IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 288

Suit 1159/1988, 1284/1988

Between

Dong Yuan Hang Trading Pte Ltd

… *Plaintiff*

And

Sunko (Singapore) Company Private Limited

… *Defendant*

GROUNDS OF DECISION

Version No 1: 11 Sep 2026 (01:05 hrs)

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Dong Yuan Hang Trading Pte Ltd v Sunko (Singapore) Company Private Limited

[1993] SGHC 288

Suit 1159/1988, 1284/1988
Lai Siu Chiu JC
03 December 1993

1 **Judgment:**

2 **Cur Adv Vult**

3 Suit No 1284 of 1988 (the first contract)

4 The facts

5 The plaintiffs are importers and exporters of foodstuff, latex, beans and chemicals and the defendants are rubber and latex traders. On or about 26 April 1988 (3PB1) the parties agreed that the plaintiffs would purchase from the defendants 191.88 mt of centrifuged Malaysian latex (the cargo) to be shipped by 12 x 20 ft containers on the following salient terms: Shipment : single shipment during June 1988 in Singapore; Unit price : S$2.98 per kilo FOB Singapore; Total value: S$571,802.40; Payment : by irrevocable at sight LC; Remarks : in the event no shipping instruction from buyer, sellar have the right to load the cargo and accordingly draw the balance amount under LC. The contract (the first contract) was concluded between the plaintiffs' director Miss

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Chee Sau Ying (Chee) and the defendants' trading clerk Ng Kim Pheng (Ng) through a broker Ang Kong Yew (who has since passed away).

6 On 3 May 1988 (2DB15) in response to the defendants' telex inquiry for shipping instructions, Chee (PW4) sent a telex to Ng (DW4) to say that the plaintiffs had booked space on a vessel called the Majapahit of Pacific International Lines (PIL) for loading between 10-15 June 1988. If there were to be any changes the plaintiffs would inform the defendants. On the same day (2DB16) Chee sent a fax to Ng to advise the shipping marks for the first contract.

7 On 11 May 1988 (3PB30) the plaintiffs sent the defendants another fax to say they were prepared to make a reservation on the vessel Alligator Victory which was due to arrive on 11 June 1988. The defendants responded on 12 May 1988 (2DB30) to say that shipment on the Alligator Victory was not possible and they requested a vessel arriving 16 June 1988. The plaintiffs responded to say that they were prepared to ship on the vessel Omex Pioneer and requested for confirmation from the defendants by return.

8 Chee spoke to Ng on 18 May 1988 and on the same day sent a fax (2DB34) to the defendants to offer either the Omex Pioneer or America Maru for shipment and requested the defendants' confirmation when the cargo would be ready for delivery. No response came from the defendants and on 25 May 1988 (exh D10) the plaintiffs hand delivered to the defendants a letter (which was duly acknowledged) to confirm that they required shipment on the Majapahit and enclosed 14 shipping orders together with blank bills of lading. On the same day (2DB41) the plaintiffs sent this telex to the defendants 1. Thank you for your acceptance of the shipping arrangement against above contract

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today. 2. If you found any inconvenience to deliver the consignment on the appointed vessel Majapahit please inform us in advance. 3. For your information there will be a vessel namely Gowa scheduled to arrive Singapore for accepting cargo on/about 27/6/88.

9 The above telex was followed by another telex from the plaintiffs to the defendants on Saturday 28 May 1988 sent at 1.34pm (2DB42) which stated: Further to our letter dated 25/5/88, we hereby once again confirmed our nomination of vessel Majapahit to carry the above contractual goods. Our notice of nomination are definitely having sufficient time for you to deliver the goods accordingly. Therefore, please note that our nomination of vessel Majapahit eta Singapore 13/6/88 is taken as final and we request you to deliver the cargo to the nominated vessel accordingly. This is a firm nomination of vessel and requirements for your delivery.

10 At 5.05pm on 7 June 1988 (2DB45) the plaintiffs sent yet another telex to the defendants: We refer to the nomination of Majapahit in our letter dated 25 May 1988. This nomination was accepted by you and you acknowledged receipt of our nomination. In our telex of 28 May 1988, we reminded you of the nomination of Majapahit eta Singapore 13/6/88 so that you could take steps to ensure that the goods would be ready for shipment. Majapahit is a container vessel and PIL will be stuffing the goods in containers on our account. We understand that PIL has contacted you to ask for the goods to be sent to PIL on Friday or Saturday, 10 or 11 June 1988. The eta for Majapahit is now 14 June 1988. Please confirm by 12 pm 8 June 1988 that you have sent cargo to PIL. You are obliged under the contract to deliver the cargo to PIL for shipment to Majapahit as our nominated vessel and in accordance with our call for shipment within the shipment period of June.

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11 On the same evening (2DB46) the plaintiffs telexed PIL to confirm their reservation on the Majapahit would be held until 8 June 1988 1700 hours. Otherwise, the cargo would be loaded on the Gowa. On the morning of 8 June 1988 the plaintiffs repeated their telex to the defendants of 7 June 1988.

12 On 9 June 1988 the plaintiffs sent the following telex to the defendants: This is further to our telex of 8 June 1988. We still have had no response. We repeat, we hold you liable for all damages for your breach of contract. While reserving all our rights for damages against you, we are willing to nominate a fresh vessel Gowa eta Singapore 27 June 1988 for you to ship the contract goods. Please confirm by the close of business tomorrow that you will be shipping the goods on Gowa eta Singapore 27 June 1988. You are already in breach of contract and this confirmation will reduce the amount of damages you are liable to pay to us. Please be informed the new booking number of vessel Gowa will be LGH-261. Shipping company, PIL, allow to send in the goods around 23 to 24 June 1988. Please take note.

