

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 160

Adm in Rem 582/1995

Between

Cotan Petroleum Pte Ltd

... Plaintiff

And

The Owners of The Ship or
Vessel "Endurance 1" ex Tokai
Maru

... Defendant

GROUND OF DECISION

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**Cotan Petroleum Pte Ltd v The Owners of The Ship or Vessel
"Endurance 1" ex Tokai Maru**

[1998] SGHC 160

Adm in Rem 582/1995

Lai Siu Chiu J

12 May 1998

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Judgment:

2 **GROUND OF JUDGMENT**

3 1. At the conclusion of the trial and after I had considered the

parties' final submissions, I awarded judgment to the plaintiffs on their claim
and

dismissed the defendants' counterclaim. The defendants have appealed against
my

decision (in Civil Appeal No. 68 of 1998).

4 The facts

5 3. The vessel was described as having a deadweight capacity of 3,600

metric tonnes and the engine had a propulsion capacity of 2,800 HP; it was built
in July

1979. The trading limit was described as 'Pacific and Indian Ocean and Arafura
Sea

and other acceptable area'. The material terms of the charterparty are set out as
follows:

6 Clause 1 (description and condition of vessel)

(1) At the date of delivery of the vessel under this charter(c) she
shall be tight, staunch, strong, in good order and condition,

and in every way fit for the service, with her machinery,
boilers, hull and other

equipment (including but not limited to hull stress calculator
and radar) in a good and

efficient state;(h) she shall comply with the description in
Form B appended hereto,

provided however that if there is any conflict between the
provisions of Form B and any

other provision, including this Clause 1, of this charter such
other provision shall

govern.

7 Form B sets out the particulars of the ship. The cargo pumping rate was stated to be 400 m.t. per hour.

8 Clause 3 (duty to maintain)

(i) Throughout the charter service Owners shall, whenever the passage

of time, wear and tear or any event (whether or not coming within Clause 27 hereof)

requires steps to maintain or restore the conditions stipulated in Clauses 1 and 2(a),

exercise due diligence to maintain or restore the vessel.(ii) If at any time whilst the vessel is on hire under this charter the

vessel fails to comply with the requirements of Clauses 1, 2(a) or 10 then hire shall be

reduced to the extent necessary to indemnify Charterers for such failure. If and to the

extent that such failure affects the time taken by the vessel to perform any services

under this charter, hire shall be reduced by an amount equal to the value, calculated at

the rate of hire, of the time so lost.

9 Clause 18 (Sub-letting)

Charterers may sub-let the vessel, but shall always remain responsible

to Owners for due fulfilment of this charter.

10 Clause 46

The charterers shall have the liberty to sub-let the vessel on time or voyage charter but shall remain responsible to the owners for the due performance of this charterparty.

11 Clause 49

The cargo is to be discharged into fishing vessels in the open Pacific and Indian Ocean and Arafura Sea and other acceptable area according to the charterers' instructions to the Master of the vessel during the voyage.

12 4. Clause 43 set out the charter period; cll 43 to 60 were subsequently incorporated into the charterparty. These additional clauses were dated 15

March 1994; I shall return to some of these additional clauses later.

13 5. Pursuant to cl 9, the plaintiffs paid advance charter hire of US\$60,000 on 16 March 1994 to the defendants, for the first month's hire.

14 6. The plaintiffs entered into a sub-charterparty of the vessel with Kohap (Hongkong) Ltd ("Kohap") on 18 February 1994 at US\$2,800 charter hire a

day. Kohap was a Hong Kong registered company managed by Korean interests.

This

sub-charter was entered into by Wonjin International Co Ltd ("Wonjin") and Unam

Chemical Carriers, who were acting on Kohap's behalf. This sub-charterparty was again

in the same SHELLTIME 4 standard form. The sub-charterers were in the business of selling

marine gas oil and provisions to fishing vessels in the Indian Ocean.

15 7. On 17 March 1994, the vessel was delivered directly to the

sub-charterers, at the plaintiffs' request. The vessel sailed to Mobil Terminal,

Singapore, for the marine gas oil to be loaded. When the vessel had completed loading, she

proceeded to Western Petroleum Anchorage to await port clearance.

16 8. The crew of the vessel comprised, inter alia, the Chief Engineer

Pither Kapa (Kapa), two other engineers, the Chief Officer and the Master. Jang Ki Seong

(Jang) was the supervisor on board the vessel to look after Kohap's interests.

