Pacific Orient Sea Transport Pte Ltd v The Owners of the Ship or Vessel 'Ever Wealthy' [2000] SGHC 101

Case Number : Adm in Rem 243/1997

Decision Date : 31 May 2000

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Oon Thian Seng with Collin Choo (Joseph Tan Jude Benny) for the plaintiffs; Belinda Ang, SC with Anna Quah (Ang & Partners) for the defendants

Parties : Pacific Orient Sea Transport Pte Ltd — The Owners of the Ship or Vessel 'Ever Wealthy'

JUDGMENT:

Background

1. The central issue in this case is whether there was ever a concluded time charter party in respect of the Panamanian vessel *Ever Wealthy* between the plaintiffs as charterers and the defendants as owners.

2. There are five parties who played a role in the negotiations relating to the charter. First, the plaintiffs: this company was incorporated in Singapore in order to carry on the business of shipping cargo from Far

Eastern and South East Asian ports to Australia. The plaintiffs did not own any ships and therefore had to use chartered vessels to carry the cargo. In early March 1997, the plaintiffs were looking for a suitable vessel to carry cargo that month and approached and appointed the second party, Southern Cross Maritime Service (Australia) Pty Ltd ('Southern Cross'), an Australian company, as their brokers for this purpose.

3. Next, we have the defendants who carry on business as shipowners. Although they are incorporated in Panama, their president, Mr James Lan Chun Sheng, is Taiwanese and for all intents and purposes, they are run out of Taiwan. The defendants are the owners of various vessels among them the m.v. *Ever Wealthy* and m.v. *Ever Forest*.

4. The fourth party is Pescadores Shipping Pte Ltd ('Pescadores'), a company incorporated in Singapore which acts as the defendants' Singapore representative. In this instance, Pescadores is also alleged to have acted as the defendants' brokers in connection with the charter of the *Ever Wealthy*.

5. Finally, there is Oldendorff Asia ('Oldendorff'), a company carrying on business in Singapore as both a ship charterer and a shipbroker. At all material times, Oldendorff was the charterer of the *Ever Forest* and its Mr James Lough was often in communication with Mr Lan of the defendants and Mr David Chua of Pescadores. Oldendorff acted as a broker in relation to the charter of the *Ever Wealthy* but it is a bone of contention between the plaintiffs and the defendants as to whether Oldendorff was acting as the defendants' broker or simply acting independently as an intermediate broker in the hope of earning commission should the charter be concluded. It is the defendants' position that Oldendorff was never their broker in these negotiations whereas the plaintiffs pleaded that Oldendorff was the defendants' broker and that the defendants were bound by Oldendorff's actions.

6. The documents show that as early as 5 February 1997 Oldendorff informed Pescadores that the plaintiffs could be interested in chartering the *Ever Wealthy* for three or six months if she was able to call at Australian ports. At about the same time, Oldendorff told Southern Cross that the defendants would consider a charter of three to six months of the *Ever Wealthy* at a rate of US$5,500 per day. The initial correspondence was exploratory only, however, and it was not till March 1997 that negotiations became serious.

7. On 4 March 1997, Southern Cross informed the plaintiffs that the *Ever Wealthy* was available and would be free at the Chinese

port of Zhanjiangang on or about 8 March 1997 and would be an ideal vessel for the plaintiffs' purposes. The plaintiffs then requested Southern Cross to make an offer to the owners of the vessel for the time charter of the vessel by the plaintiffs. Southern Cross proceeded to relay the plaintiffs' offer to Oldendorff. Oldendorff in turn relayed it to Pescadores. It should be noted that throughout the negotiations Southern Cross dealt only with Oldendorff and it was Oldendorff who was in contact with Pescadores and the defendants. Southern Cross considered Oldendorff to be the defendants' broker as it was not aware of the role played by Pescadores.

8. The offer that Southern Cross made to Oldendorff was in the following terms:

> 'ON BEHALF MY CLOSE CHTRS AM PLSD TO OFFER FIRM ASF FOR REPLY TO 60 MINS:
>
> - ACCT PACIFIC ORIENT SEA TRANSPORT, SPORE (AUST/ SPORE/HKG/MSIA J/V – WILL REVERT WITH FURTHER DETAILS)
>
> - VSL AS DESCR (PLS CNF SHE FULL AOK)
>
> - DELY DLOSP ZHANJIANGANG ATDNSHINC
>
> - L/C 7/11 MAR' 97
>
> - ABT 70-80 DYS WOG TRADING VIA SP'S FAR EAST/SE ASIA/ AUSTRALIA WITH INT HARMLESS STEEL AND TIMBER PRODUCTS, MACHINERIES, BULKS, LAWFUL GENERALS TC (CHTRS UNSTAND VSL IS NOT GRAIN FITTED)
>
> - REDELY SP COLOMBO/JAPAN RANGE INCL FULL INDONESIA NOT EAST OF SURABAYA, PHILIPPINES, MALAYSIA, CHINA
>
> - HIRE USD5000 DIOT PAYABLE EVERY 15 DAYS IN ADVANCE
>
> - SUB BUNKERS: PLS ADV QTY ROB
>
> - SUB DTLS CHTRS NYPE 93 WITH 2.5 ADPSTS
>
> - SUB CHTRS BOARD APPROVAL LATEST 6 HRS AFTER FXG MAIN TERMS
>
> AS ADVSD THERE IS A VERY GOOD CHANCE CHTRS CAN LOOK AT LONGER PERIOD BUT WILL DEFINITELY WANT TO SEE VSLS PERFORMANCE ON 1ST VOYAGE.
>
> PLS BRING OWRS CLOSEST COUNTER (PLS CALL ME WHEN SENDING AS I MAY HV TO LEAVE THE OFFICE FOR AN HOUR OR SO)'

9. What the message quoted above meant was that Southern Cross on behalf of its close charterers (ie the plaintiffs) was pleased to make a firm offer for reply within 60 minutes. The offer went on to identify the charterers as Pacific Orient SEA Transport of Singapore (a joint venture between parties in Australia/Singapore/Hong Kong/Malaysia). Delivery was to be on departure of the vessel from the outer pilot station at Zhanjiangang after completion of discharge of the cargo carried on the current voyage. The charter period was to be about 70 to 80 days and the vessel was to trade between the Far East, South East Asia and Australia and carry steel and timber products, machinery and lawful general cargo. Redelivery would take place in the range of Singapore/Colombo/Japan including Indonesia. The hire was US$5,000 per day payable every 15 days in advance. The sentence in the offer 'L/C 7/11 Mar' 97' meant that the laydays cancelling period (or as it is usually called, the laycan) was between 7 and 11 March. This was the period within which the vessel had to be delivered to the charterers failing which they

would be entitled to cancel the charter.

10. The above were the main terms of the proposed charter. The offer was, however, made subject to agreement on three items: the bunkers, the charter party details (for this purpose the New York Produce Exchange – NYPE – form of charterparty was to be the basis of the negotiations) and approval from the charterers' board of directors. In the correspondence these items were referred to as the 'subs'.

11. As soon as it received Southern Cross's offer, Oldendorff transmitted it to Pescadores in practically the same wording. Whilst Southern Cross had made its offer 'on behalf my close chtrs', the first line of Oldendorff's message read 'on behalf of POST [the plaintiffs] am pleased to offer firm as follows for reply in 60 mins'. At the end of its message, Oldendorff asked Pescadores to let it have the defendants' closest counter offer.

12. Oldendorff's message to Pescadores was sent at about noon on 4 March. Just before 1pm the same day, Oldendorff sent a message to Southern Cross reading as follows:

> 'RE: *EVER WEALTHY*/POST
>
> FURTHER TELECON OWNERS ACCEPT CHRS LAST. PLSE RUSH CHRS DTLS FOR OWNERS CONFIRMATION.
>
> AWAIT YOURS.
>
> BEST REGARDS'

Southern Cross and the plaintiffs regarded this message as an acceptance of the plaintiffs' offer and therefore considered that the main terms of the charterparty had been fixed subject to agreement on the three 'subs' relating to the details, the bunkers and the plaintiffs' board approval. There is, however, no document in the file from the defendants to Pescadores or from Pescadores to Oldendorff confirming the acceptance of the plaintiffs' offer. The defendants' stand is that they never accepted the plaintiffs' offer and that Oldendorff's acceptance was sent without authority or confirmation from them. The defendants say further that it is clear from the correspondence between the parties that there was no firm fixture for the following reasons:

> (a) the vessel was not clean fixed in that the 'sub' on bunkers was never lifted;
>
> (b) the plaintiffs and defendants did not reach a consensus on the issue of the vessel's laycan;
>
> (c) the plaintiffs did not submit a valid performance guarantee to the defendants and therefore did not comply with a condition precedent imposed by the defendants for a firm fixture.