13 The plaintiffs received no response and on 11 June 1988 (2DB52) they sent another telex to the plaintiffs which said We refer to our telexes of 8 and 9 June 1988. We regret we have had no response. We regard your behaviour as a repudiation of the contract. We accept the repudiation and will sue you in damages. We have had no choice but to buy an alternative June shipment at US$2,730 per metric ton C and F Hongkong. As the contract is at an end, we require you to immediately return the original letter of credit No LC00134454 with all relevant amendments to us.

14 The defendants responded on 13 June by telex (2DB53) as follows: Reference your telex .. dated 11 June 1988. We are not in repudiation of contract

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but you have given us very little time to respond. We are not repudiating and we will supply you with goods as soon as possible. We will also point out that the price of US$2,730 mentioned in your 11 June 1988 telex is well above market. The plaintiffs' solicitors then made a demand for the return of the plaintiffs' letter of credit. The defendants denied they were in breach, the plaintiffs' solicitors repeated their demand. By 15 June 1988 the defendants had also appointed solicitors and on the same day they returned the plaintiffs' letter of credit.

15 The plaintiffs after making inquiries of various suppliers in Singapore and in HongKong, purchased a substitute cargo from Zhing Zhan Trading Co (Zhing Zhan) of HongKong at US$2,730 per mt for a total consideration of US$523,832.40.

16 The claim

17 On 28 June 1988 the plaintiffs commenced these proceedings for the first contract. In the statement of claim the plaintiffs inter alia alleged that

18 1. the defendants failed to respond to the plaintiffs' telex of 7 June 1988 by 12 noon on 8 June 1988 and therefore the plaintiffs cancelled the booking on the vessel Majapahit;

19 2. the defendants breached their contract by failing to deliver/arrange for delivery of the latex to PIL for loading onto the Majapahit;

20 3. as a result of the defendants' breach the plaintiffs entered into a contract with Zhing Zhan and purchased an alternative cargo of 191.88 mt of latex for shipment in June at US$2,730 per mt C and F HongKong.

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21 In the (amended) defence, the defendants after referring to inter alia the plaintiffs' telex of 3 May 1988 (2DB15) and to exh D10:

22 1. denied that there was any valid nomination of the Majapahit;

23 2. alleged that the plaintiffs' booking of the Majapahit was cancelled on 4 June 1988 and transferred to the Gowa;

24 3. admitted that they did not respond to the plaintiffs' telex of 7 June 1988 timed at 1705 hours by noon on 8 June 1988;

25 4. contended that by telex on 9 June 1988 the plaintiffs informed the defendants that a new booking had been made by the plaintiffs on the Gowa and the defendants would be allowed by PIL to send the cargo to PIL around 23-24 June 1988;

26 5. alleged that the defendants by telex on 13 June 1988 affirmed their willingness to supply the cargo;

27 6. denied that any contract was made as a result of any breach of contract by the defendants;

28 7. alleged that Zhing Zhan is an associate of the plaintiffs and forms part of the group of companies/businesses headed by the plaintiffs and or Gold Way Trading Co Ltd of HongKong.

29 On the defendants' request for further and better particulars of para 9 of the statement of claim (on the cancellation of the booking on the Majapahit), the plaintiffs alleged that Chee spoke to Jennifer Cheng (Cheng) of PIL on 7

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June 1988 who agreed to reserve the Majapahit until 1700 hours on 8 June 1988 and on 9 June 1988 Chee confirmed to Cheng to cancel the booking on the Majapahit.

30 The evidence

31 I shall first review the evidence adduced from the plaintiffs' witnesses touching on the defendants' alleged breach of the first contract. Chee's version of the May-June 1988 events is as follows:

32 1. She kept a diary at the material time which extract on Saturday 7 May (2DB20-21) showed that Ng telephoned her to say that the defendants could make partial delivery in May to a maximum of 9 containers provided the plaintiffs paid a premium of 10 cents per kilo. If the plaintiffs agreed arrangements could be made to ship on the Gowa. On Monday 9 May she made an entry in her diary (2DB22-23) that she was unable to reach agreement with the plaintiffs on the premium.

33 2. On 18 May her diary recorded (2DB33) that she spoke to Ng who confirmed that the defendants could supply 9 containers for shipment in late May. She called Ng subsequently to say shipment should remain in June.

34 3. On 24 May (2DB37) she spoke to Joyce of PIL who said the cargo could be loaded onto the Majapahit eta 13 June hence her letter exh D10 to the defendants and which nomination the defendants accepted.

35 4. She then spoke to Cheng of PIL on 7 June who said that, the Majapahit will be stuffing cargo on 10-11 June, the defendants had been informed and if the plaintiffs were unable to make it they had to inform PIL in advance as

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otherwise dead freight would be payable. Chee requested Cheng to hold the booking until 5pm on 8 June which Cheng agreed.

36 5. As there was no response from the defendants to her telexes (3) of 7 and 8 June, she spoke to Cheng of PIL on 9 June and followed up with a telex to the defendants informing them of the change of vessel to the Gowa.

37 6. As there was still no response from the defendants, the plaintiffs after making unsuccessful attempts to obtain the cargo from local suppliers Lee Latex and Tropical Produce Co Pte Ltd (Tropical), contracted to buy the same from Zhing Zhan on 10 June.

38 Under cross-examination Chee denied that a. Ng had telephoned her after receipt of exh D10 and her telex 2DB41 to say it was inconvenient to ship on the Majapahit and that he would consider Gowa as an alternative vessel; b. PIL had cancelled her reservation on the Majapahit on 4 June -- in any case it was not the right of PIL but of the plaintiffs, to cancel the booking; c. Ng attempted to contact her several times on 31 May and that when she telephoned him on 1 June he repeated that shipment on the Majapahit was inconvenient; d. the documents purporting to show a sale from Zhing Zhan of the cargo were faked.