17 9. On 15 April 1994, the defendants sent a letter to the plaintiffs

informing that US\$60,000 as hire was due on 16 April for the period 17 April to 16 May

1994. They followed up with another fax of 18 April 1994. They further stated that _____ if _____ the

sum was not paid by 1700 hours on the same day, they would withdraw the vessel from the

charter. The plaintiffs disputed their liability to pay, and in their fax on the same day,

stated that the next payment was due only 23 April 1994. The defendants replied by fax on

the same day (18 April) agreeing to allow the plaintiffs to pay on 24 April 1994 but they

insisted that a bankers' guarantee for the full sum of US\$60,000 had to be given by

1700 hours on 18 April 1994.

18 10. On 18 April 1994, the defendants telexed the master of the vessel

at 1205 hours with a message asking the vessel to return to Singapore

immediately. On 25

April 1994, the defendants telexed the plaintiffs informing that as they had not receive

the sum of US\$60,000 from the plaintiffs, they had instructed the master to return to

Singapore immediately. The sub-charterers arranged for a substitute vessel. On 6 May 1994,

the defendants wrote to the plaintiffs informing them that the vessel would be arriving

outside Singapore on 8 May 1994.

19 11. What happened after 8 May 1994 was the subject of a subsequent claim between Kohap and the defendants. A new master arrived on board the vessel that day.

The cargo on board the vessel was to be transferred to the ‘**Ionian Light**’, the substitute vessel which Wonjin had chartered in place of the ‘**Tokai Maru**’.

However according to the plaintiffs, the transfer of the marine oil gas never took place.

Neither did the defendants return the provisions and equipment remaining on board

belonging to Kohap, including the plaintiffs' water-makers (2) placed on the vessel

for the fulfilment of their obligations under sub-charterparty. The defendants were

alleged to have converted the sub-charterers' cargo by selling it to third parties.

This was the subject-matter of separate proceedings and do not concern this suit.

20 The plaintiffs' case

21 13. Prior to the delivery of the vessel to the charterers, the vessel

was at Jin Huat Shipyard for repairs. Tay Siong Siew (Tay), the Managing Director of the

plaintiffs, deposed in his affidavit that he observed that two of the pumps on the vessel

were replaced with newly bought pumps. Choi Seng Hak, the President of Wonjin (PW2) was

present as well and he made the same observation. This evidence was not challenged by the defendants.

22 14. The problem began as early as 18 March 1994 when the vessel was at Western Petroleum Anchorage to await port clearance. The cargo pumps were discovered to be not working. Tay testified that the defendants' Albert Lim Liang Chai (Lim) and

Tay Chye Hock went on board, found that the pumps were fitted in reverse and the rubber

hoses were then used to change the direction of the oil flow from the pumps. The vessel

left Western Petroleum Anchorage on the same day. However the rectification proved to be

short-lived as the pump engine coupling over-heated, as a result of which the pumping rate

had to be kept low. This evidence was also not challenged by the defendants.

23 15. Jang, the supervisor of the vessel for Kohap, was on board at all

material times. He gave a full report which recorded the instances of
breakdowns of the

vessel's main engine and cargo pumps (see AB140-141). They were:

(1) on 19 March 1994 at 1432 hrs, the vessel's engine broke
down

so the engine was shut down for repairs. She remained at
anchor while shore personnel from

Singapore came on board on 20 March 1994 to inspect the
engine. The damaged parts of the

engine were dismantled and taken to Singapore for repairs.
The repairmen only returned to

the vessel on 22 March 1994. The vessel only proceeded to the
Indian Ocean at about 2201

hrs. (2) on 31 March 1994, the main engine broke down again
at 2230 hrs and

had to be repaired. The repairs were completed by 0400 hrs
on 1 April 1994. (3) on 2 April at about 1010 hrs, the No 1 cargo
pump broke down; (4) on 3 April 1994 at 0800 hours, the main
engine was shut down for

repairs; (5) on 4 April 1994 at 0815 hrs, the main engine was
again shut down

for repairs; (6) on 11 April 1994, the only remaining workable
cargo pump broke down

and had to be repaired; (7) on 12 April 1994, at about 530 hrs,
the main engine was shut down

for engine and rudder repairs; on 14 April 1994 at 0626 hrs,
the engine was shut down for

repairs; (8) On 20 April 1994 at 0020 hrs, the main engine was
shut down, and

the vessel drifted towards Africa.

24 On 22 April 1994, the crew sought assistance from another vessel called 'COVET 63'. The Chief Engineer from 'COVET 63' managed to repair the vessel temporarily. On 24 April 1994, the vessel began 'emergency sailing' for Singapore.