13. To continue the narrative, that same day Southern Cross sent a copy of the plaintiffs' proforma charterparty document to Oldendorff and also informed the latter that the plaintiffs were lifting their 'sub' on board approval so that the only 'subs' remaining to be satisfied were those relating to the charterparty details and the bunkers.

14. On either 4 or 5 March, the defendants told Oldendorff that they required a letter of guarantee from a Taiwan company to guarantee the plaintiffs' performance of the charterparty. On 5 March, a company called Fantai Shipping Corp ('Fantai'), the plaintiffs' Taiwanese agents, issued a letter of guarantee in favour of the defendants. This letter was delivered to the defendants by hand but was subsequently returned to Fantai because its wording was not satisfactory. Corrections were then made to it and the letter was then re-delivered to the defendants.

15. In the meantime, on 5 March Oldendorff informed Southern Cross that the vessel had been delayed while loading in Jakarta and that the defendants were requesting whether laycan could be extended to 16 March. The defendants expected the vessel to be ready on 11 or 12 March. The plaintiffs were unhappy to receive this request and asked for further information on the

vessel's expected arrival date at Zhanjiangang and the amount of cargo on board. Oldendorff relayed this request to Pescadores and asked it to revert with accurate information soonest so that Oldendorff could discuss the matter further with the plaintiffs and 'obtain extension'. The next day, Pescadores replied giving Oldendorff various details about the vessel and informing them that its ETA at Zhanjiangang was 9 March.

16. On 7 March Southern Cross contacted Oldendorff seeking the defendants' reply on the charterparty details. That same day the defendants sent a telex to Pescadores stating that the charterparty details had been reviewed and found to be in good order. The same telex also contained details of the bunkers on board the vessel. Pescadores immediately passed on the information it had received to Oldendorff and Oldendorff in turn sent the message on to Southern Cross at about 2.25pm that afternoon.

17. By a separate telex sent out on 7 March, Pescadores informed Oldendorff that the defendants required the plaintiffs' firm acceptance of the charterparty with laycan between 7 and 16 March. They asked for reply by 4.30pm the same day. The plaintiffs' response was that they were willing to agree on an extension of laycan up to and including 13 March on the basis of the defendants' prior advice that the vessel should complete discharge by 11 March. They asked for the defendants' confirmation that this proposal was in order. The defendants' response came in the form of a fax from Pescadores to Oldendorff that stated '… owners have reluctantly agreed 13 March. However, should vessel not ready by that time, we will treat this charter as null and void'.

18. Between 9 and 11 March Southern Cross continued chasing Oldendorff to obtain updates on the position of the vessel from the defendants. On 11 March, Pescadores informed Oldendorff that the defendants had decided to berth the vessel and commence discharge on 12 March. They then requested that the plaintiffs accept 16 March as the cancelling date and asked Oldendorff to 'advise charterers' acceptance [to] enable firm fixture'. The plaintiffs were disturbed by this news and could not understand why the defendants were berthing the vessel only the next day. They anticipated further delays and losses to them as a result. Accordingly, on 12 March Southern Cross contacted Oldendorff requesting that the defendants agree to 15 March as the cancelling date instead.

19. On 12 March, Southern Cross received advice from Oldendorff that the vessel had been further delayed. Oldendorff asked whether the plaintiffs would be willing to take delivery once the vessel had finished discharge at Zhanjiangang. On 13 March, Southern Cross informed Oldendorff that the plaintiffs had no choice but to persevere with the vessel despite the delay. The next day Southern Cross, on the instructions of the plaintiffs, confirmed to Oldendorff that the plaintiffs would accept the vessel whenever she completed discharge at Zhanjiangang. Oldendorff duly passed on this information to Pescadores at 11.28am.

20. The next communication between Pescadores and Oldendorff was sent out by the latter at about 5.30pm on 14 March. In it, Mr Lough advised Mr Chua that he had just spoken to Mr Lan of the defendants who had advised that he wished for 'this' charter fixture to be cancelled. He further stated that he had advised Mr Lan of the possible consequences of not performing the fixture and that in any case, for the sake of good order, Pescadores should revert in writing that the defendants considered the fixture with the plaintiffs to be null and void. At about the same time, Southern Cross was informing the plaintiffs that they had received a phone call from Oldendorff to say that the defendants wanted out of the charter.

21. Thereafter, the plaintiffs put the defendants on notice that as far as they were concerned, the defendants were obliged to deliver the vessel to the plaintiffs under the agreed fixture. On 17 March, Pescadores sent Oldendorff a message stating that the defendants had not given firm confirmation of the charter and the fact that the proforma charterparty details had been reviewed and found to be in order could not be construed as acceptance of the charterparty.

22. In the meantime, the plaintiffs had learnt that the vessel had been fixed by the defendants to another charterer, Toko Line, for a trip from Japan to South East Asia. It turned out that this latter charterparty had actually been concluded on 13 March. The defendants duly delivered the vessel to Toko Line rather than to the plaintiffs and the plaintiffs subsequently commenced this action and arrested the vessel in Singapore on 12 April 1997. They now seek to recover damages for the defendants' alleged breach of contract.

Issues

23. The issues that arise out of the foregoing facts are:

(i) for whom Oldendorff was acting as broker;

(ii) whether there was a concluded fixture on 7 March 1997 or at any time thereafter;

(iii) if the answer to (ii) is in the affirmative, whether the plaintiffs had suffered loss as alleged and quantified.

(i) Oldendorff's position

24. In the defence, the defendants pleaded that Oldendorff was not their broker and that at all material times it had no authority to act on behalf of the defendants. Instead, Pescadores on behalf of the defendants negotiated the charter of the vessel with Oldendorff acting as chartering broker on behalf of the plaintiffs. The plaintiffs in their reply averred that Oldendorff had, as the defendants' broker, dealt with and/or negotiated the charter agreement with Southern Cross. Alternatively, Oldendorff had the actual and/or apparent and/or ostensible authority of the defendants to negotiate and/or conclude the charter on behalf of the defendants.

25. The evidence did not establish any specific appointment by the defendants of Oldendorff as their agent. Mr Lan's testimony was that at no time had the defendants appointed Oldendorff to represent them in the negotiations with the plaintiffs for the charter of the vessel. This testimony was not shaken in the course of Mr Lan's cross-examination nor was any documents produced that could contradict it. Further, the plaintiffs did not produce any evidence of their own to support their allegation of actual authority. Mr Christopher Mackey, the person in Southern Cross who conducted the negotiations on the plaintiffs' behalf, admitted that he had not seen anything in writing from the defendants that appointed Oldendorff as their brokers.

26. It appears that the plaintiffs assumed that Oldendorff was acting for the defendants because of Mr Mackey's prior knowledge of the connection between the two companies. When he was asked the basis on which he concluded that Oldendorff was the defendants' broker, he stated that he was aware that Oldendorff had previously fixed the charter of the *Ever Wealthy* to other charterers in Australia. He thought (obviously being unaware of the existence of Pescadores) that there was no other broker between Oldendorff and the defendants and he was also aware, prior to commencing negotiations through Oldendorff, that Oldendorff had itself chartered the *Ever Forest* from the defendants.

27. There is no proof either that Oldendorff had ostensible authority to bind the defendants. Ostensible authority can only be inferred if it is shown (a) that a relevant representation was made by the principal, in this case, the defendants, and (b) that the plaintiffs entered into the contract on the faith of the representation. Here, requirement (a) was not fulfilled. Neither the defendants nor Pescadores on behalf of the defendants made any representation to Southern Cross or the plaintiffs that Oldendorff had authority to negotiate and/or conclude a charter of the *Ever Wealthy* on behalf of the defendants.