39 I next turn to Ng's version as to what transpired. Ng a trading clerk with the defendants since 1975 in charge of purchase and sale of latex

40 1. denied that he spoke to Chee on 3 May to book cargo space;

41 2. said the plaintiffs did not further advise him after their telex of 3 May on the vessel's name and loading date;

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42 3. said he did not accept the nomination of the Majapahit nor any of the subsequent vessels proposed by the plaintiffs;

43 4. contended that although he saw the plaintiffs' letter exh D10 he did not receive the shipping orders therein mentioned;

44 5. alleged that when he spoke to Chee on 25 May after receipt of exh D10 she agreed to the change of vessel from Majapahit to Gowa;

45 6. denied that PIL contacted him to send the cargo as stated in Chee's telex of 7 June. In any event it was impossible to comply with the plaintiffs' deadline therein to deliver the cargo by 12pm on 8 June as the same must come from the factory of Lee Latex in Tampoi, Johore Bahru;

46 7. said after their argument on 1 June and upon receipt of Chee's telex of 9 June he contacted Ang Kong Yew (Ang) with a request to inform Chee that the cargo would be shipped on the Gowa on 27 June; Ng wanted time until Monday 13 June afternoon in which to confirm delivery upon Lee Latex reverting to him;

47 8. said he knew that the plaintiffs had treated the first contract as ended - when he saw their telex of 11 June demanding the return of their letter of credit; 9. maintained that he was prepared to ship the cargo on or about 27 June on the Gowa in which connection he had issued shipping instruction no 1453 on 14 June (2DB57) to Lee Latex.

48 Under cross-examination Ng asserted that he had 300-400 tons of latex available in June, more than enough to fulfil the first contract but he was not in a position to deliver before 16 June.

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49 The defendants called as witnesses two representatives from PIL. The first witness was Yap Cheng Hai (Yap) the manager of PIL's container division in 1988. Yap (DW2) confirmed that the plaintiffs' booking was cancelled on 4 June 1988 as stated in PIL's letter to the defendants dated 13 July 1988 (exh D6). He further testified

50 1. the cancellation was because the Majapahit was overbooked. Cheng from his booking department had told him some cargo had to be cancelled and he approved cancellation of the plaintiffs' booking. PIL does not claim for dead freight if after space is booked the booked cargo is not loaded. Dead freight is only payable when there is a contract between shipper and shipping line;

51 2. in 1988 PIL did not and to date does not use shipping orders (exh D9) for container vessels like the Majapahit; shipping orders are for conventional vessels; shipping notes (see exh D8) are used for container vessels;

52 3. there was no extension of the booking of the Majapahit to 7 June 1988, instead the booking was transferred to the Gowa. This was confirmed in PIL's letter to the defendants dated 18 July 1988 (exh D7);

53 4. if a booking is cancelled PIL does not as a practice confirm the cancellation in writing unless requested by a party involved to do so. In the case of the defendants he recalled that their Mr Wong telephoned him and requested for exhs D6 and 7 which were signed by his documentation supervisor Steven Oon;

54 5. the loading schedule for container vessels was/is 7 days before a vessel's arrival with PSA imposing a closing time of 24 hours before a vessel's arrival for all containers to be stacked ready for loading;

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55 6. the defendants were good shippers of PIL in 1988.

56 The second witness from PIL was Cheng (DW3). Cheng who in 1988 was a booking co-ordinator with PIL's container division liner 2 confirmed Yap's evidence. She refuted the plaintiffs' telex dated 8 June 1988 para 3 saying

57 1. she did not speak to the defendants as Chee alleged -- PIL would only contact the party who placed the booking which would be the plaintiffs in this case. She would not have told Chee the Majapahit would be stuffing cargo on 10-11 June since she had told the plaintiffs their booking had been cancelled. Neither did she say dead freight was involved in any cancellation;

58 2. once cancelled a booking cannot be reinstated, therefore once the booking on the Majapahit was cancelled on 4 June it could not be reinstated or reserved but the booking was transferred to the Gowa.

59 The other witnesses called by both parties related to the second issue of whether the plaintiffs were justified in purchasing a substitute cargo from Zhing Zhan to fulfil their contractual obligations to their own buyer a HongKong company called Gold Way Trading Company Limited (Gold Way). Evidence was adduced from the plaintiffs' chairman Yeo Kiat Hui (Yeo) that, Gold Way is a shareholder of the plaintiffs (see 3PB201), that he (PW3) is a director of the plaintiffs and Gold Way and a director and shareholder of another HongKong company known as Herearn and that a partner of Zhing Zhan one Tse Suk Yee was a shareholder of Gold Way. However neither the plaintiffs nor Gold Way hold shares in Zhing Zhan. In 1988 Yeo was based in HongKong.

60 Under cross-examination Yeo testified that the substitute cargo purchased from Zhing Zhan had been originally sold by Lee Latex to Gold Way

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in March-April 1988. The plaintiffs on their part had sold the cargo under the first contract to Gold Way who resold it to Zhing Zhan. Therefore in buying the substitute cargo from Zhing Zhan to discharge their own contractual obligations to Gold Way, the plaintiffs in effect went a full circle and bought from Zhing Zhan what they were supposed to deliver to the Zhing Zhan under the first contract.

61 The plaintiffs also adduced evidence from a sales executive of Tropical Goh Yeh Cheng (PW1) and from the executive director of Darchet Co Ltd of HongKong Yeo Teo Bok (PW2) to show that because of high demand for latex between March-June 1988 prices were then on an upward trend and neither company could supply latex to the plaintiffs in place of the defendants. The defendants' witness Lim Kok Eng (DW1) from Lee Latex (who is a major supplier together with Tropical) confirmed that there was a worldwide shortage of latex in May-June 1988 resulting in a marked and unprecedented escalation in prices, he therefore considered a price of US$2,000 per mt in June 1988 to be fair as his company's price for contracts around 10 June 1988 was US$2,460 depending on who was the customer and also the quantity -- the bigger the quantity the higher the price generally.