25 The Defendants' case

26 Breach of clause 1 of the charterparty - the seaworthiness obligation

27 19. Clause 1(h) expressly provided that at the date of delivery under the charter the vessel was to comply with the detailed description in Form B.

28 20. I accepted the plaintiffs' evidence that the vessel broke down on the occasions recorded by Jang. On this issue, the conflict between the plaintiffs' and the defendants' evidence was irreconcilable. From my observation

of the witnesses for the plaintiffs and defendants when they testified, I believed

that

Jang's version of events was the true and accurate picture of what happened. I found

that the defendants' case was riddled with inconsistencies and their witnesses were

untruthful. I could not accept the engine log-book produced by Kapa as a genuine record of

all the engine breakdowns and all the repairs made for the following reasons:

(1) the handwriting and even the ink used in the engine logbook

appeared to be the same throughout. In cross-examination, Kapa at first said that the

engine log entry for 19-20 April 1994 contained the handwriting of all three engineers on

board. However he later admitted that the handwriting in the engine logbook was all the

same. In the further hearing on 26 January 1998, he changed his stance to say that he made

entries on behalf of the other duty engineers by copying what they had written on pieces

of paper, which he subsequently clarified were exercise books kept in the engine room.

However he said that the exercise books could not be produced because he did not know

where they were. It was unbelievable that as a Chief Engineer, he would allow anyone to

enter the Control Room where the exercise books were kept to take them away;(2) Kapa admitted that the repairs to the gear of the main engine on 20

April 1994 were not recorded, though he admitted that the engine broke down that day and

the gear was supposed to be repaired on that day between 1600-2400 hours. Instead, the

engine log entry stated: '*Vessel standing by awaiting next fishing vessel.*'

This entry had no reference to the true situation at all, namely, that the main engine

broke down and the vessel had stopped. There was no satisfactory explanation as to the

reason why Kapa did not record the entry as to the repairs;(3) Kapa testified that the engine movements were recorded in the log

book and the vessel did not have a bell book. However the engine log did not actually

contain any engine movements; (4) all entries on engine speed showed 220 revolutions per min (RPM).

However this was obviously untrue. For instance, on 31 March 1994, it was admitted that

the engine broke down at 2330 hours and the entry was '*engine slow ahead*'.

By his earlier testimony, engine that was slow ahead meant that the RPM should be 150. The

repairs, according to the entry, took 3 hours. However the engine speed was stated to be

220 RPM between 2320 to 0310 hours. In the same entry, under the remarks column, it said '*M/E*

(main engine) and A/E (auxiliary engine) running well'. This was obviously a

false entry since the engine had broken down and required

repairs -- the main and
auxiliary engines could not be running well. Kapa attempted
to explain the inconsistencies
by saying that he only recorded the times when the engine was
in a good condition, which
further undermined his credibility.

29 21. I also noted that Kapa was evasive during cross-examination.

Initially he testified that he could not remember whether Lim (one of the
directors of the

defendants) and Tay went on board the vessel when it was at the Anchorage to
look into the

problem of the cargo pumps which were not working. He later denied that
rubber hoses were

used to enable the cargo pumps to work.

30 22. In the course of cross-examination, other facts emerged. Though

it was not pleaded that the defendants breached cl 2 by having an incompetent
crew, the

credentials of Kapa as a Chief Engineer were suspect. His Indonesian certificate
of

competency exhibited to his affidavit evidence in chief did not qualify him to

work on

board the vessel as Chief Engineer for the vessel's voyage to the Indian Ocean but

only on board vessels where the engine capacity did not exceed 2,500 HP and only within

ports of South East Asia. On being confronted with the Indonesian certificate of

competency, he produced photocopies (at DB564 and PB74) of certificates of competency

issued by the Republic of Honduras. The original certificates were never produced despite

the request of counsel for the plaintiffs and my direction to counsel for the defendants;

no satisfactory explanation was given for their non-production either. Inquiries made by

counsel for the plaintiffs of Honduran authorities seemed to suggest that the certificates

were not authentic. Kapa did not know the requirements for obtaining such a certificate,

nor what documents were in fact submitted by the defendants to the relevant Honduran

Authority to enable him to obtain the certificate. The photocopied certificates did not

provide a limit on the vessel's engine capacity nor any geographical limit, which was

incredible, considering that Kapa had then only four years of experience as a seaman. As

such, it was impossible to place any reliance on Kapa's testimony.

31 23. Lim (a director of defendants) relied on the Chief Officer's

Log Book (the deck log) of the vessel as evidence that the dates specified in the deck log

recorded the daily routine of the vessel. However counsel for the plaintiffs demonstrated

more than adequately that the entries in the deck log were unreliable.