28. Whilst Oldendorff was not shown to have been acting generally for the defendants, nor was it shown to have been acting for the plaintiffs. Their position was that their only broker was Southern Cross and there was no evidence to contradict this assertion. Secondly, although Oldendorff, in their message of 4 March 1997 to the defendants, may have stated 'on behalf of POST am pleased to offer firm …' this representation on its part that it was acting for the plaintiffs could not bind the plaintiffs. As stated earlier, for Oldendorff to have ostensible authority to act for any particular principal there must have been a representation from that principal that Oldendorff was its agent. Like the defendants, the plaintiffs did not make any representation that Oldendorff was their broker.

29. It appears to me that Oldendorff was in fact acting for itself alone. Mr Mackey explained that there could be independent

brokers involved in a charterparty fixture negotiation. He said that there could be more than two brokers in the chain of communication and that if in such a chain there was an exclusive broker for the owner and an exclusive broker for the charterer, then the intermediate brokers would not be working for anyone but themselves. They would be part of the chain of communication and their role would be to pass on information one way and then back the other.

30. In this case, Oldendorff did not act simply as a post box. Mr Lough did not pass on verbatim to Pescadores every message sent to him by Southern Cross. Further, he did not send Pescadores all messages received by him from Southern Cross. In some cases, Oldendorff edited messages received from Southern Cross before despatching them to Pescadores. The defendants may, therefore, have got the initial impression that Oldendorff were the plaintiffs' brokers. This, however, did not stop Mr Lan of the defendants from talking to Mr Lough on a regular basis and discussing the charterparty negotiations with him and it is probable that as a result of these conversations, Mr Lan was aware that Oldendorff was not the plaintiffs' broker but had been involved in the negotiations on its own behalf.

31. The plaintiffs' case would have been made easier had they been able to establish that when Oldendorff wrote to them on 4 March 1997 stating that the defendants had accepted their offer on the charter of the vessel, Oldendorff was the defendants' broker. The fact that I have found that Oldendorff was not the defendants' broker does not, however, mean that Oldendorff's message of 4 March 1997 was not binding on the defendants. It would still be binding on them if it had been sent with their specific authority. Such authority could have been given by way of a letter or orally. No such letter was produced and there was no evidence that such a letter had ever existed. The plaintiffs argued, however, that authority to accept their offer was probably given to Mr Lough by Mr Lan in a telephone conversation that day.

32. In Mr Lan's affidavit of evidence-in-chief, there was no mention of any telephone conversation, either on 4 March or on any other date during the material period, between him and Mr Lough. The impression given by the affidavit was that Mr Lan had dealt solely with Mr Chua of Pescadores in relation to the proposed charter of the *Ever Wealthy*. His references to the events of 4 March were references only to written messages sent by Oldendorff to Pescadores and to conversations that he had with Mr Chua. In para 6 of his affidavit, Mr Lan stated that Oldendorff had in its fax of 4 March to Pescadores identified itself as representing the plaintiffs because the fax stated that Oldendorff was making an offer to charter *Ever Wealthy* on behalf of POST. In para 7 Mr Lan went on to say that as Mr Chua and he were unfamiliar with the plaintiffs, Oldendorff sent a second fax on 4 March and provided some information about the intended charterers. Mr Lan noted that the company was new and therefore, on his instructions, Mr Chua informed Mr Lough that any fixture would be conditional upon the charterers providing a performance guarantee from a third party. Mr Lan could not recall the exact date of his conversation with Mr Chua but said it would have been on either 4 or 5 March 1997.

33. During cross-examination Mr Lan was asked whether he knew how Mr Chua had informed Mr Lough about the requirement for a guarantee. His answer was no. He was asked to point out to the court any document in the agreed bundle which mentioned that provision of a letter of guarantee was one of the conditions. He replied he could not do this but he had instructed Mr Chua to tell Mr Lough about it because the plaintiff company was unknown and was too new and too small to charter the defendants' valuable vessel. Mr Lan then went on to say that Mr Lough asked for his help over the telephone and he told Mr Lough that if any Taiwanese company could guarantee the performance of the plaintiffs, he would accept them. Later in his cross-examination Mr Lan stated that after Mr Lough had sent out the plaintiffs' firm offer, he had asked Mr Lough who the plaintiffs were and told him that the defendants wanted a guarantee. He confirmed the conversation took place on 4 March itself but asserted it was not within the 60 minutes mentioned in the offer. He was then asked how long it took him to speak to Mr Lough after the defendants received the firm offer. His reply was 'I can't remember. James Lough told me there is a possibility like this. I asked who is the charterer. Therefore when Mr Lough gave me the firm offer I told him to give me the background of the charterers'.

34. After listening to Mr Lan's evidence in the box, it was clear that the defendants had not been completely forthcoming in their previous accounts of the circumstances in which Oldendorff had sent out its message to Southern Cross on 4 March stating that the defendants had accepted the plaintiffs' firm offer. The impression given by the pleadings and the affidavit evidence was that there was no contact between the defendants and Oldendorff and that Oldendorff had for some mysterious reason of its own sent out the acceptance without any input from the defendants. That picture changed substantially once Mr Lan admitted that he had had more than one conversation with Mr Lough on the vital day, 4 March, itself. It then appeared to me that there

was a distinct possibility that during one of these conversations Mr Lan could have told Mr Lough that he was prepared to accept the plaintiffs' offer.

35. There are other circumstances which indicate this may have been so. First, according to Mr Lan, he often spoke to Mr Lough during the period from 4 March to 12 March 1997. Bearing in mind that the defendants already had Pescadores involved in the matter on their behalf, the fact that Mr Lan chose to go directly to Mr Lough at various points during the negotiations shows that the relationship between Oldendorff and the defendants was a fairly close one. It is therefore possible that Mr Lan would have told Mr Lough over the phone that he was willing to accept the plaintiffs' main terms and that Mr Lough would have acted on the oral communication without waiting for written confirmation.

36. Secondly, according to Mr Lan himself, the defendants often did business by telephone and did not need to send letters whether by fax or otherwise in order to confirm contracts. He went on to say that Mr Chua was the defendants' general agent and could make any business on their behalf through a telephone conversation. It was only when the defendants were dealing with unknown, unreliable charterers that they needed to confirm a fixture by fax. He went on, however, to qualify this evidence by stating that if there was a final fixture made by Mr Chua, he would send the defendants a fax to confirm it.

37. Thirdly, the defendants did not deny that they had given direct instructions in this case to Oldendorff on amendments to the main terms of the charterparty. Mr Lan confirmed during cross-examination that on 5 March he had requested that the laycan be changed to 16 March because the vessel had been delayed. He had made this request directly to James Lough and had not used Pescadores for this purpose. There is no letter in the bundle from the defendants to Oldendorff on this issue so the instruction must have been given verbally by Mr Lan to Mr Lough.

38. Fourthly, Oldendorff's telex to Southern Cross accepting the plaintiffs' offer on behalf of the defendants was sent out at 12.55pm. In the same telex, Oldendorff asked Southern Cross to rush charterers' details for owners' confirmation. That afternoon at about 2.44pm Oldendorff sent a fax to Pescadores which began 'Further telcon many thanks your last. Will revert with chrs subs asap mtime please advise ref bunkers rob …' and continued by giving Pescadores full details of the charterers and their key executives. The first line of this message as quoted above in fact meant 'Further telephone conversation many thanks your last. Will revert with charterers' subjects as soon as possible. Meantime please advise reference bunkers remaining on board'. It appears to me that the reference to the charterers' subjects in this message only makes sense on the basis that the plaintiffs' offer of main terms had been agreed and thus all parties were concentrating on clearing the subjects as soon as possible in order to complete the fixture. If the offer had not been accepted, there would have been no need to discuss the subjects.

39. Having considered all the circumstances, I have come to the conclusion that, more probably than not, Mr Lan must have told Mr Lough during one of their telephone conversations on 4 March that he was prepared to accept the main terms of the plaintiffs' offer. It also seems improbable to me that without any input at all from the defendants or Pescadores, Oldendorff would of its own accord have accepted the plaintiffs' offer on the defendants' behalf. There was no reason for Oldendorff to put itself in the line of fire by doing this without any idea of the defendants' reaction to the proposal. Oldendorff was both a broker and a charterer with an existing relationship with the defendants and no one has suggested any credible reason why Oldendorff should want to jeopardise that relationship by sending out an unauthorised acceptance.

