The "Asia Star"
[2007] SGCA 17

Case Number : CA 81/2006

Decision Date : 27 March 2007

Tribunal/Court : Court of Appeal

Coram : Belinda Ang Saw Ean J; Chan Sek Keong CJ; Andrew Phang Boon Leong JA

Counsel Name(s) : Thio Ying Ying, Edgar Chin and Tan Yeow Hiang (Kelvin Chia Partnership) for the appellants; R Govintharash (Gurbani & Co) for the respondents

Parties : —

Admiralty and Shipping – Carriage of goods by sea – Voyage charterparties – Fixture note for vessel stating tanks epoxy coated – Fixture incorporated in Vegoilvoy form – Whether coating failure was of such magnitude as to undermine contract for coated tanks or affecting vessel's cargoworthiness – Whether contractual agreement to cancel fixture without liability existing – Whether elements of clause to trigger its efficacy existing

27 March 2007 Judgment reserved.

Belinda Ang Saw Ean J (delivering the judgment of the court):

1 This is an appeal by the appellants, Shun Da Marine Transportation Co (S) Pte Ltd, against the decision of the trial judge ("the judge") in which the judge held the appellants ("the Owners") in breach of a fixture, the terms of which were contained in a fixture note dated 15 November 2003: see [2006] 3 SLR 612. The respondents, Pacific Inter-Link Sdn Bhd, were the charterers of the product tanker, the *Asia Star.*

Background facts

2 The dispute arose out of the following circumstances. On 15 November 2003, the Owners chartered the *Asia Star* to the respondents ("the Charterers") for the carriage of refined bleached and deodorised palm oil ("RBD palm oil") of between a minimum of 21,500mt and a maximum of 22,000mt to be loaded at one to two safe ports at Belawan in Indonesia, and in Malaysia, and for discharge at one to three safe ports (at the Charterers' option) in the Gulf of Aqaba, in the eastern Mediterranean Sea, in Turkey, and at Odessa in Russia. The main terms of the fixture were contained in a fixture recap (*ie*, the fixture note dated 15 November 2003) and were otherwise on the terms of the Vegoilvoy Tanker Voyage Charterparty 1950 ("the Vegoilvoy form").

3 On 14 January 2004, the *Asia Star* arrived at Belawan and the Owners gave notice of readiness to load the cargo of RBD palm oil. She berthed on 19 January 2004 and her cargo tanks were thereafter inspected by a surveyor from ITS Testing Services (M) Sdn Bhd ("ITS") on behalf of the Charterers. The inspection was to ensure that (a) there was no rust in the cargo tanks; (b) the coatings were intact with no loose scales and blistering; (c) no residue of previous cargoes was left in the tanks; and (d) the tanks were dry after cleaning operations. The surveyor, Zulkiflee bin Jamal ("Zulkiflee"), promptly reported to the Charterers the poor condition of the cargo tanks due to the failure of the coatings by as much as 40%. There was rust on the exposed mild steel surfaces, loose scale and blistering of the coatings. Underneath the blisters were the residues of previous cargoes. It was not surprising that the Charterers cited poor tank condition as a reason for not accepting the vessel for loading and, instead, called upon the Owners to provide a substitute vessel. We pause here to mention that the Charterers had reason to be cautious as cl 17(b) of the Vegoilvoy form could

operate to bar a claim for cargo contamination once the tanks were accepted by their surveyor. It subsequently transpired that Jason Wang Jian Jun ("Jason Wang"), the assistant business manager of CSC Oil Transportation (S) Pte Ltd ("CSC Oil"), the vessel's operators and managers, requested the vessel's protection and indemnity club ("P&I Club") to send a surveyor to determine the condition of the cargo tanks. A surveyor from PT Buana Multiguna Inspection & Testing ("BMI"), the surveyors who were appointed by the P&I Club, boarded the vessel at Belawan and confirmed that her cargo tanks were unfit to load RBD palm oil. The attending surveyor's findings coincided with the results of Zulkiflee's inspection. Spica Services (Indonesia), the local correspondents for the P&I Club, in a fax dated 19 January 2004, copied the following report to CSC Oil:

> Attached is copy of surveyor prelim findings for your reference.
>
> From the surveyor findings it appeared that the tanks [are] *not suitable ... for loading edible oil, hence ... required to coat before loading the cargo*.
>
> [emphasis added]

4 Jason Wang thereupon cancelled the fixture via e-mail on 19 January 2004. In the same e-mail, the Charterers were told that no substitute vessel was available. Notwithstanding the cancellation advice and Jason Wang's earlier remark that further cleaning would not improve the state of the tanks' coating, the vessel carried out further tank cleaning. On 20 January 2004, the Charterers were invited to again inspect her cargo tanks the very same evening. However, no re-inspection took place by the deadline imposed on the Charterers and the *Asia Star* left port the next day.

5 The Charterers commenced this action claiming loss and damage stemming from their inability to fulfil their respective contractual obligations to their suppliers and Turkish buyers following the cancellation of the fixture. The trial before the judge was on the question of liability alone with damages, if any, to be assessed separately.

The fixture note dated 15 November 2003

6 It was common ground that the chartering agreement was evidenced by a fixture recap of 15 November 2003 which also expressly incorporated a number of clauses from the Gold River/Pacific Interlink charterparty dated 16 January 2003 ("Gold River charterparty"). In addition, the standard printed clauses of the Vegoilvoy form were incorporated by reference. No formal charterparty was drawn up or, if one was in fact drawn up, it was not executed.