32 24. The examples of inconsistency were as follows: Ng

Boon Tong (Ng) was a professional surveyor who carried out a survey of the vessel at the

request of the defendants on 2 September 1993 and on 13 September 1994. He issued a

certificate of seaworthiness at both times. He himself admitted that the deck log entries

for 29 March 1994 to 30 March 1994 could not be true. Based on the positions as recorded

in the entries as to the positions of the vessel at 2400 hours and 0400 hours, it meant

that the vessel had travelled 700 nautical miles over 4 hours, namely in excess of 150

knots, which is impossible, given that the maximum speed of the vessel was only 12.5

knots.

33 25. Similarly the deck log entries for 24 April 1994

were either incorrect or had been doctored to mask the true situation. The positions as

stated in the entry for 1800 and 2000 hours meant the vessel had travelled over 112

nautical miles in two hours, at the speed of 56 knots; that was clearly impossible.
More

tellingly in respect of the entry for 25 April 1994, there were two entries for the

positions of the vessel at 1400 hours which did not make sense since there
should not be a

duplication as to the position. Further the positions of the vessel at 1400 and
2000 hours

could not be correct since the two entries for 1400 hours indicated that vessel
was

travelling east, and yet the reading at 2000 hours indicated that the vessel was
in fact

sailing west.

34 26. By the defendants' own letter to the plaintiffs dated 6 May

1994, the defendants stated that the vessel was arriving on 8 May 1994, 'due to

engine problems due to inability to go astern and also unable to heave her
anchor'.

This was an admission that the engine was not working as perfectly as the

defendants

claimed.

35 27. The cargo ship safety equipment certificate certifying the seaworthiness of the vessel issued in June 1994, was not evidence of the vessel's seaworthiness and fitness for her trade and operation in the Indian Ocean. The certificates were expressed to be only valid for voyages within Singapore home trade

limits. Furthermore the initial survey was carried out from 2 September to 8 October 1993,

more than five months before the commencement of the vessel's time charter with the

plaintiffs. Similarly the survey report dated 13 September 1994 was not helpful to

determine the condition of the vessel in March-April 1994. It was common ground that by

then various repairs were carried out to the vessel.

36 28. Further, the defendants had given a deduction of 20 days off-hire in the Statement of Accounts dated 31 March 1995 to the plaintiffs, on account of

‘engine and pump breakdown at US\$2,000 per day’. This was an admission that there were at least certain breakdowns of the engine and cargo pump. However, when

confronted with the Statement of Accounts, Lim denied that there should be any deduction.

He was also evasive in his explanation of the receipts issued by the defendants to
Hozun

and signed by him in respect of the purported sale of the vessel on 26 May 1994. The
dates

and amounts of the cheques did not correspond with the receipts at all.

37 29. I was satisfied that the breakdowns in the engines did occur in the manner alleged by the plaintiffs. The question is whether the breakdowns made the
vessel

unfit for navigational purposes. These defects could not be easily remedied at sea,

judging from the number of times the engine had to be shut down before the repairs could

be carried out. The vessel was not seaworthy at the date of delivery by virtue of the fact

that the main engine was not in good order and condition. It broke down on at least seven

occasions over a period of slightly over a month, resulting in lengthy delays which lasted

over 214 hours or about 9 days.

38 Cargo pumps

39 31. Kapa had testified that the two pumps were bought just prior to

19 March 1994. He also testified that these cargo pumps were replaced in June 1994 and the

inference I drew from this evidence was, that the pumps were not working in March to April

1994. His evidence as to the supposed pumping rate of the cargo pumps was also

contradictory. At first he said that they were capable of pumping 300 m.t. per hour, but

he later shifted his position by saying that each of the pumps only had a capacity of 150

m.t. per hour in order to explain why the newly bought pumps had to be replaced in a short

space of three months.

40 32. The other inherent defects in the cargo pumps manifested

themselves during the voyage. Jang testified that on 2 April 1994, cargo pump No. 1 broke

down and only cargo pump No. 4 was workable; cargo pump No. 1 had a metal cover and

cracked, causing 5-6 tonnes of marine gas oil to leak out. On 11 April 1994, cargo pump

No. 4 also broke down. Though the crew repaired cargo pump No. 4, the pumping rate was

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very slow.