62 Suit No 1159 of 1988 (the third contract)

63 The facts

64 At the same time that the plaintiffs concluded the first contract with the defendants, Chee alleged that the parties also concluded two other contracts for latex through Ang. One was for the plaintiffs' purchase of 5 x 20 ft containers of about 80 mt (the second contract) and the other was for 4 x 20 ft containers

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of 63.96 mt (the third contract). There is no dispute on the second contract which was performed but the third contract is the subject of the plaintiffs' claim against the defendants in Suit No 1159 of 1988.

65 Chee's diary extract for 3 May 1988 (1DB3) stated that Ang made the purchase under the third contract after he had concluded the second contract for the plaintiffs. On that day the defendants/Ng sent the plaintiffs a telex (1DB4) to confirm the third contract as follows: We confirm today 3.5.88 sold to you additional qty of centrifugal latex DRC 60%, qty/terms and conditions as follows: Centrifugal latex 60% DRC Malaysian origin Brand: 'Leetex' Qty: 63.96 mtons (packed in 312 drums x 205 kgs nett) Shipment: During July 88 (full July 88) Unit price: US$1,580 per mton CNF HongKong Total value: US$101,057 CNF HongKong Payment: Irrevocable LC for 100% value in favour of Sunko (S) Co Pte Ltd, Singapore. This LC to be recd within one week from day of contract.

66 Docs under LC: B/L Packing list Analysis certificate issued by maker in Singapore or Malaysia acceptable

67 Remarks: Export declaration permit to be declared by Lee Latex (Pte) Ltd, Singapore (buyer to issue their shipping instruction to us for shipment).

68 This telex is firm commitment on our sale and no other contract will be involved.

69 The plaintiffs sent the following telex reply to the plaintiffs on 4 May 1988: Tks ytlx 3018 dd 3.5.88. We hereby cfmd to purchase fm u 63.96 mt = 4 x 20 FCL (312 drums) Malaysian centrifugal latex 60% DRC w all terms stipulated in ytlx 3018 exceptional: Payment : Either by LC (1) To increase the

existing LC No L000134454 after shipment for the month of May 1988 have been effected. Or (2) Deposit 10% of contract value to be payable to u, n balance to be covered by LC of which wl open end June 1988. Instead of your stipulated.

70 Please confirm.

71 Chee recorded in her diary that Yeo (PW3) called her from HongKong on 4 May 1988 to inquire about the LC for the third contract and it was discussed that after the defendants had performed the second contract (shipment in May) the plaintiffs would immediately increase the amount of the existing letter of credit (LC) after they had seen the goods. Ang was requested to convey the message to the defendants.

72 On 5 May 1988 (1DB11) Chee recorded in her diary (not having received the defendants' reply) that she asked Ang to find out and Ang assured her that the defendants would not repudiate as they are a big company, it would be alright if the plaintiffs did everything according to the first two contracts. When Ng telephoned her on 10 May 1988 to send someone to check the cargo for the second contract, Chee asked him about the third contract and Ng responded with the assurance that it will be shipped and there was no need to put a deposit, she should just amend the LC amount.

73 Consequently on 17 May 1988 (1DB15) the plaintiffs made the following (third) amendment to their LC issued by Hang Lung Bank HongKong: Shipment date extended to: 31 July 1988 Expiry date extended to: 15 August 1988 Amount increased by: S$202,113.60 Chee conveyed the amendment by fax to the defendants on 21 May 1988 (1DB18). It drew a telex response from the defendants on 23 May 1988 (1DB19) as follows:

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74 Re: 63.96 mtons (packed in 312 drums x 205 kgs nett) Centrifuged latex 60% DRC sold to you, terms under our tlx 3018 dated 3.5.88

75 Yr letter dated 21.5.88 sent to us by fax on same day after our office hours, which came to our knowledge this morning, that you hv amended LC no. 00134454 for abv qty. Kindly note our sale to you is no valid after yr tlx 4 May 1988 not agreed to terms/conditions stated in our tlx 3018 dated 3.5.88.

76 If you still need this qty, kindly advise and we will offer you price according to the market. Pls reply.

77 Chee replied to the defendants' telex (1DB20) on the same day as follows:

78 (1) We are surprised to receive your allegation that there is no concluded contract. We < are > kindly requested you to study all the telexes/fax exchange, as well as to bring back to memory all the telecon conversation between your K P Ng and our Ms Chee n Mr Ang Kong Yew.

79 (2) In our telex dated 4/5/88, we agreed to the terms/conditions stated in your telex dated 3/5/88. We asked for an amendment of payment terms and gave you two options. We remind you of the telephone conversation between our Ms S Y Chee and your Mr K P Ng wherein your Mr K P Ng agreed to the first option, ie that payment be by our increasing the existing LC no. LC00134454 after your shipment in the month of May 1988 for our previous contract had been effected. It was because of your Mr K P Ng's acceptance of our amendment that we increased the existing LC no. LC00134454 and forwarded the amendment to you on 21/5/88.

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80 (3) Please note that the July shipment of the centrifuged latex which is the subject of this contract is required by our buyer to make surgical gloves in its factory.

81 (4) Your failure to comply with the contract will result our buyer suffer substantial losses/damages. Please honour your contractual obligations.

82 Subsequent exchange of telexes between the parties came to nought as the defendants maintained their stand that no contract existed whereas the plaintiffs insisted that a contract had been concluded. As with the first contract the plaintiffs purchased a substitute cargo from Zhing Zhan to fulfil their own contract to their buyer.