(ii) Whether there was a concluded fixture between the plaintiffs and the defendants

40. Given my findings as stated above, on the afternoon of 4 March 1997, the position was that the parties had agreed on a charterparty of the *Ever Wealthy* to the plaintiffs on the basis that the vessel would be delivered to the plaintiffs after it departed from Zhanjiangang for a voyage of between 70 and 80 days trading between ports in the Far East, South East Asia and Australia at a daily hire of US$5,000 per day payable every 15 days in advance. The laycan for delivery was between 7 and 11 March. The charterparty was not yet firm as the plaintiffs' offer, as is usual in this type of negotiation, had been made subject to further agreement on three items ie the charterparty details, the bunkers and board approval from the plaintiffs' board. Notwithstanding the need to negotiate further on the three items, as Captain Wan of the plaintiffs testified, all the main terms as shown in the

plaintiffs' offer had been agreed and could not be altered thereafter except by mutual agreement. The laycan period was one of the main terms and, as such, on 4 March it was fixed as per the plaintiffs' offer.

(a) Board approval and charterparty details

41. The first subject to be lifted was that relating to the plaintiffs' board approval. This happened on 4 March itself at about 6.30pm as was indicated in a message from Southern Cross to Oldendorff at that time. On 7 March, the defendants sent a fax to Pescadores stating that the charterparty details had been reviewed and found to be in good order. The same fax contained information about the cost and quantity of the bunkers. Pescadores immediately passed this information on to Oldendorff who sent it on to Southern Cross. By 7 March therefore, the 'sub' on charterparty details had been resolved. The defendants did argue that stating that the details had been found to be in good order was not the same as confirming or accepting the details. I have no hesitation in rejecting this argument. The defendants were trying to make a point of semantics with no real substance. I believe that all parties understood that when the defendants said that the charterparty details were in good order, they meant that the terms proposed were acceptable to them and that they had no counter proposals to make on any of the terms. This must be so since the defendants had by then received the proforma NYPE form with all amendments the plaintiffs required to be made indicated on the document.

(b) Bunkers

42. The issue that remains is whether the subject on bunkers was also resolved on 7 March. In order to resolve this issue, it is necessary first to decide what exactly the subject on bunkers meant. The plaintiffs say that the subject on bunkers was intended to refer only to the quantity of the bunkers expected to be on board the vessel at the time it was delivered to them. They point to the wording of this clause ie 'SUB BUNKERS: PLS ADV QTY ROB (ie remaining on board)' and say that it was the plaintiffs' subject in that it was a condition imposed by the plaintiffs prior to an agreement. If the plaintiffs as charterers were concerned with the price of bunkers at delivery, they would have phrased the bunker clause to read 'sub bunkers: please advise quantity remaining on board and price'.

43. The defendants, however, say that the intention of this subject was to obtain agreement from both parties on both the price and the quantity of bunkers. It is the defendants' case that the subject on bunkers was not lifted on 7 March or at all since the price of bunkers was not agreed. In support of their contention, they point to cl 9 of the proforma charterparty which as far as relevant reads:

> '9. Bunkers
>
> (a) The Charterers on delivery, and the Owners on redelivery, shall take over and pay all fuel and diesel remaining on board the Vessel as hereunder. The Vessel shall be delivered with _____ metric tons of fuel at the price of _____ per ton; _____ tons of diesel oil at the price of _____ per ton; to be redelivered with about the same quantity as on delivery. Cost of bunkers on delivery to be paid to Owners together with first hire.
>
> …'

Since both the price and the quantity of the bunkers had to be inserted in cl 9 in order to complete it, the defendants say that the parties had to agree on both these items and that was what was intended by the subject on bunkers. Further, correspondence from Southern Cross to Oldendorff after 4 March asked for the defendants' response on both price and quantity of bunkers.

44. The defendants also rely on the oral evidence of their witnesses. Mr Lan said that the subject on bunkers meant that the

parties would have to negotiate the delivery and redelivery ports and the price and quantity of bunkers on delivery and redelivery. Mr Chua echoed this by saying that the whole phrase 'sub bunkers: please advise quantity remaining on board' meant that the charterers and the owners had to negotiate on the quantity and price to be paid on delivery and the quantity, price and quality of bunkers on redelivery.

45. The defendants pointed out that on 7 March 1997 they had advised the plaintiffs of the quantity of bunkers and their prices. They quoted US$115 per metric ton for fuel oil and US$213 per metric ton for diesel oil. This advice constituted an offer to the plaintiffs and the subject on bunkers could not be lifted until the plaintiffs had agreed to it. The plaintiffs did not respond to the information on the prices of bunkers until 12 March 1997 when, at the plaintiffs' request, Oldendorff asked Pescadores whether the owners would accept US$105 per metric ton for fuel oil and US$205 per metric ton for diesel oil. This was a counter offer which the defendants had not responded to by the time they decided to call off negotiations with the plaintiffs. It is clear therefore that if the subject on bunkers referred to both quantity and price, no agreement was reached on it before the defendants walked away from the charter. In this scenario, there would have been no concluded charter agreement and the defendants would have been entitled to act as they did.

46. The plaintiffs' evidence, however, was that the price of the bunkers was of secondary importance to them. The reason why the bunkers were made a subject of the plaintiffs' offer was that they desired to protect themselves because they were taking delivery of the vessel outside a Chinese port for a fairly lengthy voyage involving long runs to South East Asian and Australian ports. Making the fixture subject to the quantity of bunkers on board the vessel at the time of delivery would ensure that the plaintiffs knew before committing themselves to it what quantity of bunkers they themselves would have to supply to the vessel and at what stage of the voyage those bunkers would be required. According to Mr Mackey, no charterer in his experience would ever fix a ship without knowing the quantity of bunkers that owners expected would be remaining on board at the time of delivery. He explained that even at an early stage of negotiations owners would be able to estimate fairly accurately the quantity of bunkers that would remain on board at time of delivery because the owners would know exactly what quantity of bunkers the vessel would consume in the ordinary course of the voyage up to the time of delivery.

47. The quantity of bunkers remaining on board the vessel at delivery would be very important to the plaintiffs as charterers because they would need to arrange for bunkers supplies to the vessel during the course of the charter and, depending on the voyage concerned, it may be that bunkers could be difficult and/or expensive to supply during the initial stage of the voyage. In contrast, the plaintiffs asserted the price of the bunkers was of secondary importance to them as charterers (and even to the owners) because at delivery the charterers would pay for the bunkers at prices quoted by the owners and on redelivery, when the charterers were supposed to return the ship with about the same amount of fuel on board as it had had when they took it over, the charterers would receive payment for the bunkers on board at the same price as that paid by them on delivery. The charterers would not make a loss because even if bunker prices fell after delivery, they would still be entitled to receive the same price on redelivery. Mr Lan during cross-examination agreed that the same sum paid by the charterers for bunkers at delivery and that paid by owners on redelivery were substantially the same.

48. The plaintiffs' position was once the defendants had given them the requested information on the quantity of bunkers estimated to be on board on delivery via the message of 7 March they were satisfied with the situation and accordingly the subject on bunkers was lifted. They explained away their subsequent messages to Oldendorff asking for updates on the bunker position by saying that as an owner could only give an estimated figure for the bunkers remaining on board and the consumption rate of the bunkers might vary depending on the activities of the ship, the bunker figure could vary before delivery and therefore they needed to be updated on the position frequently. Whilst this seems a rather feeble explanation, I note that throughout the correspondence from 8 March onwards on this issue and on the defendants' various requests for change of the laycan, the charterers' position was consistent with an attitude that the vessel had been fixed and that there was no reservation on their part with regard to taking the vessel. Their concern at all times was to get it on hire as quickly as possible as they were being pressed by their shippers. In fact, they were pressed so hard that eventually they informed Oldendorff that they were prepared to lift their previous deadlines and take the vessel when it reached the outer pilot station at Zhanjiangang whenever that might be.

49. The defendants' insistence that the subject on bunkers referred to both price and quantity was not entirely supported by

their evidence. First, although Mr Lan claimed that the price of bunkers was of utmost importance, he had to admit under cross-examination that the sum paid for bunkers at redelivery was substantially the same as that the plaintiffs would pay at delivery. The implication of this admission was that the price was a neutral matter. Secondly, although he asserted that the 'sub' on bunkers meant a negotiation on the redelivery port, he had to concede during cross-examination that the defendants had not taken up the issue of an appropriate redelivery port after 4 March but had simply accepted the description proposed by the plaintiffs in the proforma charterparty.

