Sinogreat International Trading Ltd v Hin Leong Trading (Pte) Ltd
[2003] SGHC 91

Case Number : Suit 1611/1999

Decision Date : 14 April 2003

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : S Gunaseelan (S Gunaseelan and Partners) for plaintiffs; Toh Kian Sing and David Tan Yew Beng (Rajah and Tann) for defendants

Parties : Sinogreat International Trading Ltd — Hin Leong Trading (Pte) Ltd

Commercial Transactions – Sale of goods – Breach of contract – Causation – Cargo confiscated by customs authorities – Whether breach of contract caused by plaintiffs' instructions to change description of cargo on shipping documents

Contract – Discharge – Agreement – Novation – Contract for sale of goods – Related company purchasing goods in place of original party to contract – Whether there was evidence of any intention to novate on part of all parties involved

1 The claims and counterclaims arise out of an agreement for the sale and purchase of 43,000 MT ± 5% of Vacuum Gas Oil ("the cargo") for shipment to Xiamen, Peoples' Republic of China ("the PRC") to be delivered by 3 lots. After the agreement, the sellers at the request of the buyers changed the name of the cargo to Low Sulphur Waxy Residue ("LSWR") in the shipping documents, including the bills of lading. The first two lots of the cargo were delivered to the receivers of the lots for the buyers' account without any difficulties. When the vessel arrived at Xiamen to deliver the third lot, the buyers were not in a position to receive the cargo and the vessel sailed to Hong Kong, Out Port Limit ("Hong Kong OPL") to await the buyers chartering and sailing vessels there for ship to ship transfers of the third lot of the cargo in smaller consignments. The sellers and buyers entered into a Storage Agreement. Just as the first shipment was being transferred from ship to ship, PRC Customs officers seized the two vessels and the third lot of the cargo. As the mis-description of the third lot of the cargo did not conform to the specifications of the cargo, it was found by PRC Customs and two Courts of the Province of Guangzhou, PRC that it was without legal documentation and the third lot of the cargo was confiscated by the PRC Customs on the ground that there was deemed smuggling. The vessel chartered by the sellers was detained for an extended period of time and substantial demurrage was incurred. The vessel also suffered damage.

2 The buyers claim damages for breach of the contract of sale and for negligence as the bailees in allowing the ship to ship transfer of the third lot of the cargo when the same should have taken place, as allegedly agreed, within the Hong Kong territorial waters. The sellers counterclaim for damages for detention of the vessel and the repair of the vessel caused during the detention.

3 And now the material facts as revealed by the evidence led. By a contract dated 17 May 1999, the defendants sold to Sinocean International Investments Ltd ("Sinocean") the cargo on CFR, PRC basis. That the plaintiffs purchased the cargo from the defendants in place of Sinocean, a related company, is not disputed but the correct legal position under which the plaintiffs took over the cargo will be addressed later in this judgment. Delivery of the cargo, which was to be in two lots under the sale contract, was later varied to be in 3 lots. The range of delivery dates was extended by agreement to 10 June 1999. The contract was negotiated by Mr Lim Oon Kuin ("Mr Lim"), the Managing Director of and on behalf of the defendants. Mr Goh Kah Hiang ("Mr Goh"), the plaintiffs' General Manager and Mr Wu Zai Jin ("Mr Wu") negotiated on behalf of the plaintiffs.

4 The material times of the sale contract are as follows:

13 Title and Risks

Title and risk of product shall pass from seller to buyer when product passes ship's permanent flange connection at loadport.

15 Taxes, Duties and Other Levies:

All duties, taxes, levies and other official dues and charges as well as the costs of carrying out and clearing all customs formalities for importation of the goods and, where necessary, for their transit through another country shall be arranged by and shall be for the account and responsibility of the buyer.

16 Governmental/Customs Requirements:

Buyer warrants that all customs formalities and requirements by the local authorities have been properly secured and compiled for importation of subject cargo to buyer's designated disport."

5 Accordingly, the defendants did not have to concern themselves with matters such as payment of import duties and taxes and the procurement of import permits or any customs clearance in connection with the importation of the cargo into the PRC.