83 The claim

84 The plaintiffs commenced proceedings on 10 June 1988 and in their statement of claim alleged that the defendants' telex of 3 May 1988 and the plaintiffs' telex of 4 May 1988 concluded the third contract. They further alleged that as a result of the defendants' breach the plaintiffs purchased an alternative cargo from Zhing Zhan for shipment in July at US$2,700 per mt C and F HongKong.

85 In the defence the defendants denied the plaintiffs' allegations contending that: a. on 4 May 1988 subsequent to the plaintiffs' telex of that date a telephone discussion took place between Chee and Ng in which no agreement was reached; b. whilst the plaintiffs did make the third amendment to their LC, the amendment did not conform with the defendants' telex of 3 May 1988 in that the price offered in the telex was US$1,560 per mt C N F HongKong whereas in the LC:

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86 (i) the price was S$3,160 per mt;

87 (ii) bills of lading were required to be marked 'freight collect' which condition was more appropriate to an FOB contract and not to a C and F contract; c. by telex dated 23 May 1988 the defendants informed the plaintiffs that there was no agreement between them as was the fact.

88 The evidence

89 In her testimony for the plaintiffs Chee:

90 1. denied that Ng telephoned her on 4 May after receipt of the plaintiffs' telex and rejected the plaintiffs' proposals for payment, he did not call at all;

91 2. claimed that Ang had confirmed the third contract on 5 May after she had sent off the telex on 4 May to the defendants, hence she did not require confirmation from the defendants as stated in the telex;

92 3. asserted that the purchase price was converted from US dollar to S dollar at Ng's request on 3 May 1988 at the exchange rate of S$2 to US$1 and in her subsequent conversation with Ng on 10 May he asked her to increase the LC amount in S$ currency;

93 4. asserted that if the amendments to the LC were inappropriate it was for the defendants as the beneficiary to revert to the plaintiffs for alteration; FOB terms were more advantageous to the defendants as the buyer not the sellar has to pay freight whereas in a C and F contract it is the sellar who has to pay the freight. The defendants could have negotiated the LC notwithstanding that

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the terms were C N F as they could have deducted the freight to arrive at the FOB value of the contract.

94 Under cross-examination Chee agreed that the plaintiffs' telex of 4 May 1988 contained payment terms different from those stated in the defendants' telex of 3 May 1988 but she maintained that first Ang and then Ng, accepted the plaintiffs' payment terms.

95 Having dealt with Chee's evidence, I next turn to the evidence adduced from Ng. He said:

96 1. upon receipt of the plaintiffs' telex dated 4 May 1988 he informed his managing director S M Wong (Wong) of the plaintiffs' proposal for payment. Wong did not accept the plaintiffs' terms and instructed Ng to call Chee to inform her which he did, Ng told Chee that the defendants insisted on the terms stated in their telex of 3 May 1988 namely, an irrevocable LC for 100% value in favour of the defendants to be received within one week from date of contract;

97 2. he did not speak to Chee either on 3 or 5 May 1988. On 10 May 1988 when he telephoned Chee to send someone to inspect the cargo for the second contract, they did not discuss the third contract at all let alone that he had agreed that the plaintiffs increase the amount in their LC;

98 3. he did not confirm the plaintiffs' telex dated 4 May 1988, neither did Chee confirm payment by the first option stated therein;

99 4. he never asked for nor did he agree to the price to be converted from US$1,560 to S$3,160 at the rate of US$1 to S$2. If he had wanted payment in local currency he would have so stated in his telex to the plaintiffs of 3 May

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1988. In any case at the material time the exchange rate was S$2.0085 or S$2.0015 to US$1 (see United Overseas Bank's exchange rates in exh D14) and the correct price should have been S$3,173.43 and not S$3,160 per mt with the difference of S$13.47 giving a shortfall of S$858.98 for 63.96 tons; (the shortfall should be S$861.54);

100 5. he would have difficulty negotiating the plaintiffs' LC with the third amendment because the LC was for an FOB contract whereas his offer to the plaintiffs was on an C and F basis.

101 Suit No 1284 of 1988

102 The submissions

103 I will next consider the arguments presented by counsel. For the defendants it was submitted:

104 1. there was no valid/firm nomination of the Majapahit by exh D10 because the plaintiffs gave the defendants the alternative of shipping on the Gowa. Chee repeatedly said in her evidence that if the defendants found the Majapahit inconvenient the plaintiffs would allow them to ship on the Gowa; her diary entries were proved to be unreliable as there were many instances where telephone calls admitted by her were not recorded;

105 2. Ng never received the shipping orders supposedly enclosed with exh D10 and Yap had confirmed that PIL did not/does not issue shipping orders for container vessels like the Majapahit;

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106 3. the defendants had the right to ship at any time in June 1988 and Ng had informed Chee that the defendants wanted a vessel to be booked after 16 June 1988;

107 4 the plaintiffs' requirement in their telex of 7 June (repeated on 8 June 1988) that the defendants must confirm by 12pm on 8 June 1988 that they had sent the cargo to PIL for shipment on Majapahit was impossible to perform. It was equally impossible to ship on the Majapahit on or after 4 June 1988 because the booking had been cancelled by PIL and no extension had been granted by PIL to 7 June 1988 as Chee alleged. Chee's allegation that dead freight was payable for shipping space booked but not utilised was a fabrication;

