

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 291

Suit 2394/1996

Between

Orient Tainers Pte Ltd

... Plaintiff

And

Orient Tainers Japan Co Ltd
Nippon Concept Corporation

... Defendant

GROUND OF DECISION

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**Orient Tainers Pte Ltd v Orient Tainers Japan Co Ltd and
Another**

[1999] SGHC 291

Suit 2394/1996
Chao Hick Tin J
02 November 1999

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JUDGMENT:

2 **GROUND OF DECISION**

3 The plaintiffs are a Singapore company and were at all material times in the business of a tank operator, accepting liquid cargo for shipment. They also provided

tank handling agency services at, inter alia, Singapore, Malaysia, Indonesia, Taiwan and

Korea. The person in control of the plaintiffs was and is Mr H Ueno, their Managing

Director.

4 2 The two defendants are Japanese companies, having been incorporated in July 1993 and January 1994 respectively. Prior to 1 April 1995, 71% of the shares in

the first defendants were held by the plaintiffs. The first defendants, which were managed

and controlled by one Mr Matsumoto, a director resident in Japan, were then the handling

agents for the plaintiffs' tanks in Japan. At all material times, Mr Matsumoto and Mr

Y Yamanaka were the shareholders and directors of the first defendants.

5 3 Sometime in March 1995, Matsumoto and Yamanaka wished to purchase the

plaintiffs' 71% shareholding in the first defendants. The parties eventually agreed

and the sale was effected on 1 April 1995. According to Ueno, the plaintiffs agreed to the

sale because of his differences with Matsumoto and Yamanaka and of the high

business

costs

and risks taken by the first defendants. Thus, from that date the first defendants ceased

to be a subsidiary of the plaintiffs. I shall hereinafter refer to this break-up as "the separation".

6 4 As for the second defendants, their role in this whole matter is only this, i.e., that from 22 January 1997, they had taken over the businesses, assets and

liabilities of the first defendants. That is the basis upon which the second defendants

have been made a party to this action and it is not in dispute that the latter have properly been made a party.

7 Relationship between parties

8 5 To understand the nature of the claims of the plaintiffs in this action and the counterclaims of the defendants, it is necessary to state briefly the

working relationship between the plaintiffs and the first defendants before 1

April 1995.

Then, the first defendants did not have any tanks of their own, and their business as

handling agents in Japan was essentially to control and manage the tanks of the plaintiffs

coming into and going out of Japan. But the first defendants were allowed to utilise the

plaintiffs' tanks which were returned by the consignees in Japan for their own

shipments out of Japan, which were normally destined to Europe or USA. For the use of the

plaintiffs' tanks the first defendants did not have to pay what was the normal

industry rental of \$20 per day per tank because the parties were then associated. At the

time their accounts were consolidated, and the profits of the first defendants were

brought into the books of the plaintiffs.

9 6 As handling agents of the plaintiffs in Japan, the duties of the

first defendants included communicating with shippers/consignees there,
recovery and

cleaning of tanks, and the collection of demurrage charges incurred by
consignees who had

returned tanks late to the port or to the first defendants' depot in Japan. With

regard to demurrage, the duty of the first defendants would include the
following aspects

—

- (i) to timely furnish to the plaintiffs accurate information on the
date of arrival of the plaintiffs' tanks in Japan and the date on
which the consignee
returned each tank.(ii) to account and pay to the plaintiffs all
demurrage collected on
behalf of the plaintiffs.(iii) to inform the plaintiffs of all
demurrage that fell due but
remained unpaid.(iv) to take all necessary steps to ensure that
all demurrage due to
the plaintiffs was paid by the consignees.

10 7 The arrangement between the parties on demurrage was that, based on

information furnished by the first defendants, the plaintiffs would invoice the
first

defendants (in US\$) for the demurrage due in respect of each tank which was

returned late

and the first defendants would in turn issue a back-to-back invoice to the consignee (in

Japanese Yen) for the same.

11 8 It is not in dispute that after the separation, the first defendants

would have to pay the plaintiffs for the use of the latter's tanks to undertake the

first defendants' shipments out of Japan. Where a tank was not utilised immediately

for the first defendants' own shipment but was sent by the first defendants to their

depot in Japan to await their own future shipment, the first defendants would be allowed

14 free days from the date the tank was returned to the depot by the consignee of the

previous shipment before the first defendants would be liable to pay rental. The

entitlement to a period of 14 free days would only apply where the preceding shipment was

Orient Tainers Pte Ltd v Orient Tainers Japan Co Ltd and Another [1999] SGHC 291

that of the plaintiffs'. Once a tank was so used by the first defendants, rental continued to be payable by the first defendants until the tank was returned to Singapore

or was utilised by the plaintiffs or their European agents, Bulkhaul, for the latter's own shipment.