6 The defendants had themselves bought the cargo under a contract from Feoso Energy (Hong Kong) Ltd ("Feoso") who provided the specifications of the cargo to the defendants. The specifications were set out on the last page of the sale contract of 17 May 1999 and they are as follows:

ANALYSIS

TEST	METHOD	RESULT
GRAVITY, API AT 60 F	D-1298	25.8
OUR POINT, DEG F	D-97	-/-64
TOTAL SULFUL, X-RAY, WT PC	D-4294	1.7217
CARBON RESIDUE, CONRADSON, WT PCT	D 189	0.14
ANILINE POINT, DEG F	D-611	159.8
FLASH POINT PENSKY MARTENS, DEG F	D-93	200
WATER & SEDIMENT (BS&W),		

VOL PCT	D-1796	<0.05
VANADIUM, PPM	SOL/DIL	<0.1
SODIUM, PPM	SOL/DIL	0.3
COPPER, PPM	SOL/DIL	<0.1
NICKEL, PPM	SOL/DIL	<0.1
HYDROGEN SULPHIDE,		
PPM @ 140 DEG F		<0.5
VISCOSITY, CST @ 122 DEG F		10.1
DISTILLATION (VACUUM),		
1.8.P DEG F	D-1160	433
RCVD, 5 PCT, DEG F		510
RCVD, 10 PCT, DEG F		54
RCVD, 20 PCT, DEG F		584
RCVD, 30 PCT, DEG F		617
RCVD, 40 PCT, DEG F		648
RCVD, 50 PCT, DEG F		674
RCVD, 60 PCT, DEG F		706
RCVD, 70 PCT, DEG F		743
RCVD, 80 PCT, DEG F		797
RCVD, 90 PCT, DEG F		878
RCVD, 95 PCT, DEG F		941
END POINT, DEG F		976
RECOVERY, VOL PCT		97.5
RESIDUE, VOL PCT		2.5
TOTAL NITROGEN, PPM	D-4629	619

7 After the sale contract, the defendants chartered two vessels, namely "Ocean Dolphin" and "Ocean Opal" from Ocean Tankers Pte Ltd ("Ocean Tankers") to lift the cargo from Feoso, which was

then on board the vessel known as "Condoleezza Rice", and to deliver the same to the plaintiffs in Xiamen, PRC. On 19 and 20 May 1999, some 12,032.252 MT of the cargo was transferred from the "Condoleezza Rice" to the "Ocean Dolphin" which then proceeded to Xiamen. On 20 and 21 May 1999, the balance of the cargo, some 30,664.673 MT, was transferred from the "Condoleezza Rice" to the "Ocean Opal" which also headed for Xiamen.

8 On the evidence, it was clearly established that the plaintiffs instructed the defendants to describe the cargo on board the two vessels as LSWR instead of Vacuum Gas Oil ("VGO") on all shipping documents including the bills of lading and the certificate of quantity, quality and origin. By their fax of 24 May 1999 Sinocean to the defendants Sinocean acknowledged with thanks the defendants' co-operation in 'assisting to show product name as "LOW SULPHUR WAXY RESIDUE' in all shipping documents instead of VGO. They stated that the 'change of product name (was) purely for purpose of customs clearance facilities at discharging port'. They "further unconditionally indemnify (the defendants) all damages, losses and hold (the defendants) free from any claims, damages arise (sic) from our above request." By their letter of 8 June the plaintiffs issued an indemnity to the same effect in respect of the 11,950 MT of partial shipment of cargo which was to be paid by a Letter of Credit.

9 As to the defendants' performance under the sale contract, the lot of about 12,032.25 MT of the cargo on board the "Ocean Dolphin" was duly delivered as the first lot under the sale contract on or about 25 May 1999 to or for the account of the plaintiffs who duly paid the price without any complaint whatsoever about the specifications or quality. As to the 30,908.621 MT of the cargo on board "Ocean Opal", about 12,419.214 MT was transferred to "Ocean Dolphin" at Outport Limit, Hong Kong ("OPL, Hong Kong") for onward carriage to Xiamen on the instructions of the plaintiffs. This was the second lot under the sale contract. It was duly delivered to the plaintiffs who, again, paid for it without on or about 1 June 1999 without any protest about the specifications or quality. Both the first and second lots were, according to the Master of "Ocean Dolphin", delivered at Xiamen to other vessels without any problems. The shipments were VGO.