108 5. instead of allowing the defendants to revert on 13 June to check with Lee Latex on the availability of the cargo, the plaintiffs on 10 June 1988 entered into a contract with Zhing Zhan a related company, to purchase the same quantity of latex at a price increase of US$1,240 per mt or US$237,931.20 for 191.88 mt. The related documentation is inadmissible as no one from Zhing Zhan gave evidence. Neither is there evidence before the court that there was any sale between the plaintiffs and Gold Way. The circuitous route taken by the sale of the latex from Lee Latex to Gold Way to Zhing Zhan to the plaintiffs to Gold Way (save for the sale by Lee Latex) is at best imaginary, at worst fraudulent. There is no evidence to sustain the plaintiffs' claim for damages arising out of the sham purchase from Zhing Zhan;

109 6. the defendants' willingness and ability to ship the cargo is evidenced in their shipping instructions to Lee Latex dated 14 June 1988 which was confirmed by Lim Kok Eng of Lee Latex; it was never suggested to Lim in cross- examination that those shipping instructions were fabricated;

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110 7. shipment was to be in June 1988 and as it was an FOB contract, once proper shipping instructions are given by the buyer, the sellar must ship the goods by the end of the period specified in the contract. It is abundantly clear that the defendants should have been allowed to ship on the substitute vessel the Gowa eta 27 June 1988;

111 8. since the plaintiffs' entire claim is founded on the nomination of the Majapahit eta Singapore 13 June 1988 which reservation was cancelled on 4 June 1988 and the defendants were clearly entitled to load up to 30 June 1988, the plaintiffs' claim must fail notwithstanding that the defendants were not in a position to deliver the cargo before 16 June 1988. It was the plaintiffs who breached their obligations to accept delivery when they terminated the contract and required the immediate return from the defendants of their LC.

112 For the plaintiffs counsel submitted:

113 1. the plaintiffs as the buyer have the option as to the exact time of shipment within the month of June 1988. Equally they have the right to substitute their initial nomination with another vessel provided they gave reasonable notice to the defendants, nomination does not require acceptance. There was clearly a valid nomination of the Majapahit by exh D10. If the defendants contend that the nomination is ineffective for want of adequate time for loading, it is for them to prove. The evidence of Lim Kok Eng shows that 2-3 days' notice let alone a week's notice would have been adequate;

114 2. Cheng's evidence that PIL cancelled the reservation on the Majapahit was based on exhs D6 and D7 which letters cannot be relied on because of a possibility of an error in recording, the actual booking list was not proved to be

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in existence at the time the letters were written and there was confusion between a cancellation, a transfer of and a fresh, booking. The fact that the booking had been cancelled on 4 June did not mean that it was not further extended or reinstated. Cancellation does not at law affect a nomination, it is rendered ineffective only when the nominated vessel refuses or fails to take the goods on board after the same has been tendered by the sellar;

115 3. as there was anticipatory breach/repudiation by the defendants, the cancellation is irrelevant as the defendants were not in a position to perform anyway; the defendants' non-tender of the goods was not due to the cancellation;

116 4. Chee's version of what transpired in her several conversations with Ng is to be preferred as Ng's evidence that she had agreed to shipment on the Gowa was never pleaded nor was it put to Chee in cross-examination. Ng's contention that there was agreement reached on 25 May 1988 to ship on the Gowa is inherently incredible as the defendants had every opportunity up to 8 June 1988 to place their position on record but no explanation let alone satisfactory explanation was given by Ng as to why the defendants failed/did not do so;

117 5. it was clear from Ng's evidence that the defendants would not be performing the contract before 16 June 1988 and that they had taken no steps to load onto the Majapahit; the defendants' conduct was such as to lead a reasonable person to conclude that they will not be able to perform when the time for performance arrived, as evidenced by the defendants' failure to give an assurance to the plaintiffs' telex inquiries whether they will be loading on the Majapahit;

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118 6. the plaintiffs were justified in demanding the return of their LC as the demand was made after the defendants had repudiated the contract;

119 7. notwithstanding the plaintiffs' right and willingness to nominate a fresh vessel the defendants never reverted after 9 June 1988 on the Gowa;

120 8. shipping instruction no 1453 purportedly issued by the defendants on 14 June 1988 bore two alterations which seem to suggest that it was used by the defendants to cover their track of having sold off 100 mt of the cargo meant for the plaintiffs, to other parties at above US$2,500 in June 1988;

121 9. if the court finds for the plaintiffs, their claim is for the difference between the contract price of S$2,980 and the purchase price from Zhing Zhan of US$2,730 per mt (at US$1 to S$2) namely S$475,862.40;

122 10. the duty on the plaintiffs as the buyer to mitigate is merely to take reasonable steps to reduce any losses occasioned by the breach and the onus is on the sellar to show that the steps taken were not reasonable;

123 11. the alleged relationship between the plaintiffs and Zhing Zhan is irrelevant as the evidence shows that the purchase price from Zhing Zhan is lower than that offered by Darchet Co one of the suppliers approached by the plaintiffs.

124 As counsel for the defendants sought to rely on Forrestt & Son Ltd v Aramayo (1900) 83 LT 335 to support his clients' contention that the plaintiffs' nomination of the Majapahit was ineffective whereas his opponent maintain the case can be distinguished, a review of the case would be useful. The facts in Forrestt were: The plaintiffs agreed to construct and deliver FOB at the port of

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London for the defendants a steam launch by 7 January 1899. On 12 December 1898 the defendants asked the plaintiffs to ship the launch at Liverpool on 29 December or at Hamburg on 6 January 1899, the plaintiffs refused. The defendants wrote to the plaintiffs in December to say that if the launch were not so shipped, there would be no further opportunity to ship until April 1899. Subsequently the defendants nominated a ship which sailed on 17 April 1899. The plaintiffs sued for the price and the defendants counterclaimed for damages for late delivery. It was held that as the defendants were not ready and willing to take delivery and to give shipping instructions in accordance with the contract before the plaintiffs were ready and willing to deliver, the defendants were not entitled to deduct from the price the agreed damages for delay in delivery. To succeed in a claim for damages, the buyers would have to show one of two things:

125 a. that they were ready and willing to nominate a ship able to load in accordance with the contract, or

126 b. that the sellars had indicated that they could not deliver the launch within the contract period. On the facts the buyers could not establish alternative b) as there was no express repudiation by the sellars of their obligation to deliver the launch in accordance with the contract nor could anticipatory breach be inferred from the fact that the launch was not ready for delivery until April as this delay may well have been induced by the buyers' December letter stating that if delivery was not made in accordance with their original instructions it could not be taken until April. In these circumstances the sellars could in turn have treated this letter as anticipatory breach, rescinded the contract and claimed damages from the buyers without having to show that they could have delivered by 7 January 1899.