7 Although there was an option in the fixture for the Owners to substitute the carrying vessel, the fixture identified the vessel *Asia Star* by name with her particulars listed in the fixture as follows:

> Vessel: MT ASIA STAR ...
>
> BUILT 1982/ FLAG SINGAPORE
>
> DWT 22,756 MT AT DRAFT 10.009M
>
> LOA 157.60M/BEAM 22.96M
>
> CUBIC CAPACITY (98% EXCL SLOP TANK) 24,581.34 M3
>
> EPOXY COATED/COILED

In this fixture, the word "Vessel" followed by a punctuation mark (colon) is a descriptive provision akin to and is typical of clauses that ordinarily list a vessel's particulars and are often introduced with the words "vessel's description" or "description of vessel". In this judgment, the entire provision as reproduced above will be referred to as "the vessel's description". The allusion to "epoxy coated/coiled" in the provision pertains to two matters: first, "epoxy coated" is a reference to the vessel's epoxy-coated cargo tanks and second, the word "coiled" is a reference to the heating coils for the purposes of heating the cargo. As the dispute only concerns the epoxy coating, for convenience, the stipulation as to epoxy-coated tanks will hereafter be referred to as the "vessel's description (epoxy coated)".

8 The other special provisions relate to the details of the cargo to be lifted, the last three cargoes previously loaded including loading and discharge ports, laycan, laytime and demurrage. There is also a warranty that the last three cargoes of any substitute vessel would be "FOSFA acceptable", *ie*, that the last three cargoes of any substitute vessel would be those found on the Federation of Oils, Seeds and Fats Association Ltd's ("FOSFA") international list of acceptable cargoes.

9 The fixture recap incorporated several clauses from the Gold River charterparty and they include the freight provision, prohibition against commingling, and additional provisions as to loading and discharge, including the following provisions:

> 4. Vessel's last three cargoes in tanks, lines and pumps under this charterparty were clean, unleaded and suitable for carriage of refined vegetable oil in bulk …
>
> 5. Vessel is to clean vessel's tanks, lines and pumps to charterer's surveyor's full satisfaction.

10 Finally, we come to the standard printed terms of the Vegoilvoy form. Part 1 consists of the lettered clauses which represent the variables in the charterparty. In this case, the variables such as the description of vessel, load port and discharge port (see [7] and [8] above), are laid out in the fixture recap. Nonetheless, the preamble of the Vegoilvoy form, which mirrors the common law position, provides that, in the event of conflict, the provisions of Part 1 shall prevail over those contained in Part 2 to the extent of such conflict. Part 2 of the Vegoilvoy form comprises the standard printed clauses. The relevant standard printed clauses read:

> **1. Warranty.** (a) The Owner shall, before and at the commencement of the voyage, exercise due diligence to make the Vessel seaworthy, properly manned, equipped, and supplied for and during the voyage, and to make the pipes, pumps, and heater coils tight, staunch, and strong, in every respect fit for the voyage, and to make the tanks, holds, and other spaces in which cargo is carried fit and safe for its carriage and preservation.
>
> (b) It is understood that if the tank or tanks, into which the particular cargo covered by this Charter is to be placed, upon testing prove to be defective the Owner undertakes to execute the necessary repairs, provided repairs can be effected within 24 hours and at reasonable expense; otherwise, Owner has the option of cancelling this Charter in which case no responsibility shall rest with the Vessel, Owners, or Agents.
>
> **15. Cleaning**. Prior to loading. Charterer shall inspect the designated tanks for the purpose of determining that they are in suitable condition for the loading and carriage of the cargo specified hereunder. Acceptance of the tanks by Charterer's representative shall be conclusive as to their suitability for such purposes. If Charterer's representative does not accept the tanks as suitable

for the cargo, the Owner shall have the right, as its option, to cancel this Charter Party, without any resulting liability on the part of either party, or to again clean the tanks, subject to inspection as above.

17. General Exceptions Clause. (a) Neither the Vessel nor the Master or Owner shall be or shall be held liable for any loss of or damage or delay to the cargo or for any failure in performing hereunder arising or resulting from:— … unseaworthiness of the Vessel whether existing at the beginning of the voyage or developing during the voyage unless caused by want of due diligence on the part of the Owner to make the Vessel seaworthy or to have her properly manned, equipped, and supplied; …

(b) The tanks having been inspected by the Charterer's inspector as to tightness and cleanliness, notwithstanding any other provision of this Charter, neither the Vessel nor the Owner shall be liable for loss or damage due to contamination, deterioration, discoloration or change in quality or charateristics, or leakage, unless there is negligence on the part of the Vessel.

The pleaded case and defence

11 The Charterers' pleaded case on the condition of the tanks' coating was two-fold. First, the Owners had breached the vessel's description that the tanks were epoxy coated given the tanks' poor coating condition. Second, the poor coating affected the vessel's cargoworthiness and that constituted a breach of the Owners' express obligation under cl 1(a) of the Vegoilvoy form to exercise due diligence to make the tanks fit to carry the designated cargo.

12 The criticisms of the coating failure raised in the pleaded case and the evidence of the experts were directed to the matters identified in Zulkiflee's notice of reserve dated 19 January 2004 ("the Notice of Reserve"). The nature of the coating failure has been described in [3] above.