12 9 If the plaintiffs should require the use of a tank for their own shipment after it was placed in the first defendants' depot, rental would cease to be

payable from the day the tank was sent out of the first defendants' depot. But if the

first defendants should wish to return a tank which it had placed in its depot, then

rental for the same would only cease upon the tank's return to Singapore – there

is a dispute here as to whether the rental should cease after the return of the tank to

the Singapore port or only after its return to the plaintiffs' depot in Singapore. I

shall revert to this point later.

13 Trade pattern and alliance

14 10 The pattern of trade at the time was that low-grade liquid cargo

would be carried from Southeast Asia to Japan for processing and the processed cargo would

then be exported to Europe/USA. According to Ueno, such processed material fetched a

higher freight rate. The cost of cleaning tanks and other related services in Japan was

and is very expensive, many times more expensive than that in Singapore. But because of

the much better freight rates chargeable for cargo exported out of Japan, even if a tank

had to be cleaned in Japan, it was still a profitable proposition. Similarly, highly

processed cargo, such as petroleum related products, would be shipped from Europe/USA to

Southeast Asia.

15 11 Before 1 April 1995 in order to maximise the use of the

plaintiffs' tanks in Europe/USA and to save the cost of recovering tanks there

Orient Tainers Pte Ltd v Orient Tainers Japan Co Ltd and Another [1999] SGHC 291

and of

bringing the tanks empty back to Southeast Asia, and in the interest of mutual assistance,

the plaintiffs/first defendants entered into a strategic partnership with Bulkhaul, a

major tank operator in Europe/USA, for the reciprocal use of the plaintiffs' and

Bulkhaul's tanks from USA/Europe to Southeast Asia and vice-versa. If the plaintiffs

should use a tank of Bulkhaul it would pay the latter rental for the same at US\$20/- per

day; similarly the other way round. According to Ueno, the main object of this strategic

alliance was not so much to earn rental but to earn freight through maximising the use of

each other's tanks.

16 12 However, following the separation, the alliance with Bulkhaul had

become no longer viable, as the bulk of the shipments from Japan to Europe/USA were no

longer those of the plaintiffs' but those of an independent party, i.e., the first defendants. The first defendants had also taken over shipments into Japan from Belawan and

shipments from Japan to Busan (Korea) and Taiwan. Those were the "dedicated"

shipments on which more will be said later. The plaintiffs did not have sufficient

shipments from either Singapore or Japan to Europe/USA to justify the continuation of that

arrangement with Bulkhaul. The number of Bulkhaul's tanks coming into the region was

far more than what was needed by the plaintiffs. Thus the arrangement with Bulkhaul would

appear to have ceased sometime in July 1995.

17 13 After the separation, the first defendants continued to use the tanks of the plaintiffs for their own shipments out of Japan to Europe/USA. The parties

also continued to render to each other handling services as agents. There was,

Orient Tainers Pte Ltd v Orient Tainers Japan Co Ltd and Another [1999] SGHC 291

however,

nothing in writing setting out their rights and liabilities or on how the parties should

conduct themselves in the light of the different relationship between the plaintiffs and

the first defendants. This court is being asked to make the appropriate findings or

inferences from the oral evidence and the conduct of the parties.

18 14 Prior to 1 April 1995 the plaintiffs and the first defendants would

charge each other for handling services on a reimbursement basis. However, it would seem

that nothing was expressly agreed to by the parties as to how such mutual services should

be rendered post-separation and this has given rise to some of the disputes. The first

defendants contend that post-separation, the same system as that prevailing before that

date, including the maintenance of a running account between the parties which

was to be

reconciled at the end of each month, should apply. However, the plaintiffs contend that in

view of the fundamental changes brought about by the separation, not the entire system

that was applied prior to separation should apply post-separation.

19 Claims and counterclaims

20 15 The present action by the plaintiffs relates to matters wholly

post-separation and it concerns mainly -

(i) the rental payable by the first defendants in connection with the

use by the latter of the plaintiffs' tanks; (ii) the alleged breach of duty on the part of the first defendants in

regard to the collection of demurrage; and (iii) the handling charges incurred by the plaintiffs on behalf of the

first defendants in Singapore and Malaysia.