41 Breach of clause 3

42 34. *The Fina Samco* [1994] 1 Lloyd's Rep 153; [1995] 2 Lloyd's Rep
344 considered cl 3 of the Shelltime 4 form. Colman J at first instance

held (at p 158):

43 35. Counsel for the plaintiffs argued that their complaints to the
defendants in the form of telexes and faxes were ignored. However the
plaintiffs'

complaints related to defects which were already present in the vessel's engine
and

cargo pumps on delivery of the vessel, as I have earlier held. Clause 3(i) does
not cover

such a situation, since it is dealing with the conditions of the vessel *after* the

delivery of the vessel, as held in *The Fina Samco*. Clause 3(i) gives rise to a

separate obligation of due diligence for characteristics which appear after delivery,

where there was no deficiency at the time of delivery; hence clause 3(i) is not applicable.

44 Did the defendants wrongfully withdraw the vessel from the charterparty?

45 38. Clause 9 provides that:

Subject of Clause 3(iii), payment of hire shall be made in immediately

available funds to: SEA SOURCES TRADING PTE LTD 5001 Beach Road #11-14 Golden Mile Complex

Singapore 0719 in USD Account per calendar month in advance, less:

(i) any hire paid which Charterers reasonably estimate to relate to

off-hire periods, and

(ii) any amounts disbursed on Owners' behalf, any advances and

commission thereon, and charges which are for Owners' account pursuant to any

provision hereof, and

(iii) any amounts due or reasonably estimated to become due to

Charterers under Clause 3(iii) or 24 hereof,

46 Clause 9 also contains an anti-technicality clause:

47 In default of such proper and timely payment,

(a) Owners shall notify Charterers of such default and
Charterers shall

within seven days of receipt of such notice pay to Owners the
amount due including

interest, failing which Owners may withdraw the vessel from
the service of Charterers

without prejudice to any other rights Owners have under this
charter or otherwise....

48 39. The vessel was delivered to the charterers on 17 March 1994.

Counsel for the plaintiffs argued that the second instalment was due only on 23
March

1994, which was the date when the vessel departed for the Indian Ocean after
repairs to

her engine were made. He argued that the vessel did not in fact commence
sailing for the

Indian Ocean until that date. However I held that the obligation to pay charter

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hire was

independent of the obligation to provide a seaworthy ship. Should the vessel turn out to

be unseaworthy at the date of delivery, the charterers can elect to terminate the charterparty. If they waive the breach as the plaintiffs did, then they would have to pay

charter hire. In that case, the charterers' liability to pay charter hire during the contractual period remains and this liability is only suspended by an express provision in

the charter such as the off-hire clause. This of course does not affect the charterer's right to claim damages. Thus, in the absence of express agreement, hire

was payable when the vessel was delivered. The first instalment was due and actually paid

on 16 March 1994. The second instalment was due on 17 April 1994, being one month in

advance.

49 40. Clause 9 was an anti-technicality clause inserted

to relieve the charterer from forfeiture. The defendants relied on their notices
given on

15 April and 18 April 1994 as compliance with cl 9 of the charterparty in having
given the

requisite notice, despite which, the charterers failed to pay hire as required by
the

charterparty; thereupon the owners became entitled to withdraw the vessel for
non-payment

of hire. The first purported notice of default was given by the defendants in their
letter

of 15 April 1994. As the charter hire was due on 17 April 1994, this notice was
clearly

not a valid notice under cl 9(a) since on the date on which the notice was given,
the

charterers were not in default of payment of hire in respect of the second

instalment. A valid notice cannot be given until after the time for payment has

expired, which means after 2400 hours on the due date, at the place where

payment is to be

made (*The Afovos* [1983] 1 Lloyd's Rep 335). The letter of 15 April 1994 reads:

50 SUBJECT: CHARTERHIRE OF M.T." TOKAI MARU"

51 We refer to the above, and wish to advise you that the Charter Hire

of captioned vessel will be due on the 16th April 1994. This date is based on

the dated (17th March 1994) when captioned vessel commenced loading at Mobil

Wharf not on the date vessel sails form Singapore.

52 In view of the above, please let us have your cheque for United States

Dollars Sixty thousand only US\$60,000.00 for the charter hire from 17th April

1994 to 16th May 1994 by latest 16th April 1994.

53 Thanking you.

54 The letter of 15 April 1994 was followed by a fax dated 18 April 1994

(the first notice) from the defendants which reads:

Further to our letter dated 15 Apr 94 in respect [sic] of subject

matter we have not todate received your payment of US\$60,000 being charter hire for

captioned vessel from 17 Apr 94 to 16 May 94.

Please take notice, that unless we receive the above amount by 1700

hours today 18.04.94, you give us no alternative but to withdraw captioned vessel from

your charter.

55 This was followed by the plaintiffs' letter on the same day

wherein they insisted that the charter hire should take effect on 24 April 1994.