50. Thirdly, the defendants' dealings with Toko Line, the party to whom they chartered the vessel on 13 March, where again the price and quantity of bunkers were to be the same on delivery and redelivery, show that in such a situation the price was not regarded as significant. The issue of bunkers in this case was not settled between the defendants and Toko Line as cl 9 of the fixture recapitulation issued in respect of this charter stated 'Bunkers: to be negotiated later'. In a subsequent fixture note for the same charter, cl 9 read 'Bunkers: to be nego later. Bunkers to as on board on delivery. And on redelivery to be about same quantity as on delivery. Bunkers price to be charterer's actual price'. During cross-examination, it was pointed out to Mr Lan this clause stated that bunkers were to be negotiated later. Mr Lan agreed. He was then asked whether he considered the vessel to be fixed even though cl 9 provided for later negotiation on bunkers. His answer to that question was, 'yes'. This evidence was completely contradictory to his earlier statement that once a charter negotiation contained the words 'sub bunkers' these meant that price, quality and quantity of the bunkers had to be agreed between the parties and if all these items were not settled there would be no fixture. It should also be noted that the issue of the quality of bunkers was not pursued by the defendants in their closing submissions.

51. Another indication that the issue of bunkers was not as important to the defendants as they made it out to be was the fact that they did not bring it up when they first informed the plaintiffs in March 1997 that there was no existing charterparty agreement. This issue was not pleaded in the defence either and was only raised by the defendants some two years into the proceedings.

52. On balance, I accept the plaintiffs' submission that the subject on bunkers was put forward by them in order to ascertain the quantity that would be on board on delivery and that once this quantity had been told to them it was up to the plaintiffs to indicate dissatisfaction otherwise the subject on bunkers would be fulfilled. Accordingly, as the information on quantity was given to the plaintiffs on 7 March and at no time thereafter did the plaintiffs reject that information or state that it was insufficient to satisfy their subject on bunkers, as at 7 or at the latest 8 March the subject on bunkers must be deemed to have been lifted.

(c) The guarantee

53. The issue of a guarantee of the plaintiffs' obligations was not mentioned in Oldendorff's telex of 4 March accepting the plaintiffs' offer on the main terms. Indeed, right up to 14 March when Oldendorff informed Southern Cross that the defendants did not wish to proceed with the charter, the requirement that the plaintiffs provide a guarantee to the defendants was not referred to in any of the correspondence. It was Mr Lan's evidence, however, that when he spoke to Mr Lough on 4 March, he told the latter that he needed a guarantee from a Taiwanese company if he was to accept the charter since he did not know the plaintiff company. Mr Lan also said that when he was told by Mr Chua that the guarantee would be provided by Fantai Shipping Corporation of Taiwan he found the proposed guarantor to be accepted as he had known its president, Mr Rando Lee, for many years.

54. The fact that the plaintiffs made immediate arrangements to procure a guarantee in favour of the defendants from a Taiwanese guarantor as requested shows that they accepted that provision of the guarantee was a condition of the charterparty to be complied with by them. The defendants alleged that the plaintiffs were in breach of this condition because the guarantee which Fantai provided was not valid. In their final submissions, they asserted the invalidity arose because the guarantee referred to a trip time charterparty dated 5 March 1997 and no such charterparty actually existed. Thus, there was no concluded charter. The implication of this submission is that the provision of the guarantee was a condition precedent to the conclusion of

the charterparty.

55. There are two answers to the defendants' submission. First, it is not at all clear from the negotiations that the provision of the guarantee was supposed to be a condition precedent to the conclusion of the charterparty. The defendants could easily have made it so by sending a reply to the plaintiffs' offer which stated that their acceptance was subject to the guarantee. They did not. Secondly, I have found that Mr Lan instructed Mr Lough that the defendants accepted the plaintiffs' offer on the main details. That being so, he cannot have made the provision of the guarantee a condition precedent. At most, he made it a fundamental obligation of the plaintiffs, breach of which would have entitled him to repudiate the charter.

56. Going on the basis that the provision of the guarantee was a fundamental term of the contract, the next issue is whether the plaintiffs actually provided a valid guarantee. The facts are that the first letter of guarantee which was sent by Fantai to the defendants was not acceptable to them and therefore was returned to Fantai for corrections. The plaintiffs called Mr Rando Lee of Fantai to give evidence and he stated that when he was told that the letter of guarantee needed to be corrected, he discussed the necessary corrections with the defendants and sent the corrected letter back to the defendants on 10 March 1997. The defendants did not adduce any evidence to rebut Mr Lee's contention that they had agreed to the wording of the corrected guarantee and Mr Lee's testimony to this effect was not challenged by them. The corrected letter of guarantee was received by the defendants before 12 March 1997. If it was invalid because of a mistake in the dating of the charterparty the defendants had time in which to ask for further corrections to be made. No amendments were sought by them and their later conduct showed they did not regard the guarantee to be lacking in force.

57. The defendants did not take a consistent position regarding the guarantee. Their final submission on the invalidity of the guarantee was based on para 8 of Mr Lan's affidavit where he asserted that the guarantee was not valid because it referred to a trip charterparty dated 5 March 1997 which had never existed. Earlier, however, the defendants had taken a different position. On 19 March 1997, they had sent a fax to Fantai objecting to Fantai's purported repudiation of its obligations under the letter of guarantee and stating that those obligations would only be released after full settlement of any disputes or claims raised by the plaintiffs. At that stage, the defendants had obviously considered the guarantee to be a valid one.

58. Mr Lan was asked during cross-examination whether he agreed that the position taken in the fax of 19 March 1997 was different from that taken in court. His reply was incomprehensible. First he said that the two positions were the same and then he went on to explain that there was something 'behind' his letter to Fantai. He said:

> 'This company's [Fantai's] business cannot be the guarantee. The letter is illegal in Taiwan. They told me they can be the guarantor misleading me to the dispute with [the plaintiffs]. Therefore I don't return to them because even if I win the case, my vessel already arrested by [the plaintiffs] for two days. I have the right to claim from Fantai in Taiwan. They gave me an illegal document.'

The alleged illegality of the letter of guarantee was not supported by any evidence adduced by the defendants nor did the defendants make a point of it in their closing submissions. Further, no evidence was adduced by them to support the contention that a mistake as to the date of the charterparty (which was not surprising given the defendants' insistence on a speedy issue of that document) would invalidate the whole guarantee under Taiwanese law and/or make it impossible for them to enforce it against Fantai if the plaintiffs had defaulted in their charterparty obligations.

59. In any case, the defendants appeared to have seen some value in the letter of guarantee since in March 1997 they refused to return it to Fantai. It would have served no purpose for them to hold on to an invalid document. Further, according to the defendants, there was never a concluded charterparty between them and the plaintiffs and as such, since the indemnity given by Fantai in the guarantee was to indemnify the defendants for any losses that they may suffer due to the non-performance and/or default of the plaintiffs under the charterparty, if the charterparty never came into effect, neither did the guarantee. The letter of guarantee did not allow the defendants to claim under it if the charterparty was not concluded. If the defendants regarded the letter of guarantee as binding at any time, then at that time they must also have considered the charterparty to be binding. What the defendants seemed to be implying by their fax of 19 March 1997 to Fantai was that they would invoke their rights under the guarantee if the plaintiffs were able to raise a successful claim for their repudiation of the charterparty. Nothing

else would explain why they continued to hold on to the guarantee thereafter and even up to the date of trial. Certainly no rational reason for doing so was given by Mr Lan.

60. I therefore hold that the plaintiffs duly fulfilled their obligation to provide a guarantee from a Taiwanese company and that the defendants are not entitled to repudiate their obligations under the charterparty for non-fulfilment of that condition.