10 The 18,489.407 MT of the cargo, remaining on board "Ocean Opal" was the 3rd and final lot of the cargo under the sale contract. This last lot became the subject matter of this action.

11 The final lot was due for delivery at Xiamen to the plaintiffs on or about 9 June 1999. This, in the event, did not happen. On 10 June 1999 as "Ocean Opal" was nearing Xiamen waters, the vessel was turned back and it sailed back to OPL, Hong Kong. On the evidence, it was the plaintiffs who requested that this be done because they, the plaintiffs, were unable to obtain sufficient ullage capacity to take delivery of the 3rd and final lot of the cargo at the discharge port of Xiamen. If the plaintiffs had been ready to receive the final lot of the cargo, the defendants would have delivered the same as they were ready, able and willing to do so. The plaintiffs were therefore in breach of the agreement to take delivery.

12 As the plaintiffs had paid for most of the cargo and had caused to be issued in favour of the defendants a letter of credit for the rest of the cargo, they were anxious to obtain some documentary assurance that the defendants would not dispose of the final lot of the cargo. Both Mr Wu and Mr Goh, on behalf of the plaintiffs, spoke to Mr Lim of the defendants over the telephone. They assured Mr Lim that the plaintiffs would urgently charter vessels to take delivery of the final lot from "Ocean Opal". Their intention, I find on the evidence, was to take delivery of the final lot from "Ocean Opal" at where she was anchored which was Hong Kong, OPL in smaller quantities over a few trips by means of vessels chartered by the plaintiffs which would ultimately carry them to Xiamen. Mr Goh of the plaintiffs confirmed that the plaintiffs' intention was to lift the cargo as soon as possible by small lots and that they would lift the final lot from the vessel at the position she was anchored.

13 Mr Lim accordingly instructed Ms Serene Seng, the Manager for Corporate Affairs of the defendants, to prepare a document to be sent to the plaintiffs by way of assurance. On 14 June 1999 Ms Seng drafted what was described as the "Storage Agreement" in respect of the "redelivered" cargo, i.e. the final lot of the cargo. No consideration was furnished by the plaintiffs for the storage on board "Ocean Opal" till the end of June. It was, in my view, more in the nature of a gratuitous bailment, and I shall elaborate on the significance of this legal categorisation of the arrangements between the parties later in this judgment.

14 On 16 June 1999, one Mr Li Muchun of Xiamen Xin Mei Lu Petrochemical Co Ltd ("Xiamen XML"), the plaintiffs' agents operating in Xiamen, wrote by fax to Ms Serene Seng. They indicated that they would be chartering the oil tanker known as "Min Hai You No. 5" for her to sail to Hong Kong to ship 5,000 tons of the cargo. They asked for the location of "Ocean Opal" or where the wharf for loading was "so as to facilitate loading when "Min Hai You No. 5" arrived at the port.

15 Ms Serene Seng replied by fax. She informed Xiamen XML of "the S-T-S position for loading cargo as 'Hong Kong OPL Latitude: 22° 08' N Longitude: 114° 08' E' ". The expression "S-T-S" meant, in the context, Ship to Ship transfer at the nautical position indicated, which was the position at which "Ocean Opal" was anchored. The plaintiffs sent their chartered vessel "Min Hai You No. 5" to the nautical position to receive the cargo. This was, on the evidence, consistent with the arrangements made between Mr Goh of the plaintiffs and Mr Lim of the defendants.

16 The plaintiffs confirmed their instructions by a fax sent on 15 June 1999. They confirmed their instructions to the defendants to release about 5,000 MT of the cargo to "Min Hai You No. 5" through a ship to ship transfer at OPL, Hong Kong. The plaintiffs in the same fax again instructed the defendants to have all shipping documents reflect the cargo as LSWR.