21 The counterclaim of the first defendants relates mainly to the handling

charges incurred by the first defendants, again post-separation, on behalf of the

plaintiffs in Japan.

listed above, partial judgment in the following sums were obtained –

26 (iii) handling charges - US\$ 15,988.81

27 Interlocutory judgment was also obtained in respect of (a) the
demurrage charges in relation to the accounts of Riken Vitamin, Sumitomo and
Bulkhaul and

(b) handling charges for US\$151,253.15 in respect of which there was a lack of supporting

vouchers.

28 18 What remains to be decided at this trial before me are (i)

US\$169,085.72 for rental, less a sum of US\$19,900 in respect of which the plaintiffs are

prepared to give credit to the first defendants, and (ii) the remaining sum due for

demurrage (less the summary judgment sum and the sums found due under the interlocutory

judgment). To save time and costs the plaintiffs have decided at the commencement of trial

not to proceed with the small remaining amount of the claim under handling charges.

29 19 On the part of the defendants, they have counterclaimed against the plaintiffs for –

- (i) US\$364,088.02, being handling charges incurred by the first defendants on behalf of the plaintiffs, after separation; and (ii) US\$49,551.64, being rental charges for and sale price of 36

B-tainers (these are different from the tanks).

30 20 I ought to state that, as between the plaintiffs and the first defendants, there are still some outstanding matters concerning the accounts of the

parties prior to the separation. But these matters are not before me.

31 Rental charges of tanks

32 21 What remains of this head of claim is the sum of US\$169,085.72, less US\$19,900 for the credit notes issued. The main grounds upon which the defendants relied to contend that the plaintiffs are not entitled to claim for that sum

are these:-

- (i) the plaintiffs' calculation of the 14-day free period is erroneous as it included the day a tank was put in the first defendants' depot ("depot-in" day).
- (ii) the plaintiffs' charging of rental for the return leg of a "dedicated" shipment to the original port of loading is also erroneous;
- (iii) the plaintiffs' computation that charging of rental would only cease upon a tank's arrival at the plaintiffs' depot, as opposed to the

Singapore port, and in the case of a damaged tank, only after
the estimates for the cost
of repairs had been agreed upon, is again wrong.

33 22 Some credit notes were issued by the plaintiffs after it was

discovered that there were errors in the invoices issued by them. Obviously if
demurrage

was chargeable in respect of a tank, then there could be no question of rental
being also

due in respect of the same period for that tank. I accept the plaintiffs' evidence

that it was due in the main to insufficient or inaccurate information from the
first

defendants which resulted in the inaccurate invoicing. Some were due to their
own errors.

So credit notes were issued to rectify matters. I also accept Ueno's evidence that

further credit notes were issued in December 1995, January and February 1996
pursuant to

discussions between the parties and out of goodwill. Thus, the claim of the
plaintiffs

under this head is now only US\$149,185.72, after deducting the sum of \$19,900

representing

the sum total of all the credit notes issued.

34 Computation of fourteen free days

35 23 I shall now deal with each of the three objections in

turn. It is not in dispute that in respect of the plaintiffs' shipments which

commenced before 1 April 1995 but arrived in Japan on or after that date, rental
would be

payable by the defendants 14 days after the consignee returned each tank to the
first

defendants' depot in Japan. The question is whether in computing the 14 days
the

depot-in day should be included. The evidence shows that as between Bulkhaul
and the

plaintiffs, in computing the 14 days, the depot-in day was included in
Bulkhaul's

computation. Yamanaka (DW1) has stated in his affidavit that the arrangement
between the

plaintiffs and the first defendants was similar to that of the plaintiffs and

Bulkhaul

"in relation to the 14 days free period for rental charges." There is evidence

that the plaintiffs also charged Bulkhaul on the same basis, which was to include the

depot-in day. It would appear that in the marine industry, for example, the port, where a

vessel is required to discharge goods within a certain number of days, the day of arrival

is reckoned in the computation. I ought to add that in 1998, Bulkhaul and the second

defendants reached a new arrangement whereby the depot-in day was not included.

36 24 Reliance is also placed by the defendants on a set of minutes of

meeting between the plaintiffs and Bulkhaul where it was stated that the rent-free period

was to commence after the tanks were placed in the depot. There is no evidence that these

minutes were drafted by a legally trained person. I doubt I ought to do a literal

construction of that document. I think the actual application of that rule is more important.

37 25 Accordingly, I do not accept the first objection of the defendants.