On the

same day, the defendants faxed a letter (the second notice).

56 41. The first notice was defective in many respects. Whilst it was a

clear and unambiguous ultimatum to the plaintiffs that if they did not pay by the certain

date, the defendants would withdraw the vessel, this notice did not give the requisite

seven days specified in the charterparty for the charterers to pay before the

owners

could

withdraw the vessel. The very purpose of giving the notice was to show that the charterer

was in default, and would be given the requisite grace period.

57 42. The second notice was sent to the plaintiffs on the afternoon of

18 April 1994. The material portions read:

We refer to your fax dated 18th March 94 (Ref: CT/FX/94)

[This was a typographical error which should read 18th April 94.] We still maintain that charter hire should commence on 17 Apr 94. (The

date captioned vessel commenced loading) However we are willing to accede [sic] to your request to pay us on 24

Apr 94 provided if you can let us have your banker's guarantee for US\$60,000 by 1700

hours today 18 Apr 94. Your banker's guarantee can be post dated to 24 Apr 94.

58 43. The second notice stipulated that the charterers were bound to

furnish their banker's guarantee by 18 April 94 which was not required under cl 9 of

the charterparty. This notice did not refer to the earlier notice of 15 April 1994. The

charterers were right in arguing that the notice was not a clear and definite

ultimatum

that the vessel would be withdrawn if the stipulated mode of payment was not complied

with. As emphasised in *The Rio Sun* [1981] 2 LLR 489 and in *The Afovos*,

withdrawal was so serious a matter for the charterer that it was the duty of the owner to

give a clear and unambiguous notice of his intention to withdraw the ship. The

consequences for not paying by the stipulated mode of payment were also not spelt out in

the fax of 18 April 1994. The very least the fax should have done was to state clearly

that payment had not been received and give the charterers 7 days to pay or lose the ship.

59 44. The circumstances showed that the defendants really had no

intention to continue with the charterparty. Unknown to the charterers, the defendants

purportedly sold the vessel ‘*free from all charters, encumbrances, mortgages and*

maritime liens’ to Hozun Oil & Trading (‘Hozun’) on or about 18

February 1994. This was after the plaintiffs had entered into the charterparty with

the defendants but before the vessel was even delivered to the plaintiffs. The

expected time of delivery of the vessel to Hozun was latest 31 May 1994. On
26 May 1994,

the defendants purportedly transferred the vessel to Hozun Oil & Trading Pte Ltd. It

was not possible to transfer to Hozun free from all charters and encumbrances unless the

defendants wanted to withdraw the vessel from the plaintiffs’ charter and deliver the

vessel to Hozun. The shareholders of the defendants (Pheng Geok Lan and Lim) also owned

substantial shares in Hozun. The defendants claimed that the sale of the vessel to Hozun

was a genuine sale; the plaintiffs countered that the transfer was a sham. On 17 January

1996, Hozun's application in SIC 7667 to set aside the writ and arrest of the vessel

was dismissed.

60 45. In any event, the vessel was withdrawn from charter on 18 April

1994. The shipowners by telex dated 18 April 1994 at 1205 hours requested the Master of

the vessel to return to Singapore immediately. This was clearly a withdrawal of the

vessel. On 25 April 1994, the defendants informed the plaintiffs that they had instructed

the master to withdraw the vessel and to return to Singapore. This withdrawal was

wrongful. No valid notice was given pursuant to cl 9 to trigger off the right of the

shipowner to withdraw, the defendants cannot rely on that clause. Payments of charter hire

were generally not of the essence of the contract which would justify repudiation of the

61 46. Hence I concluded that the defendants had
wrongfully withdrawn the vessel from the charterparty.

63 48. In assessing the damages payable, the plaintiffs were to be
placed in a position as if the contract had been performed, subject to the rules
on

decide which types of loss caused by the breach of contract could be compensated by an

contract is to be found in *Hadley v Baxendale* (1854) 9 Exch 341 and restated in *Victoria*

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Laundry v Newman Industries [1949] 2 KB 528 where the House of Lords put forward the

following main propositions:

(2) In cases of breach of contract the aggrieved party is only entitled

to recover such part of the loss actually resulting as was at the time of the contract

reasonably foreseeable as liable to result from the breach ...