13 The Owners denied any breach of the fixture. In their defence, the Owners put the Charterers to strict poof as to the meaning, purport and effect of the words "epoxy coated", disagreeing that the stipulation "epoxy coated" in the vessel's description was tantamount to an express term promising that the cargo tanks would be "epoxy coated". At all material times, the *Asia Star* was ready to load and was fit to carry the designated cargo, contending firmly that the Notice of Reserve related to the cleanliness of the cargo tanks and not to the state of the epoxy coatings. The inspection was criticised for being cursory and incomplete as the BMI surveyor only inspected four tanks out of all the nominated cargo tanks. In support of their contention that the tanks were fit to receive and carry the designated cargo, the Owners averred to the vessel's history of successful voyages. In particular, prior to the fixture, the vessel had carried vegetable and animal oil for over two and a half years without any complaints from cargo interests. Again, after the cancellation of the fixture, her cargo tanks were accepted on 28 April 2004 by another surveyor, SGS Testing & Control Services Singapore Pte Ltd, to load refined palm oil after the vessel had carried molasses for three consecutive voyages. Furthermore, between May 2004 and July 2004, the vessel carried two consecutive shipments of refined palm oil without any complaints from cargo interests.

14 The Owners have a fallback defence in the event the cargo tanks are found to have been unfit to carry the cargo in question. The defence is that the Owners have a contractual right to cancel the fixture of the *Asia Star* without incurring any liability under cl 1(b) and cl 15 of the Vegoilvoy form. The Charterers disagree, arguing that, as a matter of construction, neither cl 15 nor cl 1(b) would exonerate the Owners from the Charterers' claim for damages. Clause 1(b) had to be read subject to cl 1(a) of the Vegoilvoy form and the express term relating to the vessel's description (epoxy coated) respectively. Similarly, cl 15 had also to be read subject to cl 5 as it was a special

provision of the fixture.

The decision below

15 The judge made several findings of fact and law. He held that it was an express term of the fixture that the cargo tanks were "epoxy coated". In rejecting the Owner's argument that the words "epoxy coated" in the fixture had no real meaning, the judge explained that the provision itself resonated with a coating condition that was sound. In this connection, the judge accepted the testimony of the Charterers' expert, Edwin Wong Peng Soon ("Wong"), that the coating condition would be classified as poor, either where there was a general breakdown of the epoxy coating in excess of 20% of the surface area or where loose scale formation exceeded 10% of the surface area. As for the breakdown reported on 19 January 2004, the judge found as a fact that the tanks' coating had broken down by as much as 40%. There was coating failure from the tell-tale signs of loose scales, rust and blistering of the coatings. In contrast, the Owners did not adduce any evidence to challenge the state of the cargo tanks at the material time. The judge noted that to "save costs", Jason Wang did not require BMI to issue its full report with accompanying photographs of the cargo tanks taken on 19 January 2004. The photographs, the judge observed, would have shed light on the state of the coatings, but they were not produced at the trial. Adopting Wong's method of classification, the judge had no difficulty concluding that the cargo tanks were not "epoxy coated", given the degree of breakdown reported on the 19 January 2004. Consequently, the judge held the Owners to be in breach of the fixture.

16 As for the Charterers' other contention that the poor coating condition affected the vessel's cargoworthiness, the judge agreed with the Charterers' expert, Go Peng Hai ("GPH"), that palm oil would be contaminated, discoloured or damaged by contact with the exposed mild steel surfaces of the cargo tanks as well as rust and residues of previous cargoes carried in the cargo tanks. GPH added that "[t]he presence of free rust and loose scale [signs of tank coating failure] will severely aggravate the contamination of the cargo" in so far as such contaminants in palm oil may lead to oxidative rancidity, increase of insoluble impurities, reduction in oil stability and colour deterioration. GPH concluded that ITS and BMI were right not to have approved the tanks for loading. In the circumstances and, in addition to noting that the testimonies of the Charterers' experts, GPH and Wong were not "effectively countered" by the Owners, the judge found as a fact that the *Asia Star* was not cargoworthy at the time she was presented to the Charterers at Belawan for loading.

17 The judge further rejected the Owners' contentions that they had exercised due diligence to make the vessel cargoworthy under cl 1(a) of the Vegoilvoy form. Notably, there were no maintenance records to show that the tanks were properly maintained. The judge disbelieved the master who claimed, amongst other things, that there were no loose scales or rust in the cargo tanks despite contemporaneous documented evidence in the nature of the daily work report for the vessel dated 20 January 2004 and 21 January 2004 containing remarks like, the crew "chipped loose scale and rust in cargo tank". In addition, the master's testimony also contradicted his fax on 20 January 2004 to CSC Oil in which he reported that his crew had worked "barefoot to mop the rusty part" of the tanks until there was "no … rusty powder on the surface of it" and that the crew "removed off loose scale by hand" and removed the rusty scales completely. The judge equally rejected the chief officer's claim to receiving oral instructions to monitor the state of the tanks given the patent absence of documentary evidence supporting his claim that the cargo tanks were inspected and the results recorded every three months. The judge relying again on Wong's testimony concluded that there was a failure to monitor the state of deterioration of the epoxy coatings or to ascertain the cause of the coating problem in order to determine the appropriate remedial action to be taken. The judge had no difficulty finding the Owners in breach of their obligation under cl 1(a) of the Vegoilvoy form.

