

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 276

Adm in Rem 139/1998

Between

Petromar Energy Resources
Pte Ltd

... Plaintiff

And

The Owners of the Ship or
Vessel "Epic"

... Defendant

GROUND OF DECISION

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**Petromar Energy Resources Pte Ltd v The Owners of the Ship
or Vessel "Epic"**

[1999] SGHC 276

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Lai Siu Chiu J

19 October 1999

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JUDGMENT:

2 **Cur Adv Vult**

1. On the evidence,

Glencore had not made out a case for the Mareva injunction and Anton Piller order. Their

case rested wholly on the close relationship between Petromar and Metro, and not on any

evidence of wrongdoing on Petromar's part. The important fact was that

Petromar's operations were at no time controlled by Metro or the Kilakos group.

Looking at the evidence as a whole, the most that could be safely said

was that Petromar and Metro had a very close commercial relationship but it did not follow

that Petromar was knowingly involved in the alleged fraud. On
the contrary, the evidence
relied on by Glencore to support their allegations against
Petromar did not really
implicate Petromar.

3 47. I hold that there was such a spot charter. In addition to the oral
testimony from Tziolas, there is a fax from the plaintiffs to Metro (see PB30)
setting out

the terms of the spot-charter Tziolas said he agreed with Captain Fotis for the
vessel,

although Metro's telex dated 12 February 1998 suggests otherwise. The agents
(through

Gaitas) and the Master had denied receipt of Captain Fotis' hand-written fax
dated 13

February 1998 correcting Metro's telex (to the Master that the vessel was fixed
for

the account of Metro). Tziolas had testified that he was able to produce a copy
in court

as he obtained the original of that fax from Metro's liquidators. In their closing

submissions, the plaintiffs argued that it was likely Captain Fotis made a typographical

error in Metro's telex. Counsel also submitted that in any event, Metro's telex should not be given any credence as the maker Captain Fotis was not called to testify. By

the same token, if I accept that argument, then Captain Fotis' correction fax sent a

day later should also not be given any consideration. Neither document however, was

crucial in my determination of the second issue for reasons which I shall elaborate on, in

the following paragraphs.

4 48. Under cross-examination, Tziolas had explained that the original fax (dated 10 February 1998) in PB30 pertaining to the spot charter could not be produced

because the document was likely to have been amongst those seized by Glencore in the

execution of the Anton Piller order on or about 12 June 1998, five (5) of which
boxes had

not yet been returned. Counsel pointed out that in Tziolas' affidavit filed (on 20

February 1998) in support of the plaintiffs' application for an injunction in this

suit, Tziolas had exhibited (at p 12 of MT2) a copy of the spot charter; therefore
the

document could not have been fabricated for purposes of this trial. Furthermore,
he

pointed to the fact that the plaintiffs' list of documents filed on 16 December
1998

disclosed the spot charter. As the defendants' solicitors did not avail themselves
of

counsel's invitation to inspect the plaintiffs' documents by the deadline of 13

January 1999 and they did not serve a notice on the plaintiffs' solicitors

challenging the authenticity of the spot charter, the defendants were deemed to
have

admitted its authenticity, under O 27 r 4(2) of the Rules of Court. Hence the
copy

produced in court by the plaintiffs was admissible as secondary evidence,
pursuant to s 65

read with s 67(c), of the Evidence Act Cap 97.

5 49. Counsel for the defendants argued that the spot charter was a sham

created by the plaintiffs after the event so as to defeat the defendants'

counterclaim. He submitted that if indeed the original had been seen by
plaintiffs'

counsel as Tziolas claimed when proceeding started, then the plaintiffs or their

solicitors should still have the original at the trial. Further, if indeed the original

formed part of the documents seized under Glencore's Anton Piller order, it
would

have been recorded and itemised. With respect, these assertions are based on an
incorrect

reading of the evidence – Tziolas did not say that the plaintiffs' counsel had

seen the original but only that the document in PB30 meaning a copy, had been
seen by

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their counsel (N/E 61). The second assertion is without basis as no evidence was adduced

on the manner in which the Anton Piller order was executed, let alone that the independent

solicitors who supervised the execution listed out all the documents seized from the

plaintiffs. Another argument put forward by the defendants was that the persons who

concluded the spot charter were not called to testify; he identified Steven Tan, Margaret

Gene and Captain Fotis as those persons; with respect, that is again incorrect. The fax

from the plaintiffs' Steven Tan to Metro in PB30 started off as follows:

We refer to the various telecons between Mike/Capt. Fotis on the above spot charter. We are pleased to provide the terms and conditions as follows:

6 In other words, the spot charter had already been agreed between

Tziolas and Captain Fotis; Steven Tan was asked to do the follow-up but neither

he nor

Margaret Gene concluded the contract.