(3) What was at that time reasonably so foreseeable depends on the

knowledge then possessed by the parties or, at all events, by the party who later commits

the breach...(4) For this purpose, knowledge 'possessed' is of two kinds;

one imputed, the other actual. Everyone, as a reasonable person, is taken to know the

'ordinary course of things' and consequently what loss is liable to result from

a breach of contract in that ordinary course... But to this knowledge, which a

contract-breaker is assumed to possess whether he actually possesses it or not, there may

have to be added in a particular case knowledge which he actually possesses, of special

circumstances outside the 'ordinary course of things,' of such a kind that

breach in those special circumstances would be liable to cause more loss...

64 49. The plaintiffs claimed as losses the profits they could and would have made from the sub-charter of the vessel to Kohap, which duration was for the same

term as the charterparty. Counsel for the plaintiffs argued that the defendants actually

knew that the plaintiffs sub-chartered the vessel to third parties. In any event, there

was imputed knowledge that a sub-charterparty was contemplated. Counsel for the plaintiffs

invited the court to decide the issue without the need for any reference for assessment.

As counsel for the defendants did not object when I indicated to him during the hearing

that I would quantify the plaintiffs' claim, I proceeded to do so.

65 50. The sub-charterers were unhappy with the vessel supplied.

Specifically, on 31 March 1994, they complained by telex that: (i) cargo pumps,

water-makers and derricks were not working; (ii) vessel's maximum loading draft was

not in compliance with the charterparty and they claimed that the vessel could not load as

much cargo as desired; (iii) the failure to register account no. code of the vessel's

radio station with Singapore radio; (iv) the vessel's Chief Engineer and radio

officer ignored engine and radio station; (v) delays by the vessel had caused their own

buyers of marine gas oil quantity to cancel their orders; (vi) vessel was not in

possession of a P&I Club certificate; (vii) the cargo ship safety equipment

certificates showed that the vessel was only valid for voyages within Singapore and not

the Indian Ocean.

66 51. Following the telex, there was a series of communication between

the plaintiffs and Wonjin, which was seeking a satisfactory response. Wonjin acting on

behalf of Kohap, eventually sent a telex dated 8 April 1994 to the plaintiffs indicating

their intention to terminate the sub-charterparty at end April 1994 when the vessel

returned to Singapore if no suitable reply was forthcoming from the plaintiffs or, if the

vessel's defects were not rectified. In the telex, they stated that they were

dissatisfied with, inter alia: (i) the maximum loading quantity of the vessel; (ii) not

all 4 cargo pumps were working; (iii) failure to record account no. code of vessel's

radio station in Singapore; and (iv) the P&I Club certificate.

67 52. There is no question that the defendants had actual knowledge of the sub-charterparty to Kohap. Clause 46 of the charterparty expressly provides that

‘the charterers shall have the liberty to sub-let the vessel on time or voyage charter but shall remain responsible to the owners for the due performance of this

charterparty’. Under cl 57 of the charterparty, the defendants agreed to provide

16

crew members including four Korean-Chinese crews. This clause was obviously inserted

because the plaintiffs needed Korean speaking crew as the sub-charterers were Korean

parties. The defendants must have known that the plaintiffs had sub-chartered the vessel

to a Korean party.

68 53. On 29 April 1994, Wonjin, on Kohap's behalf, requested the plaintiffs to replace the vessel with another vessel. On 4 May 1994, as no substitute

vessel was ever provided, Wonjin on behalf of Kohap terminated the sub-charterparty

agreement with the plaintiffs, retrospectively to 8 April 1994; Kohap refused to pay

charter-hire from 8 April 1994.

69 54. The charter commenced on 17 March 1994, and was for a year with an

option for extension. If the plaintiffs had exercised their option to extend the charterparty for another year, the charter period would have ended on 16 March 1996. The

sub-charterparty was for a period for one year with an option by the sub-charterers to

renew, at a rate of US\$2,800 a day. The damages would be the difference between the two

charter hires, which was US\$800 per day for a period of 709 days (from 8 April 1994 to 16

March 1996) or US\$567,200. There was no doubt that the market rate for charter hire rose

during the period of the charterparty. For instance Hozun had chartered the vessel to

Sentek Marine & Trading on 5 Jan 1996 for US\$3,500 per day. As a consequence of the

breach of charterparty, the plaintiffs suffered the loss in profit they would have made if

the charter with the sub-charterers had continued.

70 55. Counsel for the defendants argued that the plaintiffs failed to
mitigate their losses by not chartering another vessel after the wrongful
withdrawal of

the vessel. The charter hire for the sub-charterparty was at a daily rate of
US\$2,800.

When the vessel was withdrawn, the market for charter hire rose. Tay's
evidence,

which I accept, was that the daily rate of hire for a similar vessel in May 1994
was

US\$3,000. As such, the plaintiffs did not fail to mitigate their loss.