18 In considering the interplay between cl 1(a) and cl 1(b) of the Vegoilvoy form, the judge construed both clauses and concluded that cl 1(a) conferred an overriding obligation on the Owners to exercise due diligence to provide a cargoworthy vessel in the sense of its fitness to receive and carry the stipulated cargo and the overriding obligation could only be modified or restricted by clear words to that effect. In support of that proposition, the judge relied on *Sleigh v Tyser* [1900] 2 QB 333, a decision of the English court that was approved and followed by this court in *Sunlight Mercantile Pte Ltd v Ever Luck Shipping Co Ltd* [2004] 1 SLR 171. The judge ruled that the language of cl 1(b) was not "express, pertinent, and apposite" enough to modify or restrict the overriding obligation in cl 1(a). In the result, the judge held that the Owners could not cancel the fixture under cl 1(b).

19 Turning to cl 15 of the Vegoilvoy form, the judge held that the Owners could not rely on that clause to cancel the fixture on the ground of unclean tanks. Clause 5, being a special provision on tank cleanliness, and the printed term cl 15 were inconsistent with each other and to that extent could not be reconciled. Applying *The Brabant* [1965] 2 Lloyd's Rep 546 to the present case, the judge read cl 5 as prevailing over the standard printed provision of cl 15. Besides, the judge reasoned that given the state of the coating breakdown no amount of cleaning would "rectify the fundamental defect as so much of its epoxy coating has been worn out".

The appeal

20 Before the judge, the Owners challenged the deterioration of the epoxy coatings as recorded in the Notice of Reserve by Zulkiflee. There was much debate as to the accuracy of the inspection and the nature and degree of the coating breakdown. The same arguments were raised in the Appellant's Case. The Owners' main argument was that the findings of Zulkiflee and BMI were untrue. Their attempt to denounce the results of the visual examination of their own P&I Club appointed surveyor as a plain copying of Zulkiflee's inspection results was rejected by the judge who, nonetheless, formed the view that Zulkiflee did a fairly thorough job in his visual examination of the cargo tanks and that his assessment of the poor condition of the epoxy coatings was borne out by BMI's inspection. However, at the hearing of the appeal, we note that counsel for the Owners, Mrs Thio Ying Ying, departed from the Appellant's Case and she conceded that coating failure, as reported by Zulkiflee, had occurred. With that concession, she abandoned the arguments set out in the Appellant's Case that questioned the substratum on which the assessment of the unsuitability of the tanks for loading was founded. In addition, Mrs Thio confirmed that the Owners were no longer relying on cl 15 of the Vegoilvoy form as one of the grounds for cancelling the fixture.

21 In the light of the Owners' concessions, the two main grounds of appeal are as follows. The first relates to the issue of breach of the fixture. There are two distinct breaches which are:

(a) the failure to provide a vessel with epoxy-coated tanks on account of the breakdown of the coatings as reported on 19 January 2004 contrary to the express term of the fixture that the vessel's tanks were epoxy coated (*ie*, the vessel's description (epoxy coated)); and

(b) the vessel's cargoworthiness and the Owners' duty to exercise due diligence before and at the commencement of the voyage to make the tanks in which cargo is carried fit and safe for its carriage and preservation under cl 1(a) of the Vegoilvoy form.

The second ground of appeal is on the Owners' contention that, even if either breach is proved, they have the contractual right to cancel the *Asia Star* without incurring any liability to the Charterers.

The Owners' arguments

22 In the first ground of appeal, Mrs Thio's main contention is that there was no credible evidence that cargo contamination would result from the breakdown of the epoxy coatings as reported. The Charterers had failed to establish that the state of the cargo tanks warranted any concern that the vessel was unfit to load the stipulated cargo of RBD palm oil. In having not established the possibility of cargo contamination by the condition of the epoxy coatings, it could not be said that the tanks were not "coated" contrary to the express term relating to the vessel's description (epoxy coated). For the same reason, neither could the Owners be in breach of the warranty of seaworthiness under cl 1(a) of the Vegoilvoy form to provide a vessel fit to carry the stipulated cargo. These submissions, in our judgment, are not well founded for the reasons discussed later.

23 Mrs Thio seeks to denounce the probative value of the evidence relied upon by the judge to conclude that the poor coating condition would damage the cargo. First, the judge had erroneously taken into consideration the regulations promulgated by FOSFA ("FOSFA Regulations") which were not incorporated into the fixture in arriving at the decision that the Owners had breached the express term in the fixture requiring epoxy-coated tanks. Second, Zulkiflee was not competent to comment on whether or not the designated cargo of RBD palm oil would be damaged as a result of the state of the cargo tanks. Third, BMI's preliminary report was inadmissible as hearsay. Fourth, GPH's evidence was unreliable as his expert opinion was premised on a study primarily on the importance of tank coatings in the carriage and storage of crude palm oil which was totally irrelevant and, hence, inapplicable to refined palm oil which has a lower free fatty acid ("FFA") content. Mrs Thio has explained that the FFA content of crude palm oil (3.5%) is higher than refined palm oil (0.1%) and that the FFA content is a major factor in determining the absorption of iron from mild steel tanks and the attendant contamination of the oil. In the circumstances, Mrs Thio argues that there was no scientific basis for GPH's testimony that the shipment of the designated cargo oil in mild steel tanks would result in iron contamination. The judge was wrong to have accepted the evidence of GPH that (a) one of the major sources contributing to quality deterioration of palm oil products during shipping was the carriage of palm oil products in mild steel tanks (or coated tanks with a significant area of mild steel exposure); (b) iron from the mild steel would be absorbed in the palm oil during the whole transport process from origin to destination resulting in iron contamination and, the longer the voyage, the higher the risk of contamination; and (c) the presence of free rust and loose scale would severely aggravate the contamination.