17 The ship to ship transfer of 5,000 MT of the cargo started on 17 June 1999 at OPL, Hong Kong. On the following day, PRC Gongbei Customs officers boarded both vessels. Mr Lau Hee Puang ("Mr Lau"), a Senior Cargo Officer, ship to ship Operations, of the defendants was present on board "Ocean Opal" at OPL, Hong Kong when the customs officer of the PRC boarded the vessel. He was on board the vessel about a week before the customs officers went on board.

18 In the period before PRC Customs officers boarded "Ocean Opal", she carried out three STS operations. On 13 June 1999, one of the vessels of Ocean Tankers, "Tenyoshi Maru No. 4" transferred to the "Ocean Opal" some 1,908 MT of marine gas oil for the purpose of cleaning the cargo holds of the "Ocean Opal". According to Mr Lau, such cleaning was done by flushing the marine gas oil through the cargo holds and pipelines to dissolve the oil that the vessel was carrying. After such cleaning, the oil would then be used for the vessel's own consumption, as bunkers. On 15 and 16 June 1999 "Tenyoshi Maru No. 4" and another vessel "Soon Wah" received from "Ocean Opal" 252.6 MT and 431.6 MT of the 1,907.8 MT originally received by the "Ocean Opal". The balance of the marine gas oil remaining on board the "Ocean Opal" was 1,233.6 MT. Mr Lau, who supervised the three STS operations, produced copies of the ship telexes confirming these transfers of oil.

19 According to Mr Lau, 4 or 5 PRC Customs officers boarded both vessels. When they were on board "Ocean Opal", they asked the Master some questions about the cargo, namely the type of cargo and its quantity. Later, they required the Master to sail "Ocean Opal" and follow them to Zhuhai Pilot Station. Eventually, "Ocean Opal" anchored at the Zhuhai Pilot Station. The customs offices carried out investigations, in the course of which they took samples of the cargo from the tanks. On or about 18 July, 1999 Mr Lau left "Ocean Opal" and returned to Singapore.

20 As a result of the investigations, the balance of the cargo remaining on board the "Ocean Opal" was seized and confiscated by the PRC Gongbei Customs. In the Notice of Penalty Decision issued by the Gongbei Customs dated 13 August 1999, the PRC Gongbei Customs noted that the Master of "Ocean Opal" illegally transhipped to the tanker "Min Hai You No. 5" oil which was subsequently seized by a coastguard vessel of the Customs. It was confirmed that "Min Hai You No. 5" was freighted with 4,688.015 MT of fuel oil containing 60% light diesel and "Ocean Opal" was freighted with 13,705.371 MT of fuel oil containing 60% light diesel and 1,243.532 MT of heavy oil, totalling 14,948.903 MT "*which did not tally with the 'LOW SULPHUR WAXY RESIDUE ["DI LIU LA YOU"] as listed in the shipping documents of the respective vessels, and thus there (were) no legitimate certificates"* (emphasis added).

21 The Master of "Ocean Opal" applied for 136.287 tons of heavy diesel as power fuel oil for the vessel. His application to the Gongbei Customs was granted.

22 In accordance with the provisions of Sections 4(2) and 5(1)(2) of the "Rules for Administrative Penalty of the Customs Law of the PRC", the Gongbei Customs confiscated the remaining 14,812.616 MT of fuel oil and heavy diesel carried by "Ocean Opal". They also confiscated the 4,688.015 MT of fuel oil carried by "Min Hai You No. 5".

23 Article 4(2) of the said Rules provides that the carriage, purchase and sale in inland or territorial waters of goods which are prohibited or restricted by the State *without legal certification* shall be deemed or considered as smuggling conduct. There was therefore under the Laws of the PRC this statutory presumption of smuggling.Whether the presumption is irrebutable because the offence was one of strict liability is not a question I need to deal with. It does not arise in this case. Article 5 provides for confiscation of the cargo as one of the possible punishments if an act of smuggling is committed.