38 Dedicated shipments

39 26 The second objection relates to what was called "dedicated shipments". This term refers to a series of shipments where a tank or tanks was or

were being sent back to the original loading port to ship the same or similar cargo of a

shipper/consignee without requiring the tank(s) to be cleaned until the entire lot of

shipments of identical/similar cargo had been concluded. According to the first

defendants, a single round trip of a dedicated shipment would involve the journey from the

port of loading to the port of destination and back (without goods) to the port of

loading. The freight for each such individual shipment would have incorporated the cost of

the return leg. On this basis, the defendants say that they should not be made liable for

rental charges for a tank on the return leg, as the freight collected by the plaintiffs

for that round trip shipment (which commenced before 1 April 1995) would have included the

cost of the return leg.

40 27 In the context of the operations then, the following were the

dedicated shipments in question:-

(i) Belawan (loading port) to Japan for Marubeni Corporation;(ii) Japan to Busan (discharge port) for Kao Japan, Nissho Iwai and

Yurin Busan;(iii) Japan to Taiwan (discharge port) for Kao Japan and Nissho Iwai.

41 After separation all these dedicated shipments were completely taken

over by the first defendants.

42 28 As I understand the problem, the issue is a narrow one. It only

concerns the first return leg in respect of each tank on "dedicated" shipment

which took place after the separation. It is not in dispute that for the second return leg

(after separation) in respect of the same tank, the first defendants would be liable to

pay the rental therefor.

43 29 On this matter, one would think the question to ask is where was the starting point for a dedicated shipment. But Yamanaka admitted that it could be either

way. As mentioned before, the only material difference between "dedicated" shipments and normal shipments is that for dedicated shipments no cleaning was required

after the cargo had been discharged but before each tank was sent back empty to collect

the next lot of cargo at the same port of shipment. The plaintiffs' contention is that so long as the first defendants wished to use a tank after 1 April 1995, it should

pay rental as per normal, regardless of whether the shipment was "dedicated" or otherwise. They say that if the first defendants had rented a tank from another operator,

they would still have had to pay for the rental for transporting the tank to say, Belawan,

to pick up the next batch of cargo.

44 30 Another point which seems to support the position contended for by

the plaintiffs is this. If the defendants are correct, then the ocean freight to transport

the tank back to Belawan should have been borne by the plaintiffs. Yet it would appear

that it was the first defendants who paid for such ocean freight. The invoices raised by

the first defendants did not include a claim for the return leg of the ocean freight

against the plaintiffs. That is wholly consistent with the plaintiffs' contention

that it would not gain anything from sending the tanks back to Belawan, as the next batch

of cargo to be shipped from that port would not be plaintiffs' but the first

defendants' and it would be the first defendants who would collect that freight.

Thus, the first defendants should bear all costs and expenses incurred to earn that

freight. In his evidence in court Ueno seemed to have been confused when he said that the

freight collected from the shipper/consignee for the outward leg would incorporate the

ocean freight for the return leg. He was mistaken. He corrected himself later.

45 31 Another way to look at the matter is this. There was nothing to stop the plaintiffs from pulling back all their tanks. If the first defendants would wish to

continue with those "dedicated shipments", then they would have to rent tanks from other operators and send them to the port(s) of loading; rental would have to be paid

to position the tanks at the port(s) of loading.

46 32 I hold that the second objection of the defendants also fails.

47 Return of tanks to port or depot

48 33 The third objection of the defendants is simply this. They say that

Orient Tainers Pte Ltd v Orient Tainers Japan Co Ltd and Another [1999] SGHC 291

in relation to a tank which was returned by the first defendants to the plaintiffs,
rental

for that tank should cease upon its return to the port in Singapore. However, the

plaintiffs say that it should only cease upon the return of the tank to the

plaintiffs' depot. A related dispute concerns the situation where a tank on return

was damaged, and here the plaintiffs say the rental should only cease after the
parties

had agreed on the estimated cost of repairs. There is really very little objective

material upon which I could rely to determine these issues. Ueno admitted that
there was

no specific agreement between the parties as to when rental should cease
whenever a tank

upon return was damaged. But what is significant is that contemporaneous
invoices were

issued by the plaintiffs to the first defendants on the basis of the position taken
by the

plaintiffs and no objection was raised thereto until many months later, which
seems to me

to suggest that that was the respective understanding of the parties and the objection

raised later was an afterthought.