24 Mrs Thio lastly submits that as it was not established that the tanks were unfit to load the stipulated cargo, it was unnecessary to posit any failure of due diligence in the providing a cargoworthy vessel. Nonetheless, the Owners boldly claimed that they had discharged the burden of proving due diligence in the face of their earlier and subsequent experience alluded to in an earlier paragraph in which the vessel carried the same type of cargo in the same tanks with no resulting trace of cargo contamination.

25 The second ground of appeal is based on an alternative tack. It is said that even if the Owners had been in breach on account of the poor state of the tanks' coating and the vessel was therefore not cargoworthy or was unfit for the loading and carriage of the designated cargo, the Owners were, nonetheless, entitled under cl 1(b) of the Vegoilvoy form to cancel the fixture, which they did on 19 January 2004. No further facts were relied upon under this alternative head beyond those said to justify the cancellation of the fixture.

26 The Owners' case is that the Charterers' claim for damages for breach of the fixture must fail on a true construction of cl 1(b) as the cancellation of the fixture was without any liability on the part of the Owners. Clause 1(a) was an express warranty of seaworthiness and the judge mistakenly applied the principle of interpretation applicable to implied warranty of seaworthiness which was that

an exemption clause would have no effect on the implied obligation to provide a seaworthy vessel in the absence of express, clear and apposite language. If the judge was right in his interpretation of cl 1(a) as imposing an overriding obligation, Mrs Thio argues that the option of cancelling in cl 1(b) would never be capable of being exercised in situations like the present one where repairs to the tanks could not be done within 24 hours and at reasonable expense.

The Charterers' arguments

27 Counsel for the Charterers, Mr R Govintharasah, submits that the divergence in the treatment of breaches of an express and implied obligation was no different from the approach taken by the courts in construing limitation and exclusion clauses. As cl 1(b) was an exclusion clause, the judge was correct in concluding that cl 1(b) was to be read subject to cl 1(a). If the Owners' construction of cl 1(b) was upheld, it would mean that the Owners could tender a vessel with her tanks' coating substantially deteriorated and yet be able to cancel the fixture by walking away free of any liability or consequences. Such a result, as Mr Govintharasah points out, would "rob the contract of any commercial efficacy".

28 Mr Govintharasah went on to explain the purpose of contracting for epoxy-coated tanks. Epoxy coating was required to prevent damage to RBD palm oil by contact with the mild steel surface of the cargo tanks. As it turned out, the tanks were not epoxy coated as contracted for and the judge was correct to read "epoxy coated" as requiring the epoxy coating to be in a sound condition, for such an interpretation gave effect to the plain and ordinary meaning of the words in the context of the carriage of refined palm oil which was susceptible to contamination and damage from carriage of the palm oil in mild steel tanks. As the tanks' coating had broken down by as much as 40%, the Owners were correctly held to be *ipso facto* in breach of the term relating to the vessel's description (epoxy coated).

29 In addition, the Charterers assert that the condition of the epoxy coating as reported affected the vessel's cargoworthiness. By presenting a vessel that was unfit to load the designated cargo of RBD palm oil from Belawan to Turkey, the Owners failed to exercise due diligence to comply with their express obligation of cargoworthiness, which is an aspect of seaworthiness, under cl 1(a) of the Vegoilvoy form.

30 As for the expert witnesses, Mr Govintharasah, in highlighting the professional standing of the experts, maintains that the judge rightly accepted the evidence of GPH who was a qualified and trained chemist with the requisite knowledge and working experience in dealing with shipments of refined palm oil in epoxy-coated cargo tanks and the effect of shipping refined palm oil in mild steel tanks. In contrast, the Owners' expert, Ong Ngai Gee ("Ong"), was not a chemist, but it was conceded that he had a working knowledge of the transportation of refined palm oil, having dealt with contamination claims in the past. GPH's testimony should be preferred as it was based on studies on the carriage of both crude and refined palm oil and the studies did not draw any distinction between the two types of oil products in terms of the conditions in which they should be stored or carried. Notably, the Owners' expert, Ong, did not make any distinction of a similar nature between the two types of oil products. Neither did he adduce evidence that carriage of refined palm oil in mild steel tanks would have little or no effect on refined palm oil as compared to crude palm oil. In fact, Ong in cross-examination admitted to the contrary that if the coatings had broken down by as much as 40%, the cargo tanks would have been unfit to receive and carry the cargo in question.