71 Conversion of the water makers

72 56. The plaintiffs had placed on board the vessel two water-makers for
the purposes of the sub-charterparty. One water-maker was purchased from
WaterMac

Engineering at S\$15,000 on 20 September 1993 and the other was purchased
from Aqua-Tech

Engineering & Supplies Pte Ltd at a cost of S\$32,800. When the defendants withdrew the

vessel and informed the plaintiffs accordingly on 25 April 1994, they never returned the

water-makers to the plaintiffs. The plaintiffs demanded the return of the water-makers but

the defendants never did. On 4 May 1995, about a year later, the defendants gave notice to

the plaintiffs to take delivery of the water-makers from the vessel by 11 May 1995 failing

which the defendants would sell or otherwise dispose of the water makers, in accordance

with the agreement with the plaintiffs' director. On 6 May 1995, the plaintiffs

replied, denying that there was any agreement to dispose of the water-makers or the marine

gas oil. They asked the defendants for the position of the vessel. On 8 May 1995, the

plaintiffs sent a reminder to the defendants as there was no reply from the

defendants.

However no reply was forthcoming from the defendants. There was no doubt that the

defendants wrongfully retained the plaintiffs' water-makers, thereby committing the

tort of conversion. Once the charterparty was terminated in May 1994, the defendants were

obliged to return the plaintiffs' equipment placed on board the vessel for use during

the charter. Counsel for the defendants argued, somewhat disingenuously, that it was the

plaintiffs who refused to collect the water-makers when invited to do so! It was clear

that the invitation by the defendants to the plaintiffs to collect the water-makers was

meaningless when the defendants had deliberately refused to advise the whereabouts of the

vessel. Moreover, the vessel was in Singapore from 5 May to 9 May 1995 and yet, the

defendants refused to inform the plaintiffs of the whereabouts of the vessel.

73 57. The normal measure of damages for conversion is the market value of

the goods converted at the time of conversion, which was in May 1994. If there was no

current market price for the goods converted, the measure of damages would be the cost of

replacement (*Hall v Barclay* [1937] 3 All ER 620). In *Hall v Barclay*, certain

davits and testing apparatus had been converted by the defendant and sold as scrap. There

was no current market price at which the goods could have been bought or sold, and the

Court of Appeal held that the plaintiff was entitled to the cost of replacement, since the

price at which the goods had been bought afforded evidence of their value. Here there was

no current market price for the used water-makers and hence the plaintiffs were entitled

to the total cost of replacement, i.e. S\$47,800.

74 Counterclaim

In the argument before us, as before the learned judge, a suggestion

was advanced by counsel that the appellants might have acted in 'bad faith' in

arresting the vessel... It may well be that ultimately the appellants' claim may

fail but that is not the test of whether they had acted in 'bad faith'.

Claimants are entitled to arrest a vessel or other such property as is permitted to obtain

security for the claim. It cannot be argued that the arrest is made in 'bad

faith' merely because there is good defence to the claim. In our opinion, for an

arrest to be in 'bad faith', there must be some element in the arrester's

conduct, for example, where the arrest was in relation to a malicious claim, or is of

itself malicious, *apart* from the proper enforcement of his claim.'

75 The only evidence of bad faith claimed by counsel for defendants was

that the plaintiffs could have arrested the vessel immediately rather than waiting for

more than a year. This by itself, was clearly insufficient.

76 60. For the above reasons, I awarded judgment to the plaintiffs in the sum of US\$567,200 and S\$47,800 with interest at 6% from date of writ, and costs; the

defendants' counterclaim was dismissed with costs. I was informed that the plaintiffs

had made an offer to settle dated 16 June 1997 in respect of their claim and another offer

to settle on 19 June 1997 in respect of the counterclaim; the defendants did not accept

either offer. As the plaintiffs obtained a judgment not less favourable than the terms of

the offer to settle, under O 22A r 9 of the Rules of the Supreme Court, the plaintiffs

were entitled to costs on the standard basis, in respect of their claim, until 16 June

1997, and similarly for the defendants' counterclaim up to 19 June 1997. Thereafter

for the plaintiffs' claim commencing 17 June 1997 and for defendants'

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counterclaim commencing 20 June 1997, the costs to the plaintiffs would be on
a full
indemnity basis.

77 Lai Siu Chiu

78 Judge

79 12 May 1998

Lai Siu Chiu J

Loo Dip Seng, Goh Kok Leong & Hung Ning Shing (Ang &
Partners) for the plaintiffs
Gourdeep Singh (Gourdeep Singh & Partners) for the defendants