49 Miscellaneous points

50 34 Besides the above three main objections there are also a few other

arguments raised by the defendants on the rental claimed by the plaintiffs. Some of the

rental claimed relates to tanks shipped out of Japan to Europe/USA by the first defendants

post 1 April 1995 and which were subsequently used by Bulkhaul. If that were the position,

it is not in dispute that Bulkhaul should pay the rental upon their taking over of the use

of the tanks. What the plaintiffs say is that the liability for the rental for those tanks

remained with the first defendants unless the plaintiffs were timely advised by the first

defendants of the take-over of the tanks by Bulkhaul. It is agreed that if the

Orient Tainers Pte Ltd v Orient Tainers Japan Co Ltd and Another [1999] SGHC 291

plaintiffs

were so advised, then the first defendants' liability for rental would cease on the day the tanks were placed in Bulkhaul's depot in Europe/USA.

51 35 The first defendants argued that as Bulkhaul were also the agents of the plaintiffs, Bulkhaul should have informed the plaintiffs of the take-over. In my view

once a tank was used by the first defendants for their own shipment out of Japan, rental

would be payable by the first defendants for that use and such rental should continue

until the first defendants advised the plaintiffs otherwise. The fact that Bulkhaul should

also have informed the plaintiffs of the same, but did not, would not absolve the first

defendants from their responsibility.

52 36 Another argument of the defendants is that the plaintiffs had been simply billing the first defendants for rental without showing when the tanks were placed

in the first defendants' depot. In my opinion this argument is wholly without merit.

The first defendants were the agents of the plaintiffs in Japan. Such proof is entirely

within their knowledge. In the absence of information from the first defendants, the

plaintiffs could only work on the basis of the estimated time a tank would have come into

the first defendants' depot in Japan. If the first defendants say that that

assumption is not correct, then the evidential burden shifts onto them. If a tank had been

returned late by a consignee, then as the agents, the first defendants should have

informed the plaintiffs of the same, who would then not be claiming for rental but for

demurrage from the consignee.

53 37 Obviously a tank which was, post-separation, positioned in Japan at

the request of the plaintiffs, no rental would be payable by the first defendants

in

respect of that tank. This is the case with regard to the tanks used for MIBC shipments.

The plaintiffs do not aver otherwise.

54 38 In the premises, I would allow the plaintiffs' remaining claim
for rental amounting to US\$149,185.72.

55 Demurrage

56 39 Under the head of demurrage, the complaints of the plaintiffs
against the first defendant are the following:-

- (i) failure to furnish to the plaintiffs, timely and accurately,
information on the date each tank arrived in Japan and the
date the consignee returned the
tank. As an illustration of this failure, the plaintiffs referred to
the fact that one
consignee, Riken Vitamin, had paid demurrage to the first
defendants in respect of the
plaintiffs' tanks in the sum of 15,721,644 (equivalent to
US\$164,675) whereas based
on the information furnished by the first defendants, the
plaintiffs have only invoiced
Riken Vitamin for US\$119,959. (ii) failure to account and pay
to the plaintiffs all demurrage which
the first defendants had collected on behalf of the plaintiffs.

57 40 The defendants do not dispute that in respect of each tank which was returned late, the plaintiffs would bill the first defendants in US\$ for demurrage based

on information furnished by the first defendants and the latter would, in turn, bill the

consignee in Japanese Yen. The first defendants were obliged to account to the plaintiffs

for demurrage collected on the plaintiffs' behalf and to take all necessary steps to

recover the amounts invoiced by the plaintiffs and/or the first defendants but not yet

received from the consignees. The first defendants denied that they had furnished

incorrect information to the plaintiffs for the purpose of raising invoices for demurrage.

58 41 There is evidence which shows that the first defendants had collected more from consignees than the invoices which were issued by the plaintiffs based

Orient Tainers Pte Ltd v Orient Tainers Japan Co Ltd and Another [1999] SGHC 291

on the information furnished by the first defendants (e.g., Riken Vitamin, Marubeni).

There is also evidence that the first defendants did not account to the plaintiffs all the

demurrage they collected on behalf of the plaintiffs.

59 42 Accordingly, I hold that the first defendants had failed to fulfil

their duties as an agent. In the premises, I would make an order that the first defendants

shall render a general account to the plaintiffs, as matters concerning demurrage are

wholly within their knowledge, and the first defendants shall pay the plaintiffs all

moneys found at the inquiry to be due and owing to the latter. In respect of demurrage

which is still outstanding from any consignee, the burden shall rest on the first

defendants to show that they had taken all reasonable steps to recover the same and that

the irrecoverability was not due to any default on their part. There shall be

liberty to

apply in relation to this order.