(c) Other observations

61. In their written submissions, both parties laid a lot of emphasis on the issue of the agreed laycan dates if any. I have not discussed that issue in any great detail here as I think it is redundant in the light of my finding that the main terms were agreed on 4 March 1997. The main terms included the laycan. The correspondence that took place thereafter must therefore be considered to be attempts by the defendants to change the agreed laycan. These attempts were successful to some extent in that the plaintiffs were so desperate to get the vessel that they agreed to a change in the laycan and although initially they rejected the final change requested by the defendants in the end they were willing not to impose a deadline for the vessel's delivery but to take it whenever it was free. This agreement was indicated to the defendants on the morning of 14 March and could be construed as an acceptance of the defendants prior request for laycan to be extended to 16 March as by then it was obvious the vessel would not be free any earlier than 16 March. So if not before there was agreement on the laycan before the defendants discarded the fixture.

62. I must also mention that I found Mr Lan to be a most unsatisfactory witness. Most of his testimony was given in English and although his grammar was not particularly good, he was fluent and able to answer most of the questions in English and at some length. Occasionally, though, he had recourse to the assistance of a Mandarin-speaking interpreter. Given his facility in the language as a whole, it appeared to me that he only needed help from an interpreter when he found a particular question difficult and wanted some time in which to consider his answer.

63. The plaintiffs submitted that Mr Lan's evidence on critical points was self-serving and shifted wherever he perceived his case to be. There was some force in that submission. He certainly did not come across as a forthright and candid witness. His evidence was particularly unsatisfactory in relation to the defendants' negotiations with the alternative charterer Toko Line. Further, he insisted on maintaining that he had informed Mr Lough on 12 March 1997 that he wished to break off negotiations with the plaintiffs although the correspondence that took place between that date and 14 March 1997 showed that Oldendorff did not learn of the defendants' intentions until 14 March 1997. His evidence flies in the face of the very clear statement in Mr Lough's fax to Mr Chua at 5.24pm on 14 March that he had 'just spoken to James Lan and was advised he wishes for this charter fixture to be cancelled'. Mr Lan was obviously trying to put the defendants in a better light by showing that they were free of the plaintiffs by the time they concluded their charter with Toko Line. The truth seems to be that they were not willing to break off with the plaintiffs until they had Toko Line committed and once that happened, Mr Lan was willing to renege on his contractual obligation to the plaintiffs because Toko Line was a well known and reputable company and the plaintiffs were strangers to him.

(iv) Damages

64. The plaintiffs are claiming for the following loss and damages which they say they sustained by reason of the non-delivery of the vessel pursuant to the charterparty:

(a)	(i)	Loss of earning/profits if voyage had been performed by m.v. 'Ever Wealthy'	US$140,464.00

	(ii)	Additional costs/expense to re-book cargoes with other carrier from Inchon to Kuching (steel coils 943.91 mt at US$7.00/mt)	US$ 6,607.37
(b)	(i)	Bill of Lading surrender for above cargoes	US$ 5.62
	(ii)	Courier service charge for documents on above cargo	US$ 10.12
	(iii)	Booking commission	US$ 707.93
(c)		Communication costs with Southern Cross Maritime during negotiation/fixing of the vessel	US$ 1,000.00
(d)		Communication costs with various port agents regarding space/cargo booking/LTA	US$ 1,500.00
(e)		Appointment of solicitors Messrs Murell Stephenson	US$ 1,200.00
			Total US$151,495.04

The defendants have submitted that the plaintiffs are not entitled to recover any of the above items as they have not proved them adequately. I will take each item in turn.

(a) Loss of profits

65. The plaintiffs have quantified their loss of profits by calculating that if the charter had taken place they would have earned a total of US$663,617 as freight for cargo carried between the various ports of the intended voyage and as against that they would have incurred expenses of US$523,153 leaving them a net profit of US$140,464. The details of these calculations are set out in a costing projection prepared by Captain Wan on or about 13 March 1997 and annexed as an exhibit to his supplementary affidavit of evidence-in-chief.

66. The defendants submitted that there was no causal connection between their breach of contract and the plaintiffs' alleged loss. They relied on the fact that by Captain Wan's evidence it appeared that the plaintiffs had started booking cargoes for the intended voyage as early as a month before its intended commencement. By so doing, the plaintiffs they said, bore the commercial risk of things going wrong for example if they were unable to find a vessel to carry the cargoes. Thus the breach of contract was not the effective cause of the plaintiffs' loss. I am not able to accept that argument.

67. As the plaintiffs submitted, it is often necessary for charterers to open bookings for cargo prior to the intended voyage so that they will know what type and size of vessel is required and also the profitability of the intended voyage. Secondly, the fact that the plaintiffs here started looking for cargo a month or so before fixing the *Ever Wealthy* does not mean that their loss was not due to the defendants' default. Once the *Ever Wealthy* was fixed, the plaintiffs would have organised their schedules around

that vessel and would have ceased their efforts to find another vessel to carry the cargo that they had managed to book. When the defendants failed to deliver the *Ever Wealthy* the plaintiffs had to start looking for a carrier from scratch and many of their shippers were not willing to wait till they found one. As Captain Wan testified, they lost cargo as a result of the defendants' default and in my judgment, as long as they were able to prove that this cargo had been fixed with them and was intended to be shipped on the *Ever Wealthy* they would be entitled to recover for damages sustained when that shipment could not take place. As far as the quantum of damages recoverable is concerned, this would have to be calculated based on the proved freight rates as against the proved expenses.

68. According to Captain Wan, the following cargoes were booked with the plaintiffs to be loaded on the vessel:

PARTICULARS

S/No	Ports	Cargo details	Quantity	Frt/Rate
1.	Port Kelang	Timber	1,000cbm	US$62.00/cbm
2.	Port Kelang	Timber	500cbm	US$70.00/cbm
3.	Port Kinabalu	Timber	813cbm	US$95.00/cbm
4	Ternate	Timber	783cbm	US$95.00/cbm
5.	Ceram	Timber	380cbm	US$95.00/cbm
6.	Inchon	Steel coils	978mt	US$70.00/mt
7.	Inchon	Steel coils	958mt	US$30.00/mt
8.	Kaohsiung	Steel products	1,167mt	US$72.40/mt
9.	Kaohsiung	Yacht	380cbm	US$45.00/cbm
10.	Kuching	Steel coils	400mt	US$65.00/mt
11.	Kuching	Timber	100cbm	US$95.00/cbm

12.	Kuching	Steel pipes	238mt	US$65.00/mt
13.	Singapore	Drill pipes	400mt	US$85.00/mt
14.	Singapore	Copper slag	3,000mt	US$22.50/mt
15.	Jambi	Plywood	500cbm	US$80.00/cbm
16.	Ternate	Plywood	85cbm	US$65.00/cbm

69. The defendants challenged the plaintiffs' assertion that they had the cargo listed above fixed for loading on the vessel. This was because in many cases the plaintiffs were unable to produce documents evidencing the fixture and/or the freight rate applicable. It should be noted, however, that on 11 March 1997, the plaintiffs had sent detailed loading and sailing instructions to the master of the vessel. These instructions mentioned all the loading and discharging ports and all the cargoes which are set out in the table in para 69. It therefore provides some circumstantial evidence that at the material time the plaintiffs expected to load those cargoes on the *Ever Wealthy*.

70. The plaintiffs' problem is that in respect of many of the shipments they had no documentation other than the letter of instructions to the master to indicate that the cargo referred to in those shipments would actually be loaded on the vessel. The plaintiffs explained that this was because many fixtures were concluded by telephone. They also said that they were not able to call the parties who had made those fixtures with them because it would have cost them an amount that would have been unreasonable in the circumstances and/or would have led to delay. Such difficulties might help in the admission of documents but they provide no help when it comes to establishing an oral contract. The plaintiffs have the burden of proving the existence of legally enforceable contracts for the shipment of these various cargoes and this can only be done by the production of the contract document, where it is written, or the other party to the contract, where the contract was made verbally. If no such evidence is made available to the court, then the court has no basis on which to find that such contracts existed notwithstanding the circumstantial evidence of the plaintiffs' belief that the persons with whom they dealt were actually going to ship with them. Due to the differing evidential positions with regard to the various shipments, it is necessary to deal with each shipment in turn in order to see whether the plaintiffs have succeeded in establishing the existence of the relevant contract.

Shipment no. 1

71. This shipment involved 1,000 cubic metres of timber from Port Kelang. The freight rate was US$62 per cubic metre. In support of the shipment, the plaintiffs produced the copy of a liner booking note between themselves and a company called Scan-Trans Shipping & Chartering Sdn Bhd dated 13 March 1997. The defendants' objection to this was that the other party to the contract was not called to confirm its issue of the document.