24 Mr Cheng Yicong (DW4), a senior partner in the law firm of Lin Yi Hua, Cheng Yi Cong in Guangzhou gave evidence on the Rules for Administrative Penalty of the Customs Law of the PRC and the nature of the proceedings in two Chinese courts following the confiscation of the cargo. He agreed, in cross examination, that a foreign registered vessel on entering Chinese territorial waters had to report to the Customs establishment or the Port Authority. He further agreed that Article 4(2) of the Implementation Rules of Customs Law would not apply if the vessel had not been in Chinese waters because obviously the Chinese Customs would not have jurisdiction over the vessel. But he opined that the confiscation order was made in accordance with Article 4(2) of the Implementation Rules because the cargo was not accompanied by legal certification.

25 Legal expert opinion was led by the defendants on the question whether the LSWR and VGO are cargoes which require an import permit pursuant to the list of "Restricted Import Commodity" attached to the PRC's Notice on the Updating of Commodity catalogue and Issuing Authority Control (1997) Wai Jing Mao Guan Fa No. 96. Mr Wang Jing, the founding partner of M/s Wang Jing & Co Law Firm, Guangzhou gave the expert evidence. He was not cross examined on his opinion. According to him, VGO comes within the categorisation of "Other fuel oil" as set out under Commodities Serial No. 27100040 of Annex 1 of the Catalogue of Commodities Imported Under the Control of Quota and Permit. He stated that its import was subject to quota and required a permit. On the other hand, LSWR was a commodity which did not require an import permit into the PRC. It does not require much imagination to know the reason why the plaintiffs had requested for the change in the description of the cargo from VGO to LSWR.

Events after the confiscation

26 On the day the "Ocean Opal" and the cargo were detained by the Chinese Customs, Mr Lim informed Mr Wu and Mr Goh about the detention. They later requested Mr Lim to assist the plaintiffs to get the cargo released by the Chinese customs. Mr Ng Hoi Shuen ("Mr Ng"), Managing Director of the plaintiffs, contacted Mr Lim for the first time over the transaction. Mr Ng said that the plaintiffs were prepared to bear the expenses. For reasons best known to the plaintiffs and the persons associated with them, they did not want to deal directly with the Customs authorities. The plaintiffs directed the defendants what representations to make. For e.g. to explain to the Customs authorities the transfer of 4,760 MT of the cargo from "Ocean Opal" to "Min Hai You No. 5", a contract for the sale of this quantity was drawn up solely for the purpose of making representations to the Customs.

27 The defendants failed to persuade the Chinese Customs to release the cargo. On 21 August 1999 the Chinese Customs issued a Notice of Penalty Decision confiscating the cargo on board the "Ocean Opal" and the "Min Hai You No. 5". The decision to confiscate was based on the fact that the description of the cargo in the shipping documents, i.e. LSWR was inconsistent with the nature of the cargo and therefore the cargo was without proper legal certification.

28 At the request of the plaintiffs, the defendants instructed Chinese solicitors to apply to the Chinese courts for a review of the decision of the Chinese Customs to confiscate the cargo. The decision of the Chinese Customs to confiscate the cargo was upheld by the Guangdong Province Zhuhai City Intermediate Court which confirmed that by reason of the mis-description the cargo was without legal certificates under PRC law. The defendants unsuccessfully appealed to the Higher People's Court of Guangdong Province. The highest provincial court also ruled that the description of the goods as LSWR in the shipping documents was inaccurate and inconsistent with the nature of the cargo and that the cargo was therefore without legal certificates under PRC law. If the cargo which is bound for discharge in any PRC port had been accurately described as VGO, the cargo after the STS transfer would have been permitted to proceed to Xiamen where the receivers of the cargo or the plaintiffs would produce the necessary Customs clearance and take the cargo out of the port.

29 Financial liabilities were incurred as a result of the detention of the vessel. Arising from the erroneous description of the cargo, "Ocean Opal" was detained by the PRC Customs for a period of 64 days from 18 June 1999 to 21 August 1999. Ocean Tankers, on behalf of Nan Fang Maritime Pte Ltd ("Nan Fang"), claimed against the defendants for demurrage and/or damages for detention of the vessel in the sum of USD608,000.00 based on the demurrage rate of USD9,500 per day or pro rata as provided for in the charterparty in respect of "Ocean Opal".