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127 Counsel for the plaintiffs submitted the facts here are clearly distinguishable from those in Forrestt as: a. here there is no divided option as to the time for shipment; b. the plaintiffs were at all times ready and willing to nominate a vessel able to load in accordance with the contract and c. were willing to make a substitute nomination namely the Gowa.

128 The findings

129 On the facts and on the law I find for the defendants and would accordingly dismiss the plaintiffs' claim with costs. I hold that the defendants were not in breach of the first contract and I rely on Forrestt's case for the following reasons:

130 1. The plaintiffs' attitude to say the least was ambivalent -- on the one hand they contended that they had made a valid/firm nomination of the Majapahit by their letter exh D10 to the defendants, yet on the other hand they had telexed the defendants on the same day to say if the Majapahit was inconvenient the Gowa was available and the defendants should inform them in advance.

131 2. The defendants' obligation at law under the (FOB) contract was to load on a vessel nominated by the plaintiffs within the shipment period of June and therefore no later than 30 June 1988. As the Gowa was scheduled to arrive in Singapore on 27 June 1988, the defendants could still have shipped in time had they loaded on the Gowa instead of the Majapahit bearing in mind they had telexed the plaintiffs on 12 May 1988 to request a vessel arriving after 16 June 1988.

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132 3. The defendants were not afforded an opportunity to load on the Majapahit let alone the Gowa because of the plaintiffs' telex sent at 1701 hours on 7 June 1988 requesting confirmation from the defendants by 12 noon the following day that they had sent cargo to PIL. Chee and Yeo in their evidence clarified that what was meant by the telex was that they required confirmation from the defendants that they would load, not that the defendants had to load, by 12 noon of 8 June 1988; this 'correct' interpretation is set out in para 8 of the statement of claim.

133 4. It was not unreasonable however of the defendants' managing director or Ng to give the telex its literal interpretation rendering it impossible for the defendants to perform the contract in less than 24 hours. It is a requirement at law that the buyer must afford the sellar adequate notice (in the absence of an express term in the contract) to enable the sellar to perform his duty of delivery (see Benjamin's Sale of Goods 4 ed para 20-030 p 1245). The plaintiffs' notice was clearly unreasonable given the evidence of Lim Kok Eng that Lee Latex as the defendants' supplier required at least 2-3 days and at times one week, to process delivery.

134 5. It was Ng's evidence as reflected in the defendants' telex of 13 June 1988 (2DB53) that he was willing to supply the cargo to the plaintiffs but he wanted an extension of time up to Monday afternoon 13 June 1988 in which to confirm delivery after hearing from Lee Latex. The extract from Chee's diary (3PB67) of 10 June confirms Ng made the request but it was peremptorily rejected by the plaintiffs whose solicitors demanded the return of their LC the next day.

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135 6. The plaintiffs' conduct to say the least was puzzling, if indeed they were prepared to accept the Gowa as a substitute nomination they never afforded the defendants an opportunity to load on this vessel. Leaving aside whether the evidence of PIL's two representatives is to be preferred to that of Chee's regarding the cancellation of the booking on the Majapahit on 4 June 1988, the fact remains that the plaintiffs never gave the defendants sufficient time to ascertain whether the latter could or could not ship by the end of the shipment period (30 June 1988) bearing in mind that the defendants at no time expressly rejected the Gowa as an alternative nomination. The plaintiffs' demand for the return of their LC in effect meant that the defendants could no longer perform the contract after 11 June 1988.

136 7. I do not accept the plaintiffs' submission that as the defendants had taken no steps to load onto the Majapahit, their conduct was such as to lead a reasonable person to conclude that they will not be able to perform when the time for performance comes -- the time for the defendants to perform is not limited to shipping on the Majapahit but shipping on any vessel including the Gowa so long as it was on or before 30 June 1988.

137 8. While I will not adopt the words of counsel for the defendants that the plaintiffs 'were out for damages', I would certainly say that the plaintiffs acted hastily in asserting that the defendants were in breach of contract and in purchasing a substitute cargo from Zhing Zhan. They should have waited until after 30 June 1988 before allegedly mitigating their loss as there was before that, no express repudiation of the contract either in words or by conduct, by the defendants.

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138 In view of my findings it is unnecessary for me to determine whether the purchase by the plaintiffs from Zhing Zhan was or was not an arm's length transaction in view of the relationship between them and Gold Way due to common shareholders and or directors. Neither is it necessary to make a finding on whether there is any truth in the plaintiffs' allegation that the defendants' shipping instruction to Lee Latex of 14 June 1988 was highly suspicious as it had been altered. Had they been more patient, their suspicions may well have been proven true. The plaintiffs' own conduct prematurely terminated the contract.