60 Counterclaims: handling charges in Japan

61 43 I now turn to consider the counterclaims of the first defendants.

The first relates to the handling charges which they allegedly incurred on behalf of the

plaintiffs at cost. Such charges amounted in total to US\$314,458.77. All supporting

invoices for those charges have been furnished to the plaintiffs. The original sum claimed

was US\$364,088.02. But that included a sum of US\$49,629.25 in relation to handling charges

incurred before separation. The parties have agreed to put aside the dispute on the

accounts pre-separation. Before me both counsel had also agreed that there is duplication

in relation to one bill (invoices No 20718 and JIMB 10211) for the sum of US\$758/-. So an

Orient Tainers Pte Ltd v Orient Tainers Japan Co Ltd and Another [1999] SGHC 291

amount of US\$758/- should be deducted. Thus, what remains of the claim is only

US\$313,700.77.

62 44 The issue on this matter centres on the plaintiffs' contention that in respect of tanks which upon arrival in Japan (post 1 April 1995) were not required

for the plaintiffs' shipments out of Japan no cleaning of those tanks should have been carried out in Japan; instead they should have been returned empty/dirty to Singapore

to be cleaned, as cleaning and other charges in Japan are extremely expensive, being

anything between 3 and 5 times (according to the defendants) or 7 and 8 times (according

to the plaintiffs) that of Singapore. I am inclined to take the higher end of the range

indicated by the defendants. They say it made no economic sense at all for such a tank to

be cleaned in Japan and then returned to Singapore empty/clean. Furthermore,

in respect of

tanks which were cleaned in Japan and then utilised for the first defendants’

shipments out of Japan, then for similar reasons the plaintiffs should also not be made to

pay for those cleaning expenses; they should properly be borne by the first defendants.

The plaintiffs say that they would have to earn rental of up to seventy-five days before

it was sufficient to pay for the cleaning and other charges incurred in Japan. The

plaintiffs aver that such cleaning carried out in Japan would be wholly for the benefit of

the first defendants. The plaintiffs admit that it would be different if a tank was

required for the plaintiffs’ shipments out of Japan in which case the plaintiffs

should of course bear those cleaning and other costs in Japan.

63 45 It is conceded that before 1 April 1995, the plaintiffs did not make

any complaint of the fact that the tanks were being cleaned in Japan, whether the tanks

were subsequently used for the plaintiffs' or the first defendants' shipments

out of Japan. No specific approval of the plaintiffs was needed to do cleaning
of the

tanks in Japan. The reasons given by the plaintiffs are: before the separation,
71% of the

shareholding in the first defendants was owned by the plaintiffs. The accounts
of the

plaintiffs and the first defendants were consolidated. The operations of the first

defendants were treated very much as the operations of the plaintiffs' and the

profits of the first defendants would be brought into the books of the plaintiffs.
There

was thus no reason to take issue who should bear the cleaning cost. But the same
cannot be

said of the position after the separation. The plaintiffs also contend that,
following the

separation, there was a fundamental change in the relationship between the
parties such

Orient Tainers Pte Ltd v Orient Tainers Japan Co Ltd and Another [1999] SGHC 291

that the first defendants knew or ought to have known that they could not rely on the

practice that prevailed before 1 April 1995.

64 46 The position taken by the defendants is that there was an express agreement with Ueno that the parties would continue to handle each other's tanks/shipments in the same way as before separation. The plaintiffs knew clearly the

rates which were payable for cleaning and other related services in Japan. There was

nothing new in that. There was no need to obtain approval of the rates. The first defendants also referred to the fact (not disputed) that before separation Bulkhaul's

tanks, which were shipped to Japan, would similarly be cleaned by the first defendants

(then a subsidiary of the plaintiffs) in Japan and then used by the plaintiffs/first defendants for their shipments out of Japan and yet the cleaning and related costs in

Japan were borne by Bulkhaul and not the plaintiffs/first defendants.

65 47 It seems to me that there must have been some general conversations

between Ueno and Matsumoto with regard to how each party should handle the other

party's shipments in each other's territory. To an extent it makes sense if the

parties had, in a general sort of way, agreed that the existing arrangement should

continue. The arguments of the plaintiffs boil down to asking me to determine whether it

was fair in all the circumstances for the first defendants to incur cleaning and other

charges (which are extremely high) in Japan so that the tanks could be used for the first

defendants' shipments out of Japan. Was it reasonable for the first defendants to

rely on a practice that was in use before the separation?