30 According to evidence led by the defendants "Ocean Opal" suffered a leak in her stern tube though damage to the seal of the stem tube. The damaged seal of the stern tube was repaired after the vessel returned to Singapore following her release from detention. As a result of the leaking stern tube, the "Ocean Opal" suffered additional time loss due to her slow speed in her journey back to Singapore. The time loss amounted to USD90,808.12. The owners claimed against the defendants who quite properly paid the claim.

31 A surveyor from SGS Hong Kong Ltd was on board when the 'Ocean Opal' was detained. The surveyor had to be transported back to Hong Kong from the PRC. The owners of 'Ocean Opal' through their agents Jardin Agencies (H.K.) hired a tug from South China Towing Co. Ltd to transport the surveyor. The whole exercise cost HKD52,920.00. Ocean Tankers on behalf of Nan Fang claimed against the defendants for the said sum which was duly paid by the defendants.

32 The plaintiffs claim is for breach of the contract of sale. They assert that the defendants failed to deliver 18,489 MT of the cargo. They also make the same claim under the storage agreement and they claim that the defendants as a bailee had failed to take reasonable care of the cargo. The

plaintiffs asserted that the delivery of the cargo should have taken place within "OPL Hong Kong" as they had instructed and that position for the ship to ship transfer refers to the body of water which is north of the Hong Kong boundary waters, i.e. within the territorial waters of Hong Kong. To support their claims, the plaintiffs also claimed that the cargo that was delivered did not contain either VGO or LSWR, but rather 'fuel oil containing 60% of light diesel oil". They further point to the fact, as recited earlier, that tanks 3s and 3p of 'Ocean Opal' contained 1,224 MT of diesel oil. They therefore seek the further remedy of asking from the defendants an indemnity for any demurrage or detention that they may be liable to pay the owners of "Min Hai You No. 5" for 47 days by the Gongbei Customs.

33 On the other hand the defendants' counterclaim is for the sum of USD698,808.13 and HKD136,837.76 or, alternatively, damages. The defendants' counterclaims are based on the letters of indemnity given by the plaintiffs dated 20 May 1999 and 8 June 1999 in consideration of their instructions to change the name of cargo in the shipping documents from VGO to LSWR as well as the plaintiffs' implied obligation at law to indemnify the defendants in acceding to their instructions.

34 After the close of submissions it became clear that the plaintiffs did not deal with their claim for breach of contract of sale.

35 However, for the first time in these proceedings the plaintiffs assert in their closing submissions at paras 5, 6, 15 and 23, that there was *no* contract of 17 May 1999 between them and the defendants. They submit that the 'plaintiffs' contractual relationship with the defendants only commenced with the contract dated 10 June 1999'. In my view this submission is inconsistent with the plaintiffs' case and the evidence given by the managing director of the plaintiffs, Mr Ng.

36 I refer to the plaintiffs' pleaded case. By paragraph 1 of the further amended statement of claim of 12 April 2002 the plaintiffs referred to the 'contract in writing dated 17th day of May 1999, bearing the defendants' contract reference number '95/05/0k/s5296-00' and *"entered into between the plaintiffs and the defendants"* (emphasis added). Later in paragraph 6 the plaintiffs asserts that defendants had breach the contract of 17 May 1999. In paragraph 2(c) of their reply the plaintiffs aver that "at all times the defendants dealt only with the plaintiffs, and not with Sinocean, in all matters pertaining to the cargo and the plaintiffs were advised and guided by the defendants with regard to the same as stated below." It is clear from the plaintiffs' own case that their dealings with the defendants commenced from the outset of the transaction, i.e. in May 1999. They are not permitted to assert a case inconsistent with their pleadings: see *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1992] 2 SLR 793, *Kiaw Aik Hang v Tan Tien Choy* (1964) 30 MLJ 99, 101 and *Esso Petroleum Co Ltd v Southport Corporation* [1956] H.L.(E.) 218, 237, 243.