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140 The submissions

141 I next turn to the submissions regarding the third contract. For the defendants it was argued that the plaintiffs claim should be dismissed as:

142 1. the defendants' offer by telex to the plaintiffs on 3 May 1988 required payment to be by irrevocable LC for 100% value in favour of the defendants but the plaintiffs' telex on 4 May 1988 proposing an increase in the value of the plaintiffs' existing LC for the second contract did not conform with the plaintiffs' telex and the price was also different;

143 2. Ng had denied that he had agreed with Chee in telephone conversations (2) on 4 May and 10 or 11 1988 to the change in payment terms;

144 3. the plaintiffs' telex of 4 May 1988 was not acceptance of the defendants' offer but a counter-offer which was subject to confirmation by the defendants who did not confirm;

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145 4. the fact that the plaintiffs were not in a position to confirm in the statement of claim but three months later in their further and better particulars that the second telephone conversation took place on 10 or 11 May shows their uncertainty;

146 5. it was Chee's evidence that Ang brokered and concluded the deal on 3 May 1988 on the telephone and it was then that the plaintiffs wanted to change the payment terms and Ang then told her on 4 or 5 May that the change was acceptable to the defendants. The plaintiffs had not proved that Ng had accepted their counter-offer as pleaded in para 3 of the statement of claim and Chee's evidence is not reconcilable with their case as pleaded;

147 6. there was no request by Ng to change the currency from US$ to S$ at the rate of S$2 to US$1 on 3 May 1988 since if there had been such a request as alleged by Chee, the defendants would have telexed their request to the plaintiffs as they did for the second contract on 3 May 1988 (which telex preceded the defendants' offer for the third contract). Chee had tailored her evidence to suit the LC amendment; 7. the defendants' offer was on the basis of C and F HongKong but the plaintiffs' LC was on FOB terms.

148 For the plaintiffs it was submitted:

149 1. the plaintiffs' counter-offer was accepted by Ng on 10 May 1988;

150 2. Chee's evidence is to be preferred to Ng's in this respect as there was no conceivable reason why the defendants would not accept an amendment to an existing LC for the second (undisputed) contract;

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151 3. the plaintiffs have referred to the 10 May telephone conversation at every opportunity and this has never been denied by them whereas the defendants have never mentioned a telephone conversation between Chee and Ng on 4 May 1988;

152 4. in their subsequent telexes the defendants kept repeating that if the plaintiffs still wanted the goods they would offer them at the prevailing price which seemed to suggest that the defendants were aware of the price escalation and were seeking to wriggle out of their contractual obligations;

153 5. it is a matter of construction whether the amendment to the LC complied with the defendants' telex of 3 May 1988. Even if the amendment did not comply, it is irrelevant to the question of liability as before they even received the amendment (on 25 May 1988) the defendants had on 23 May 1988 (1DB19) repudiated the contract by denying its existence;

154 6. if the court finds for the plaintiffs then they are entitled to damages which would put them in a position they would have been had the contract been performed which prima facie is the difference between the contract price and the market price.

155 The findings

156 I find on the evidence that the plaintiffs have not proved their claim on a balance of probabilities and accordingly I dismiss it with costs.

157 Unfortunately for both parties the persons who could have given material evidence namely Ang and Wong (Ng's superior) have passed away. Ang would have been able to confirm whether there had been agreement

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between him and Ng on the change in payment terms and Wong similarly would have been able to confirm Ng's contention that the defendants rejected the plaintiffs' payment proposal of 4 May 1988. The court therefore has to decide the matter based on whose evidence is the more credible, Chee's or Ng's, and based on the documents.

158 I am of the view that no third contract was concluded between the parties as the plaintiffs' telex of 4 May 1988 was a counter-offer and not an acceptance of the defendants' offer of 3 May 1988. That being the case and as there was no evidence that the defendants and Ng in particular accepted the plaintiffs' counter-offer, there is no basis for the plaintiffs to maintain this action let alone to mitigate their alleged loss by purchasing a substitute cargo from Zhing Zhan. Chee's diary entries of her conversations with Yeo and Ang on 4 and 5 May 1988 prove nothing as the defendants were not privy or a party to the same. It may well be that Ang assured her that the defendants were unlikely to reject the plaintiffs' proposals for payment but that did not mean that the defendants were bound by his assurances as Ang was the middleman between the parties, not the defendants' agent. The plaintiffs relied heavily on Chee's diary entries for both suits but it is noteworthy that not all relevant/significant items were recorded by her in particular her entry for 10 May 1988 (see 1DB14) made no mention that Ng as she claimed, requested her to convert the contract price form US to S$. As the plaintiffs did not disclose Chee's diary entry for 11 May 1988 it can safely be assumed that there was no record that she spoke to Ng that day.

159 The plaintiffs most probably relied on Ang's assurances and proceeded to amend their LC for the second contract to include payment for the third contract on the assumption that the defendants would agree to their proposals for payment and for the same reason for the plaintiffs' own convenience they

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changed the contract price from US to S$. Unfortunately there was no obligation on the defendants to accept the plaintiffs' terms as the defendants' telex of 3 May 1988 concluded with the words This telex is firm commitment on our sale and no other contract will be involved. Further the plaintiffs converted the defendants' offer of an C and F contract into an FOB sale. However advantageous an FOB contract may be to the defendants as compared to a C and F contract as claimed by Chee, the point is that at law there is no consensus ad idem on the terms and therefore there is no contract.

160 I should point out that it is unlikely that the defendants wanted or agreed to the change in currency for the third contract as on the same day that they made their offer to the plaintiffs, they had sent an earlier telex to the plaintiffs on their offer for the second contract which contract was performed. In the latter offer (1DB5) they had asked for payment in US dollars converted into S$ at the specified rate of S$2 to US1. If the defendants had wanted payment in S$ as opposed to US$ I would imagine that the defendants would have so specified.

161 Accordingly I dismiss both claims of the plaintiffs with costs to the defendants.

Lai Siu Chiu JC

Christopher Chuah (Drew & Napier) for the plaintiffs
K S Chung (Harry Elias & Partners) for the defendants

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