Respondent did place before the court cast doubt on its ability to sell the river sand it procured to anyone other than FTPL. It appeared to be more of a carrier for FTPL (and FTPL alone) than anything else. If this were the case, how could it then be said that the damage it suffered should be compensated on the basis of US$46.85 per MT? Such compensation, if awarded, would, in these circumstances, surely have constituted a windfall.

43 On the basis that the Respondent had failed to prove the existence of a market on a balance of probabilities, we found that the replacement cost was a viable alternative method to assess damages. It was undisputed that US$62,950 was the amount the Respondent had actually paid for the sand. This was also the amount the AR arrived at. We therefore restored the AR's award.

Issue 2

44 As we found there was no (*relevant*) market to begin with, there was, strictly speaking, no need to consider this particular issue (*ie*, market value). As mentioned above, in the light of the dearth of evidence adduced to establish a market (let alone a market value), we preferred the cost of replacement measure. On this note, and for completeness, we address the parties' reliance on *Furness* (see above at [21] and [24]).

45 In *Furness*, the victim's damages were initially assessed on the basis of the "wholesale price" of the converted goods. To recapitulate, the plaintiff – Adrium Industries – was in the business of selling to the wholesaler in a particular novelty goods industry (analogous to Marine Alliance's position in this case). On appeal, the Supreme Court of Victoria Appeal Division found that the judge below had erred in adopting the "wholesale price" and, instead, assessed the plaintiff's damages on the basis of the amount it paid for the goods, *ie*, the replacement cost. The reason for this was that "the only evidence about the market [in] which the converted goods were capable of being purchased by [Adrium Industries] was the market from which it had originally purchased them[;] [t]here was no

evidence which justified an award of damages by reference to the wholesale price" (at 675).

46 As was the situation in *Furness*, no evidence was led as to the market in which the Respondent was selling or intending to sell the converted goods. The court in *Furness* appeared to arrive at its conclusion by reasoning that "market value" could refer either to the market into which the good was going to be sold by the victim (which seems to correspond to market price) or the market from which the good was bought by the victim (which corresponds to cost of replacement). In *Furness*, the court found the latter to be more appropriate in the light of the dearth of evidence of the former.

47 Our determination of the second issue also led to the conclusion that the cost of replacement was the appropriate measure of damages to be adopted in this case. Further, as the purchase from Marine Alliance was in US Dollars, it was appropriate for the damages to be awarded in that currency.

Conclusion

48 For the reasons set out above, we allowed the appeal and restored the AR's award. We also awarded costs here and below to the Appellant fixed at S$20,000, excluding reasonable disbursements.