37 An analysis of Mr Ng's evidence confirm the following facts. The plaintiffs treated themselves as the buyers of the cargo. Sinocean was merely their nominee from the outset in mid May 1999; certainly the outset was not from 10 June 1999. He agreed in cross examination that the plaintiffs had received the first two lots in late May, 1999 and early June 1999 of the cargo without any complaints about the quality or specifications. Further, on the plaintiffs' own evidence it was clear that they had in May 1999 sold the cargo to Nanan Xinjinjiang, PRC. Mr Goh, the general manager of the plaintiffs, made the glib claim in cross examination that there was no contract as at 17 May 1999 between the plaintiffs and the defendants. His evidence is not borne out by the documentary evidence led in court. Those correspondence after 17 May 1999 either referred to or implicitly acknowledged the existence of the contract. In my judgment it is quite clear that the plaintiffs had from the outset regarded themselves as the buyer of the cargo and Sinocean was in fact their nominee. It is not permissible for the plaintiffs to turn around now during the closing submissions and claim that prior to 10 June 1999 they had no contractual relationship with the defendants.

38 In my view this submission is a last-ditch attempt to avoid the plaintiffs' obligations under the letters of indemnity of 25 May 1999 and 8 June 1999 and to get round the fact that the instructions to change the name of the cargo came from the plaintiffs themselves, who must bear the consequences.

39 By paragraph 6 of their closing submissions the plaintiffs assert a novation of the contract of 17 May 1999. They go on to say that the contract of 17 May 1999 was extinguished by reason of the novation and it was replaced with the contract of 10 June 1999. For a start, it should be noted that the plaintiffs did not plead novation. In my judgment, there was no novation. There was no evidence of any intention to novate on the part of all three parties, namely, the plaintiffs, the defendants and Sinocean, which was emphasised in *The Tychy (No. 2)* [2001] 1 Lloyd's Law Rep 10, 24. The relevant principles on novation were summarised thus:

> "(a) Novation involves the creation of a new contract where an existing party is replaced by a new party. (b) Thus, novation requires the consent of all parties, including in particular the party which is thereby accepting a new person as his debtor or as his counterpart under an executory contract. (c) The consent may be apparent from express words or inferred from conduct. (d) The consent must be clearly established on the evidence as being only consistent with the intent of achieving a novation: see *In re European Assurance Society,* (1875) 1 Ch. D. 34; *Lorentzen v. White Shipping Co. Ltd.,* (1942) 74 Ll. L. Rep. 161 and *Lindern Trawler Managers Ltd. v. W.H.J. Trawlers,* (1950) 83 Ll. L. Rep. 131."

40 What had happened was this. The rights, liabilities and obligations arising in connection with the contract of 17 May 1999 as well as the shipments thereunder were *transferred* from Sinocean to the plaintiffs. The contract of 10 June 1999 carried the reference 99/05/ok/85296-00(*assign*) (emphasis added). By paragraph 5 of his own affidavit evidence in chief, Mr Ng deposed of an assignment of rights and benefits. Significantly, the notice of assignment related to a *transfer of "all liabilities and obligations of all the shipments including but not limited to those shipments that were delivered prior to the assignment…"***.** In my judgment, the assignment formalised what the parties had intended from the outset, which was that it was the plaintiffs who was in fact and in truth the buyer of the cargo to be shipped in 3 lots to Xiamen.

41 By way of reply against the case of the defendants the plaintiffs make the following submissions. First, they say the changing of he name of the cargo in the shipping documents from VGO to LSWR was to avoid the possibility of the PRC Customs mistaking the alphabets 'GO' in VGO to mean gas oil. This argument is without any support on the evidence. Secondly, the change of name was a matter between Sinocean and the defendants only and it was the plaintiffs' buyers, Nanan Xinjinjiang who requested for the change of the name of the cargo. On the evidence, the explanation is simply not so innocent. As noted earlier, Mr Ng agreed in cross examination that it was the plaintiffs who requested the defendants to change the name of VGO to LSWR. The change in name was clearly to import the cargo without permit and to get round the quota imposed by the PRC.