31 Turning to cl 1(b) of Vegoilvoy form, the Charterers maintain that the judge had rightly construed cl 1(a) as imposing an overriding obligation on the Owners since there was no clear and apposite language in cl 1(b) to exempt the Owners from liability arising from their failure to exercise

due diligence to make the cargo tanks cargoworthy. Mr Govintharasah argues that to hold otherwise would be to contradict cl 17(a) of the Vegoilvoy form that provides that the Owners shall not be liable for, *inter alia*, any failure in performance of the charter arising or resulting from uncargoworthiness of the vessel, whether existing at the beginning of the voyage or developing during the voyage, where there was no want of due diligence on the part of the shipowner to make the vessel seaworthy. In addition, the commercial efficacy of the contract would be lost if the Owners' construction of cl 1(b) was upheld.

Discussion and decision

Was there a breach of the term relating to the vessel's description (epoxy coated)?

32 In this appeal, the Charterers are not asserting that term relating to the vessel's description (epoxy coated) was a condition of the fixture which entitled them to reject the fixture. Repudiation of the fixture by the Charterers was never an issue as it was the Owners who had cancelled the fixture under cl 1(b) of the Vegoilvoy form and had raised cl 1(b) as a defence to the Charterers' claim for damages for breach of the fixture. The Owners, who had initially filed a counterclaim against the Charterers for refusing to load, eventually dropped their counterclaim at the hearing below. Although divergent positions were taken in the pleadings, both parties accepted in the end that the provision relating to the vessel's description (epoxy coated) was an intermediate term entitling a claim for damages for any loss suffered as a result of the misdescription. Jason Wang confirmed this in his written testimony where he said:

> The term "Epoxy coated/coiled" in the email fixture recap of 15 November 2003 is a general description of the type of coating of the Vessel's tanks and that the tanks would be equipped with a "heating coil", i.e. in the present case, the Vessel's tanks were to be epoxy-coated and coiled.

33 As stated at [3] above, the notice of readiness of 14 January 2004 was not accepted and loading was refused by the Charterers as the vessel's cargo tanks were not epoxy coated and, hence, did not accord with the description "epoxy coated". Mr Govintharasah's argument that the Charterers' refusal to load was due to the condition of the tanks' coating is the same point put in a different way. In this regard, the question is not whether the Charterers were justified or not in refusing to load the contracted cargo, but rather whether the evidence establishes a breach of the term relating to vessel's description (epoxy coated) which generally (*de minimis* discrepancies aside) has to be correct at the time the charter was entered into. The misdescription was, as is usual, discovered by the Charterers upon inspection of the cargo tanks after tender of the notice of readiness of the vessel to load.

34 In the present case, we fully agree with the judge that the fixture was for epoxy-coated cargo tanks. The fixture was of a named vessel, the *Asia Star*. Added to the description of the named vessel were words of description in reference to her cargo capacity and epoxy-coated tanks. All these particulars formed part of the contractual description of the vessel at the time of the fixture. Significantly, the vessel's description was not accompanied by words of estimation such as "about" or "approximately". In contrast and by way of illustration, the fixture of the *Asia Star* to Raffles Shipping and Investments Pte Ltd dated 24 March 2004 on Shelltime 4 form stated that the cargo tanks were "fully coated" in that "about 85–95% coatings remain in each tank". These are qualifying words and in this way the Owners were not giving any warranty as to the state of the coating. If authority is needed, we refer to *The Lipa* [2001] 2 Lloyd's Rep 17. In that case, the vessel's description was a typed clause setting out particulars of the vessel including her name, flag and identity of the disponent owners as well as the details of her engines and her cargo capacity, including her

speed/consumption in various weather conditions. The final paragraph of that clause provided as follows:

> All details "about" – all details given in good faith but without guarantee.

The question for determination in that case was whether the charterparty, properly interpreted, contained a warranty about fuel consumption of the vessel. The charterers had complained that the consumption of excessive quantities of fuel constituted a breach of the warranty. It was argued that the qualifying words applied to the fuel consumption provision which was given in good faith but without guarantee. The words "without guarantee" prevented the shipowners from being held to an absolute warranty. Andrew Smith J held that if and in so far as a provision in the charter was qualified by the words "without guarantee", such a provision was not a warranty.

35 Reverting to this appeal, of relevance to the issue before us is the contextual meaning of the contractual language "epoxy coated". As stated, the Owners' contention that the words "epoxy coated" had no real meaning was roundly rejected by the judge. There is no difficulty with the word "epoxy". The coating is an epoxy paint. The vexed question is the meaning to be given to the term "coated". What did "coated" mean in the context of the fixture? In particular, could it be said that the cargo tanks were "coated" in the face of an admitted deterioration of the coatings as reported by Zulkiflee?

36 In construing a commercial contract such as this fixture, regard must be had to the commercial purpose of the contract and the factual background against which it was made. The court would take into consideration the language of the fixture and the words used must be construed in the context of the fixture as a whole and set against its factual matrix. As Lord Steyn reasoned in *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] 1 WLR 3251 at [18]:

> The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.

37 The *Asia Star* is an old vessel that was built 21 years ago at the time of the fixture. The cargo tanks were made of mild steel and the Charterers contracted for epoxy-coated tanks for the carriage of RBD palm oil from South East Asia for delivery at a range of optional discharge ports. Conventional wisdom demanded the use of epoxy-coated tanks to ship RBD palm oil to prevent or minimise cargo contamination by contact with the mild steel surface of the cargo tanks in the course of a relatively long voyage. In addition, the Charterers undertook to load a full cargo subject to a stipulated minimum quantity of 21,500mt and maximum of 22,000mt. By this provision, the Charterers were obliged and entitled to load either a full cargo as the vessel could safely carry or the stated maximum, whichever was the less, with the Owners giving a corresponding warranty that the vessel could carry the minimum quantity (see Julian Cooke *et al*, *Voyage Charters* (LLP, 2nd Ed, 2001) at para 6.16). In the context of this mutual obligation and the underlying requirement for coated tanks, it would have been reasonable for the Charterers to expect that the tanks' coating would support rather than thwart the purpose of the fixture, namely, to make available to the Charterers a vessel with epoxy-coated cargo tanks for the carriage of the cargo in question.