72. The plaintiffs' response was that they had the letter to the master as corroboration of the shipment and that calling their shipper to Singapore to support their cargo booking would have involved unreasonable expense as compared to the amount of the cargo booked. They submitted that the court should admit the booking note as evidence under s 32(b) of the Evidence Act (Cap 97) as being a statement made in the ordinary course of business. They also relied on the case of *Mohsin Abdullah Alesayi v Brooks Exim Pte Ltd* [1993] 3 SLR 433 where the court admitted in evidence certain cash receipts although the party relying on

them did not call the staff members who issued them because those particular persons could not be found at the time of the trial. Whilst in this case the fixture involved 1,000 tons of cargo and would have earned the plaintiffs approximately US$62,000 in terms of freight so that the expense of calling a witness from Malaysia would not have been disproportionate to the value of the evidence, I note that the plaintiffs had no way of compelling the witness' attendance since he was out of the jurisdiction and they had no leverage with which to persuade a foreign witness to disrupt his normal business to attend a court case in which he had no interest. In these circumstances, I consider the booking note admissible under s 32(b) of the Act and therefore that this shipment has been proved.

Shipment no. 2

73. This involved the shipment of 500 cubic metres of timber from Port Kelang at US$70 per cubic metre. The name of the shipper is not known. The plaintiffs were unable to produce any document evidencing this fixture. It was one of those allegedly made by telephone. The oral evidence of Captain Wan is not sufficient to prove it because his belief that the cargo would have been loaded had the vessel called at Port Kelang could not in itself convince the court that the plaintiffs would have had a legal right to call on the shipper to ship or to claim damages against them for non-shipment.

Shipment no. 3

74. This involved a shipment of 813 cubic metres of timber from Kota Kinabalu at a rate of US$95 per cubic metre. In court Captain Wan said that this booking was evidenced by a freight statement forwarded to the plaintiffs by their agent in Kota Kinabalu in respect of cargo shipped on *m.v. Zilina*. According to Captain Wan, the *m.v. Zilina* was the substitute vessel that the plaintiffs employed for the shipment of some of the cargo that had originally been intended for the *Ever Wealthy*. The defendants' objection to this document was that it did not relate to the *Ever Wealthy* and also no one was called to prove it. I admit this document under s 32(b) of the Act on the same basis as the booking note for the first shipment. I also accept that this document establishes the booking and the freight rate for the third shipment although it refers to the *m.v. Zilina* because Captain Wan's evidence as to his original intentions for this cargo are corroborated by 11 March letter and in due course the cargo was sent to the original destination for which it was intended. This booking has been proved.

Shipment no. 4

75. This shipment involved 783 cubic metres of timber to be carried from Ternate at a freight rate of US$95 per cubic metre. The shipper of the cargo was Auspine International Pte Ltd ('Auspine'). As evidence of the shipment, the plaintiffs produced a document prepared by the shipper setting out the details of this cargo that it was intending to ship to Melbourne and Brisbane by the *Ever Wealthy* as well as correspondence sent by Auspine to its shipper in Ternate. The plaintiffs also called Mr Tay Chin Joo who was employed as a manager by Auspine. He confirmed that he had prepared all the documents in court relating to the Ternate shipment including the document containing the cargo details. Mr Tay stated that once his company got the name of the intended carrying vessel, it would prepare a summary of the cargo to be shipped and fax that summary to its various suppliers to tell them to load their cargo onto the vessel. The document produced in court had been sent out by Auspine in March 1997 to its various suppliers of timber in Indonesia to instruct them to load the parcels of timber onto the *Ever Wealthy*.

76. Mr Tay further testified that when the *Ever Wealthy* did not arrive, Auspine had looked for a substitute vessel and had managed to ship one parcel of cargo on that substitute. The rest had been shipped out on other vessels including a parcel on the *m.v. Zilina*. The defendants submitted that I should not accept Mr Tay's evidence because he did not produce the documents from his suppliers that he used to prepare his instructions. This argument is specious. Mr Tay as a representative of the shipper, an independent party, confirmed that the shipper had agreed to ship shipment no. 4 aboard *Ever Wealthy* and

produced a contemporaneous document showing how the shipper had acted on that contract. That was all the proof I required. The defendants also submitted that the freight rate had not been proven as Mr Tay did not testify on the applicable freight rate. In this respect I accept Captain Wan's evidence that the freight for this voyage was the same as that which the plaintiffs had previously charged Auspine for carriage of timber from Ceram to Melbourne and Brisbane as evidenced by a freight invoice dated 4 February 1997. The defendants did not produce any evidence that that was an exorbitant or even an unusual freight rate for the voyage in question. I therefore find this shipment proved.

Shipment no. 5

77. This was another shipment of timber by Auspine. The port of loading was Ceram. The quantity was 380 cubic metres and the freight rate was US$95 per cubic metre. In this regard, the plaintiffs produced a letter written by Mr Tay to his agent in Jakarta informing the latter that the *Ever Wealthy* would arrive in Ceram around 30 March to load Auspine's orders for March shipment. When Mr Tay was in court, he confirmed preparing this letter and his evidence was not challenged. I find this shipment proved.

Shipment no. 6

78. This was a shipment of 978 metric tons of steel coils from Inchon to Brisbane at a freight rate of US$70 per metric ton. The defendants conceded that the booking had been proved by the plaintiffs but argued that the freight rate had not since none of the documents relied on specified the rate for the voyage. I notice, however, that the message to the plaintiffs from their booking agents in Korea confirming the bookings did mention that Dongbu Steel which was the supplier of steel coils wanted to ship an additional 63 metric tons of this cargo to Brisbane and would be charged US$65 per metric ton for the same. There is therefore evidence at least of a freight rate of US$65 per metric ton which I accept. This shipment has been proved at a rate of US$65 per metric ton.

Shipment no. 7

79. This was a shipment of 958 metric tons of steel coils from Inchon at a rate of US$30 per metric ton. The defendants accept that the booking was made but quarrel with the rate. Once again, I note that in the booking agents' fax of 11 March 1997 to the plaintiffs the agents mentioned a proposed rate of US$30 per metric ton for this shipment from Inchon to Kuching and asked whether that rate was correct. I accept the plaintiffs' evidence that that was the correct rate for that shipment. This shipment has been proved.

Shipment no. 8

80. This was a shipment of 1,167 metric tons of steel products from Kaoshiung at a rate of US$72.40 per metric ton. The plaintiffs relied on a fax from Fantai dated 13 March confirming the shipment. Mr Rando Lee confirmed that that fax was from Fantai and that the Mr YH Chen named in it as the sender of the fax was Fantai's shipping general manager. He identified the document as being a booking list sent out for the purpose of booking space on the *Ever Wealthy*. Under cross-examination, he was not able to remember whether the plaintiffs had responded to confirm the booking. The defendants submitted that he was unable to prove the document. I disagree. Mr Lee's evidence was sufficient to establish that his company had desired to ship the particular cargo on board the *Ever Wealthy* and had booked the space. There was no evidence that the plaintiffs had not accepted this booking. Indeed, from their message to the master of the vessel, it was clear that they expected the vessel to load that cargo in Kaoshiung.

81. The only problem relates to the freight rate. There is no documentary evidence on the exact rate charged for this booking nor was Mr Lee asked about it. Captain Wan's evidence was that the plaintiffs' shipping service from Asia to Australia was a service run on a monthly basis from 1991 or 1992 when he was working at Pine Seas Maritime. When Pine Seas stopped that service, Captain Wan had started the plaintiff company to fill the gap and all agents, customers and consignees were familiar with the service and the rates charged. He produced documents showing that in January 1997 he had charged US$75 per metric ton for steel cargo shipped from Kaoshiung to ports in Australia. I accept the plaintiffs' evidence. I find it probable that the rate charged by the plaintiffs for this shipment was the usual rate. This shipment has been proved.

Shipment no. 9

82. This was a shipment of a yacht from Kaoshiung to Sydney. The rate charged was apparently US$45 per cubic metric for 380 cubic metres. This booking was proved by the same document emanating from Fantai as that related to the steel cargo. There is, however, no evidence at all on the applicable rate. I therefore find that the plaintiffs have not proved their loss in respect of this shipment.