7 50. Another point which the defendants said supported their contention

that the spot charter was a sham was its timing – it was apparently fixed one day before

the plaintiffs nominated the vessel to the sellers via telex (on 11 February 1998). They

asserted that Tziolas' explanation that the plaintiffs' said telex meant the vessel *or substitute* was highly unsatisfactory.

8 51. On a balance of probabilities, I am prepared to accept there was

indeed a spot charter by the plaintiffs of the vessel. It was a common enough practice for

the plaintiffs to fix such spot charters when the cargo being carried on board a vessel

had been on-sold to them by the original buyers in the course of the voyage, more often

than not by Metro. In this regard, I accept Tziolas' testimony that convenience

was

the main reason for such practice, in order to move cargo from point A to point
B in

Singapore. As SPC had previously accepted the vessel for its cargo also
purchased from the

(same) sellers and, both the fuel oil and SPC's cargo were loaded by Hin Leong

Trading Pte Ltd (see PB42-44), Tziolas said there was no reason for the sellers
not to

accept the vessel; hence the spot charter preceded the nomination. He added that
there

were occasions where within one (1) day, the plaintiffs changed nominations
three (3)

times (N/E102). I would observe that the defendants adopted an inconsistent
stand —

before they did a volte face by the agents' second telex of 16 February 1998,
they

had impliedly accepted (by the first telex) that there was such a spot charter, by
their

agreement to accept from the plaintiffs, the sub-freight of US\$42,804.91 due to Metro. I

should in fairness point out that Gaitas had, under cross-examination (N/E146) explained

he had accepted the sub-freight offered on 16 February 1998 taking the plaintiffs at their

word. He said he changed his mind a few hours later after he had spoken to Margaret Gene

and John Kilakos. Counsel for the defendants said the plaintiffs' offer of US\$42,809.91 could also refer to the freight payable under the bill of lading; I accept

that was a possibility but highly unlikely because the bill of lading freight would cover

a (very short) voyage from the Van Ommeren terminal to the Pulau Sebarok terminal.

9 52. At this juncture, I need to address a side-issue which arose in the course of cross-examination of Gaitas and the Master. The Master had questioned why

Captain Fotis would send a (hand-written) fax to him when the standard method of

communication between Metro and the vessel (evidenced by the documents produced in court)

was by telex. Yet Gaitas himself claimed to have sent the fax in D4 to the plaintiffs on

his own personal computer! This exhibit was only revealed in the course of his

re-examination. I find D4 highly questionable and I reject it totally; his counsel had

confirmed that the document had not been disclosed in either the defendants' list or

supplementary lists of documents; indeed counsel himself was only told about the existence

of D4 on the evening prior to Gaitas' re-examination. There was no independent

evidence of its transmission to the plaintiffs apart from Gaitas' claim and Tziolas

had denied receiving it.

10 (iii) did a collateral contract come into existence on 16 February 1998

between the parties?

11 53. To determine this issue, I turn to the exchange of telexes on 16

February 1998. In the plaintiffs' telex of that date, they had set out the terms of

the LOI they were prepared to furnish to the defendants in exchange for delivery
of the

fuel oil without production of the original bill of lading; the telex further stated:

For the discharge of the above [20,000 mts HSFO 180 CST +/-
5 pct

currently on board mt 'Epic'] we Petromar Energy Resources
Pte Ltd undertake to

pay the freight agreed between the time charterer and
Petromar Energy Resources Pte Ltd

for US\$42,804.91 (B/L qty 19,024.406mts x
USD2.25mt). Payment will be made by bank draft from Credit
Lyonnais favouring Crest

Shipping Ltd and this draft will be presented to the Master of
mt 'Epic'

tomorrow (17 February 1998). Please confirm that you will
instruct Master to discharge the

cargo upon Master notifying you of receipt of above draft
tomorrow. Please confirm the above arrangement is fully
acceptable to yourselves

by return telex asap.

12 The agents responded to the above telex on the same day (copied to
Metro) as follows:

With reference to
your telex dd 16 February 1998, on behalf of our principals,
owners of the mt Epic, we
confirm the vessel will discharge the cargo once Master
notifies us of receipt of the
irrevocable bank draft in the amount of USD42,804.91 duly
confirmed by the bank.

Lai Siu Chiu J

Tongel Yeo (as counsel), Yoga Vyjayanthimala and Song Ruoh Jin
(Gillett Kian Fong) for the plaintiffs
Lim Tean, Minn Naing Oo and Steven Lau (Rajah & Tann) for the
defendants