38 In our judgment, the real issue is that of the adequacy of the coatings for the fixture and the voyage in question. In our view, the adequacy test will not be satisfied if coating failure is of such a magnitude that it undermines the contract for coated tanks or affects the vessel's cargoworthiness.

In this connection, we find the dissenting decision of the New York arbitral tribunal in *The Ficus* (SMA 2473, 25 April 1988) persuasive and of assistance. In that case, the vessel's tank coatings had deteriorated by 30%. On the coatings of the tanks, it was contractually stipulated in Part 1 of the Asbatankvoy charterparty under the heading "Description and Position of Vessel" that the tanks were coated. The majority held that the coating breakdown of 30% was not itself a ground to reject the vessel because reasonable wear and tear was expected. As such, the tanks were "coated" for the carriage of unleaded naphtha from Algeria to a range of discharging ports. The dissenting view, which is redolent of the adequacy test, was that whilst some degree of reasonable wear and tear to the tank coatings were to be expected, "at some point, obviously the wear and tear will cause the coatings to deteriorate to such a point that they will affect the vessel's cargoworthiness and frustrate the charterer's purpose in seeking coated tanks". The dissenting arbitrator decided that damage to the coatings resulting in the exposure of almost one-third of rusted tank walls was a fundamental breach of the charter in question. He was of the view that the charterer had fixed the *Ficus* on the basis of the vessel having a history of two prior unleaded cargoes and coated tanks.

39 In this case, it is an indisputable fact that the negotiations for the fixture continued following the answers provided by the Owners to the "Standard Tanker Voyage Chartering Questionnaire 1988" ("the Questionnaire"). In particular, part of the relevant context in construing the contract is the fact which was known to each party that the Owners had informed the Charterers in answer to the Questionnaire as follows:

> CARGO TANKS *FULLY* COATED/
> TYPE OF COATING ..... YES/EPOXY
>
> [emphasis added]

The Charterers thereafter proceeded to contract for "epoxy coated" cargo tanks. As it turned out, there is no recognisable distinction between "fully coated" as stated in the answer to the Questionnaire and "coated" cargo tanks in the fixture. In submissions, the Charterers accepted that they did not expect the word "coated" in the contract description to mean that the vessel's tanks had to be 100% coated. In short, some coating breakdown was expected and accepted. The experts on both sides talked in terms of "minimal" breakdown. In this regard, even Ong agreed that a coating breakdown of 40% was not "minimal". The notion of "minimal" breakdown came from a FOSFA requirement that "[m]ild steel exposure in coated tanks to be minimal with no loose scale". In a FOSFA circular dated 1 January 2002, the notion of "minimal" breakdown was seen to be applicable to even new coatings. The circular pointed out that there could be minor scratches or abrasions on new coatings and such minor infractions were allowable.

40 As stated in [15] above, the judge accepted Wong's method of classification and held that the epoxy coating was not sound as coating breakdown of 40% with loose scales and blistering of the coatings would render the tanks unfit for use under the fixture since contamination was a likely result from that poor condition. While some reasonable wear and tear to the tanks' coating was to be expected for the reasons discussed, the judge found that deterioration of the coatings by as much as 40% affected the cargoworthiness of the vessel and the fitness of the cargo tanks to receive the cargo in question. Corrosion was apparent from the presence of rust on the exposed mild steel surface and remedial action would have to be taken. The judge rightly rejected the evidence of the chief officer, Ji GuoLiang, and the master, Cheng XianKun, who contended that the breakdown was no more than 10% and was between 1% and 5% respectively. None of them produced documentary evidence of their observations which, if true, would have been recorded somewhere as a matter of shipboard procedure. In the circumstances, the judge was right not to give any weight to their evidence on coating breakdown.

41 In the premises, it is clear to us that the Owners in presenting the vessel with epoxy coating broken down by as much as 40% did not give what the Charterers had contracted for at the time of the fixture. We agree with the judge that the express term of the fixture that the vessel's cargo tanks were "epoxy coated" had been breached. In our view, had the Charterers known at the time of the fixture that the tanks' coatings had failed by as much as 40%, the fixture would not have been made.

Would clause 1(b) protect the Owners from the consequences of a breach of the term relating to the vessel's description (epoxy coated)?

42 We now come to a related issue arising from the inaccurate description of the tanks' coating. The issue is whether the Owners had sufficiently protected themselves against any action for breach of the term relating to the vessel's description (epoxy coated). This brings into consideration cl 1(b) of the Vegoilvoy form. Simply put, does cl 1(b) in effect qualify any obligation in respect of the vessel's description (epoxy-coated) in the fixture? In our discussion, it is necessary to look at the Owners' obligations under cl 1(a) of the Vegoilvoy form as both clauses have to be read in conjunction.