Shipment no. 10

83. This was a shipment of 400 metric tons of steel coils from Kuching to Australia at a rate of US$65 per metric ton. The shippers of this cargo were Delta Bond and/or Pacific Sheet & Coil. As proof, the plaintiffs produced a letter dated 20 February 1997 from Delta Bond stating that Pacific Sheet & Coil were hoping to have 1,000 metric tons of steel coil available to ship to Australia from Kuching in March 1997. There was another letter dated 19 March 1997 from Pacific Sheet & Coil to Delta Bond stating that because of the poor performance of Delta Bond (ie the non-showing of the *Ever Wealthy*), Pacific Sheet & Coil had 1,800 metric tons of goods sitting at Inchon and 400 metric tons of goods sitting at Kuching. The letter also asked whether alternative shipping arrangements should be made for the cargo that had been waiting for the *Ever Wealthy*. Mr Faulkner of Delta Bond who had sent out the first letter and received the second was called as a witness and he confirmed having sent out correspondence to the plaintiffs on behalf of Delta Bond in relation to shipments by Pacific Sheet & Coil. There was also a letter from the plaintiffs to Delta Bond for onward transmission to Pacific Steel & Coil explaining that they were having difficulty trying to get a substitute vessel to carry the 400 metric tons from Kuching. All in all, I am satisfied that there was a booking for the carriage of this cargo by the *Ever Wealthy*. Unfortunately, there is no evidence to support the freight rate charged by the plaintiffs. I therefore hold that the plaintiffs have not proved their loss.

Shipment no. 11

84. This was a shipment of 100 cubic metres of timber cargo from Kuching at US$95 per cubic metre. There are no documents to support this shipment. The plaintiffs submitted that Mr Faulkner was called to prove the shipment but I cannot find anything in his evidence that talks about shipment of timber from Kuching either in relation to quantity or in relation to rate. Such mention as there was of timber in Mr Faulkner's fax of 26 February 1997 appears to have been purely exploratory. The plaintiffs have not proved this shipment.

Shipment no. 12

85. This was a shipment of 238 metric tons of steel pipes at US$65 per metric ton from Kuching for Delta Bond. Once again the plaintiffs relied on Mr Faulkner's evidence to prove this booking. Nothing was mentioned about this shipment in his oral

evidence and his letter of 26 February 1997 was vague with no mention of quantity or rate. The plaintiffs have not proved this shipment.

Shipment no. 13

86. This was a shipment of 400 metric tons of drill pipes from Singapore at US$85 per metric ton. No documents were produced to support this shipment apart from the letter of instruction to the master. Neither was anyone called to testify that he had made this booking. This shipment has not been proved.

Shipment no. 14

87. This was a shipment of 3,000 metric tons of copper slag from Singapore at the rate of US$22.50 per metric ton. The plaintiffs produced a copy of an unsigned Gencon charterparty dated 11 March 1997 purportedly made between Pan Abrasives Pte Ltd as charterers and themselves as disponent owner for the carriage of this cargo from Singapore to Mackey. They did not call anyone from the prospective charterers' office to confirm the fixture had actually been concluded although that company is a Singaporean company. Captain Wan, who testified that this document had been prepared by Eastport Shipbrokers in Singapore around 11 March 1997, said that he had tried to contact the shipbrokers to give evidence. When he called their office, however, he had been informed that the two gentlemen who had dealt with him were no longer with Eastport. One of them had gone to Japan and he did not know the whereabouts of the other one though this latter person was probably a local. It must be noted that the plaintiffs only tried to contact Eastport on the first day of this trial and, even though hearing was subsequently adjourned, no further attempts were made to call either Eastport or anyone from Pan Abrasives to confirm that there had been a concluded charter for the carriage of the copper slag. The plaintiffs have not proved this charter.

Shipment no. 15

88. This was a shipment of 500 cubic metres of plywood from Jambi at US$80 per cubic metre to be undertaken on behalf of Auspine. The documents adduced by the plaintiffs and supported by Mr Tay's evidence show that this booking was made. As for the freight rate, although there is nothing in the documents which directly supports the rate which the plaintiffs say had been agreed, the documents also show a rate of US$95 per cubic metre for carriage of timber from Ternate to Australian ports. In view of that, US$80 per cubic metre from Jambi which is further away from Australia than Ternate would seem reasonable. The plaintiffs have proved this shipment.

Shipment no. 16

89. This is another shipment undertaken on behalf of Auspine from Ternate. It is of 85 cubic metres of plywood for which the plaintiffs charged US$65 per cubic metre. This booking was proved by Mr Tay's evidence and documents which supported the plaintiffs' stand. As for the freight rate, the position is the same as that regarding shipment no. 15. I consider US$65 per cubic metre reasonable in the circumstances. The plaintiffs have proved their loss.

Conclusion on loss of profits

90. The plaintiffs have proved the following shipments with the following freight income:

Shipment no.	Freight (US$)
1	62,000
3	77,235
4	74,385
5	36,100
6	63,570
7	28,740
8	84,490.80
15	40,000
16	5,525
Total	472,045.80

91. This means that the plaintiffs have proved that had the charter of the *Ever Wealthy* proceeded, they would have earned US$472,045.80 as freight. That would have been their gross income from the charter. The plaintiffs had, however, also calculated that in order to earn this freight, they would have had to spend US$523,153. This figure comprised charter hire, cost of fuel, port charges, loading/discharging costs and various miscellaneous charges. As their admitted costs exceed their proved income, the plaintiffs have not proved that they would have suffered any loss of profits by reason of the defendants' breach of contract.

Other items of the plaintiffs' claim

92. The next item of the plaintiffs' claim is US$6,607.37 which they spent in order to send cargoes booked with them on another vessel from Inchon to Kuching. The substitute vessel was *AIS MAMAS* and the plaintiffs produced documents issued by various companies in Korea including their agent Tai Young Shipping Co., Ltd to substantiate these costs. The defendants

object to the sum on the basis that the plaintiffs have not proved that the original freight rate for this cargo was US$30 per metric ton. I have, however, accepted the plaintiffs' evidence in this regard and the objection therefore has no further weight. I find that the plaintiffs have proved this item of expense and accordingly award them US$6,607.37.

93. The plaintiffs also incurred other costs in relation to the substitute arrangements for the shipment of this cargo comprising bill of lading surrender fees, courier service charges and booking commission. These total US$723.67. These expenses were evidenced by a fax dated 28 March from Tai Young Shipping Co., Ltd to the plaintiffs which said that these were expenses incurred as a result of the withdrawal of the *Ever Wealthy* and the non-arrival of the vessel at Inchon. I accept that document as evidence on the basis of s 32(b) of the Act. Accordingly I award this sum to the plaintiffs as well.

94. The next claim is for US$1,000 being communication costs incurred by the plaintiffs and Southern Cross in communicating with each other and with Oldendorff and Pescadores. Whilst it is clear from the evidence that there was a great deal of communication between these various parties, it has to be noted that the plaintiffs' claim is for the estimated costs that they incurred and not the actual costs. As the plaintiffs have not proved what their actual expenditure was on this item, I cannot award it to them.

95. The same objection must be made to the plaintiffs' next claim which is for US$1,500 being their estimated communication costs when they communicated with various port agents regarding space/cargo booking and the vessel. This estimate has not been substantiated by any bills and must be rejected.

96. Finally, the plaintiffs wish to recover US$1,200 as being the fees of their Australian solicitors. They point out that the defendants did receive a letter of demand from these solicitors and that was clear evidence of the legal expenses which the plaintiffs incurred by reason of the defendants' breach. The plaintiffs have not, however, produced any bill to show either the exact amount charged by their Australian solicitors or the work for which this sum was charged. The figure of US$1,200 is far too large to cover simply a letter of demand. Therefore, the plaintiffs have not proved that the sum claimed relates directly to the defendants' breach of contract.

Conclusion

97. In the result, there will be judgment for the plaintiffs in the sum of US$7,331.04 and interest thereon at 6% per annum from the date of the writ. As the plaintiffs have not succeeded on the most substantial portion of their claim, however, some adjustment may have to be made in relation to costs. I will hear the parties on costs.

JUDITH PRAKASH

JUDGE

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