66 48 It is true that the separation would constitute a fundamental change

in the relationship of the parties. But this is a point which both parties must have

been

aware of when they decided that each party would continue to be the handling agents for

the other. The existing arrangement was there and if either party had wanted to modify

that, that party could easily have said so. The parties must make their own deal. It must

be borne in mind that if a tank were to be sent back to Singapore empty dirty, ocean

freight of approximately US\$440/-, and port handling charges of US\$100, would have to be

incurred. In addition there would also be cleaning and other costs to be incurred in

Singapore, which on the evidence would be about US\$230/-. Furthermore, it would take 12

days for a tank to travel from Japan to Singapore, which means a rental loss of US\$240.

All these would add up to US\$1,010/-. This saving in cost must be brought into the

equation. There is evidence before me indicating that the cleaning cost in Japan
per tank

was about US\$1,160. Viewed in this light, the difference is not too significant.

67 49 The plaintiffs have alleged that in June 1995 their operations

manager, Ms Shirleen Ong, had despatched a fax to the first defendants to
instruct the

latter to return all tanks to Singapore empty dirty and to obtain approval for any

cleaning, repair or depot charges incurred in Japan. Quite apart from the fact
that this

evidence is hearsay, as Shirleen Ong did not come forward to testify, the
plaintiffs could

not even produce a copy of the alleged fax. Furthermore, this alleged general
instruction

from Shirleen Ong runs counter to the explanation which Ueno offered in court
that he did

not instruct the first defendants to send all the tanks to Singapore, which the
plaintiffs

Orient Tainers Pte Ltd v Orient Tainers Japan Co Ltd and Another [1999] SGHC 291

did not require for their shipments out of Japan, because of his concern that if he should

do so that might annoy the first defendants, as it would effectively stifle the

latter's business, as they were then without any tanks of their own. Ueno thought

that that in turn could very well cause the defendants to repudiate their responsibility

as agents and refuse to help the plaintiffs recover their tanks which were then with

various consignees in Japan, thereby causing even greater losses to the plaintiffs. I am

not satisfied that this explanation (apart from the fact that it is contradictory to the

allegation that Shirleen Ong had issued a general instruction to the opposite effect) is

convincing. Surely, the plaintiffs could appoint another entity in Japan to take over from

the first defendants as their handling agents there. I do not think that the plaintiffs

were completely at the mercy of the first defendants.

68 50 The point was made that as the invoices to the plaintiffs in respect of April-June 1995 for the handling charges incurred by the first defendants were only

issued in September 1995, this shows the whole thing was an afterthought. As I see it,

since from 1 April 1995 a new relationship was in place, some time would have to be given

to the first defendants to make the necessary internal adjustments and sort things out.

There was also a staffing problem at the first defendants. All said, I do not think this

delay warrants the drawing of any inference against the second defendants. It is not in

dispute that during the period April to June 1995, some handling charges were properly

incurred by the first defendants on behalf of the plaintiffs and in respect of which the

plaintiffs would have to pay. It seems to me the first defendants were just slow.
It would

be different if the first defendants had invoiced handling charges properly
incurred

promptly, leaving only the handling charges which were likely to be contentious
to be

invoiced later.

69 51 Another point which does not assist the plaintiffs' assertion

is this. According to the plaintiffs, they received the first defendants' invoices

covering the period April – September 1995 in November 1995. Yet, no
objection was

taken by the plaintiffs to those invoices on the ground either that it was contrary
to the

general direction issued by Shirleen Ong or, that it was wholly unfair for the
first

defendants to thrust the entire cleaning cost of the tanks in Japan to the plaintiffs,

when those tanks were not thereafter required for the plaintiffs' own shipments

out

of Japan.

70 52 The plaintiffs have also referred to instances where tanks were cleaned and kept in the first defendants' depot for anticipated future use which did

not materialise and the tanks were returned to Singapore empty/clean and the first

defendants had refused to pay even rental and instead claimed for handling charges,

including cleaning. Perhaps this was a misunderstanding. As I understand the submission of

the defendants, they will pay the rental of the tanks to Singapore (to the plaintiffs' depot if I should so find). What they are asking the plaintiffs to do is to bear the handling charges in Japan, including cleaning.

71 53 Finally, I think there is another reason why the plaintiffs did not specifically ask the first defendants to return all their tanks to Singapore.