42 Thirdly, the plaintiffs allege that the defendants have not adduced any evidence to show that VGO contains 60% light diesel oil. Apart from the questionable relevance of the point, this submission ignores the evidence of Mr Ray Hogger, the expert who gave evidence for the defendants. He concluded that the contractual specifications of the cargo are more consistent with the typical properties and specifications of VGO, as opposed to LSWR, in terms of viscosity, pour point, sulphur content, metals content and distillation date. He expressed the view that it would be inappropriate to describe the cargo as LSWR as its sulphur content was too high. The cargo was essentially a distillate, as opposed to a residue. VGO is a distillate whereas LSWR, by definition, is a residue. Mr Hogger explained why the cargo was VGO. He considered the Zhuhai report produced by the Gongbei

Customs. Mr Hogger said that "the samples tested by Zhuhai inspection bureau are one and the same product as the cargo sold by the defendants to the plaintiffs," having noted that "the analytical results stated in the Zhuhai report are essentially the same as the specifications and the saybolt/sgs results." The latter two documents related to the cargo in question.

Conclusions

43 The key to the resolution of the disputes in this case lies in the answer to the question as to the effective and proximate cause of the confiscation of the cargo by the Gongbei Customs. on the question what is the legal causation, Chitty on Contract Vol 1, 28th edn at para 27-024 stated:

> "the claimant may recover damages for a loss only where the breach of contract was the "effective" or "dominant" cause of that loss the courts have avoided laying down any formal tests for causation: they have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the claimant's loss."

44 The plaintiffs also based their claims under the storage agreement of 14 June 1999. They assert that it is for the defendants to show that the loss of the third lot of the cargo did not result from their negligence. Under this head of claim, the defendants again take the position that the confiscation of the cargo was caused by the plaintiffs' change of name of the cargo from VGO to LSWR. But for the change of the name of the cargo, the confiscation of the cargo would not have happened. In my judgment the evidence support this submission. Without the erroneous naming of the cargo by the plaintiffs the offence under article 4(2) of the implementation rules could not have been committed even if there was a ship to ship transfer within PRC waters. Neither the decisions of the Gongbei Customs nor the two judgments of the Chinese courts was it stated that the ship to ship transfer was the basis of the confiscation.

45 On any view of the evidence, it is also clear beyond dispute that both the plaintiffs and the defendants agreed to take the third lot of the cargo from Hong Kong, OPL. This much was admitted by the plaintiffs general manager, Mr Goh, in his cross examination. The vessel's nautical position at Hong Kong, OPL was 22° 08' N, 114°08' E at which the ship to ship transfer was to take place. When advised of the nautical position, the plaintiffs, their employees and agents accepted it for the ship to ship transfer without any modification or reservation. The plaintiffs instructed their chartered vessel, "Min Hai You No. 5" to proceed to that position for the ship to ship transfer. The plaintiffs seek to show that they had intended to take delivery of the third lot of the cargo in small lots within Hong Kong territorial waters. There is, in my view, no substance to this assertion. Nor was it possible because the Hong Kong Marine Department made it abundantly clear that 'transfer of petroleum cargo in bulk between ships is not permitted within Hong Kong waters due to port safety, weather and environment factors.' Indeed, Captain Peter Chu Chi Tung, a master mariner and an experienced Hong Kong port pilot, told the court that he had never superintended, or seen or heard of a STS transfer of petroleum products in bulk within Hong Kong waters. I reject the evidence led by the plaintiffs through their expert, Mr Sherman Yan, who attempted to say that STS transfer of petroleum in bulk was possible at the dangerous goods anchorages, especially the south Lamma Dangerous Goods Anchorage. In my view and I agree with the defendants' contrary evidence that such STS transfer would increase the dangers manifold and would not be permitted by the port authority of Hong Kong.

46 Accordingly, the plaintiffs' claims are wholly without merit and are dismissed with costs. They caused the confiscation and loss of the third lot of the cargo by their mis-description of the cargo as LSWR when it was VGO. It follows that the defendants' counterclaims are allowed with costs.

Plaintiffs' claims are dismissed with costs.

Defendants' counterclaims are allowed with costs.

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