Admittedly, this would stifle the first defendants' business for about a month,

as

that would be the lead time for the first defendants to make the necessary arrangement for

a new supply of tanks. Ueno said that at the time of the separation the number of tanks of

Bulkhaul which were coming to Southeast Asia were more than what they needed. If all the

plaintiffs' tanks were to be returned from Japan to Singapore, this would only worsen

the over-capacity problem. So it would still be better to have the tanks on hire rather

than have them all back, but idling here. The plaintiffs would also save on the cost of

bringing each tank back to Singapore. This seems to me to be quite a valid reason why the

plaintiffs did not ask that all their tanks be returned to Singapore.

72 54 Accordingly, I find that the plaintiffs should pay the cleaning cost of the tanks in Japan.

73 B-tainers

74 55 A B-tainer is a type of small-box container. The first
defendants' counterclaim under this head is based on an agreement evidenced
by a

letter dated 30 June 1995 from the first defendants to the plaintiffs wherein the
former

agreed to lease to the latter 36 units of B-tainers, which were then positioned in

Jakarta, at the rate of US\$1/- per unit per day. Part of the 36 units was taken by
the

plaintiffs on 13 July 1995 and the remainder on 21 July 1995. On 26 July 1995
and 8 August

1995 the plaintiffs returned the 36 B-tainers to Bulk Distributors Sdn Bhd
(BDS) at Port

Klang in Malaysia. The first defendants alleged that BDS were the agents of the
plaintiffs

and by the plaintiffs returning the B-tainers to BDS, they had not returned the
B-tainers

to the first defendants. The first defendants aver that from September 1995 to

Orient Tainers Pte Ltd v Orient Tainers Japan Co Ltd and Another [1999] SGHC 291

May 1996,

they had attempted unsuccessfully to obtain possession of the B-tainers from BDS, who

refused to release them unless the storage charges incurred at BDS were paid. The first

defendants were not able to obtain the

75 release of the B-tainers as BDS had allegedly sold them off to pay for

the outstanding storage charges. Thus, the first defendants have counterclaimed for the

loss of rental of their B-tainers for the period 1 September 1995 to 31 May 1996 amounting

to US\$9,864 and also for the price of the 36 B-tainers at US\$39,687.64. However, in their

final submission to me the defendants have only claimed for the rental of US\$9,864.00 and

are not pursuing their claim for the price of the B-tainers.

76 56 In my opinion, this claim has no basis whatsoever. The terms for the renting of the 36 B-tainers were clearly set out in first defendants' fax of 30

they could easily have sent the requisite number to Jakarta for their own use. In any case

by 19 October 1995 the first defendants were informed by the plaintiffs that the B-tainers

had been returned to BDS. In fact, before this the first defendants had already known that

the B-tainers had been returned by the plaintiffs as they said that from September 1995

they were trying to get possession of the B-tainers from BDS.

78 58 There was some dispute as to whether BDS were the agents of the plaintiffs or the first defendants. Whatever may be the true position, under the terms of

the contract for the renting of the 36 B-tainers the plaintiffs were to return them to BDS

which they did. The first defendants should have made their own arrangement with BDS to

receive the 36 B-tainers.

79 Judgment

80 59 Accordingly, there shall be judgment in favour of the
plaintiffs in the sum of US\$149,185.72. In addition, there shall be a general
order to

account in the terms of para 41 above.

81 60 There shall also be judgment in favour of the defendants on their
counterclaim in the sum of US\$313,700.77.

82 61 Both judgment sums shall bear interest at the rate of 6% from the
date of the writ.

83 62 On the question of costs, one option would be for me to grant an
order on costs to both parties and they could have their bills taxed. In the
alternative,

I could take a broad view of the matter, having regard to, inter alia, the time
each issue

had taken at the trial and the issue(s) on which the parties have succeeded or
failed, to

come to a conclusion whether any party need to reimburse to the other party any
proportion

Orient Tainers Pte Ltd v Orient Tainers Japan Co Ltd and Another [1999] SGHC 291

of the latter's costs. I think the second approach would, in the circumstances of this case, best serve the interest of the parties. While the judgment sum in favour of the defendants is higher than that for the plaintiffs, the latter have succeeded to obtain an order to account in respect of the claim on demurrage, though the exact quantum of which is yet to be determined. All in all, I think it would not be unfair to either party if I should order that each party should bear its own costs and I do so order.

84 Chao Hick Tin

85 Judge

Chao Hick Tin J

Conrad Campos (Colin Ng & Partners) for the plaintiffs
Andrew Yeo with Chua Boon Thien (Allen & Gledhill) for the
defendants