43 In our judgment, the Owners' obligation under the vessel's description (epoxy coated) is a separate and independent term of the fixture. It is not a contractual obligation which hinges upon or derives from the exercise of due diligence to provide a seaworthy ship and to properly carry and discharge cargo under cl 1(a) of the Vegoilvoy form. The first sentence of cl 1(b) is specifically aimed at the due diligence obligation in cl 1(a) which is directed at a period of time before loading (see [60] and [61] below). Clause 1(b) is thus not apt to apply to the situation where, at the time of the fixture, the Owners had separately and expressly contracted to provide epoxy-coated cargo tanks and, as it turned out, the cargo tanks were not epoxy coated.

44 Moreover, the term relating to the vessel's description (epoxy coated) would be denied contractual effect if cl 1(b) was otherwise applicable. The same concern was echoed in the English decision of *The TFL Prosperity* [1984] 1 Lloyd's Rep 123 which is, by analogy, of assistance. The case there was concerned with the effect of cl 13 of a Baltime charterparty which provided that the shipowners were responsible for delay and loss and damage to goods only if caused by want of due diligence on the part of the shipowners or their managers or by their personal act, omission or default. The issue before the court was whether the effect of cl 13 would serve to qualify obligations in respect of a detailed description of the vessel set out in cl 26 of the charterparty including a provision of "Main Deck 1.10m" under the heading "Free Height". Lord Roskill, with whose speech the other members of the House of Lords agreed, said this (at 130):

> In truth *if cl.13 were to be construed so as to allow a breach of the warranties as to description in cl.26 to be committed* or a failure to deliver the vessel at all to take place without financial redress to the charterers, *the charter virtually ceases to be a contract for the letting of the vessel* and the performance of services by the owners, their master, officers and crew in consideration of the payment of time charter hire *and becomes no more than a statement of intent by the owners* in return for which the charterers are obliged to pay large sums by way of hire, though if the owners fail to carry out their promises as to description or delivery, are entitled to nothing in lieu. *I find it difficult to believe that this can accord with the true common intention of the parties and I do not think that this conclusion can accord with the true construction of the charter in which the parties in the present case are supposed to have expressed that true common intention in writing*. [emphasis added]

45 There is further reason why cl 1(b) is inapplicable. Mr Govintharasah referred us to the New

York arbitral decision of *The Maaskant* (SMA 2688, 31 July 1990). The dispute in *The Maaskant* arose out of a Vegoilvoy charterparty. The charterer sold soybean oil to the State Trading Corporation of India ("STC") and the *Maaskant* was chartered to carry the refined soybean oil from New Orleans to India. A special provision of the charter (cl 6) provided for the "Cargo to be stowed in epoxy coated tanks". On arrival in New Orleans, her tanks were found to be extensively deteriorated of epoxy coatings in more than 50% of the cargo tanks. The charterer cancelled the *Maaskant* and chartered another vessel, the *Pattaya*, which was delayed and loading did not take place until two days after the deadline required by the STC contract. In the result, STC agreed to accept the cargo at a reduced price. The charterer sought to recover, *inter alia,* the reduction in the price of the cargo. In coming to its decision, the tribunal reasoned that cl 6 contained a warranty that the tanks were in fact "epoxy coated" and could not be derogated from notwithstanding the vessel owner's exercise of due diligence to make the tanks fit to load the cargo. As the surveyors found the epoxy coatings flaking and peeling, the vessel owner was in breach of cl 6. On the question whether cl 1(b) of the Vegoilvoy charterparty would exonerate the vessel owner for a breach of cl 6, the tribunal correctly applied the common law principle that the terms of typewritten clause should govern and override the printed clause in the event of a conflict. Clause 1(b) could not be reconciled with cl 6 and the latter provision, being a typewritten clause, prevailed over cl 1(b). In that context, the tribunal said that the charter could not be construed to contain a warranty which, if breached, gave the party in default the right the cancel the charter. Likewise, we agree with Mr Govintharasah that the same common law principle applies to the present dispute with equal force and result.

46 For the reasons stated, cl 1(b) does not qualify the contractual obligation in respect of the vessel's description (epoxy coated) in the fixture to the extent of enabling the Owners to cancel the fixture without incurring any liability. The Owners are therefore liable for the breach. A dismissal of this appeal on this ground must therefore follow.

Was there a breach of the Owners' obligation under clause 1(a) of the Vegoilvoy form

47 Having decided that the vessel did not have coated tanks, contrary to the requirements of the fixture, it is strictly not necessary to deal with the question of whether there was a breach of the Owners' obligation under cl 1(a) of the Vegoilvoy form. We are, nevertheless, obliged to consider the second ground of appeal (see [21] above) since our views, with respect, differ from the judge on the construction of cl 1(a) and cl 1(b) of the Vegoilvoy form. We begin by first considering whether the admitted deterioration of the tanks' coating as reported by Zulkiflee affected the vessel's cargoworthiness in the context of cl 1(a).

48 The wording of cl 1(a) of the Vegoilvoy form has a well-recognised meaning which encompasses different stages of seaworthiness involving the Owners' obligation to maintain a seaworthy ship and to properly carry and discharge the cargo. Clause 1(a) is an express warranty of seaworthiness in the sense of fitness to carry the stipulated cargo. The Owners must exercise due diligence to make the vessel cargoworthy for the loading process. The focus here is on the coating condition in the context of cargoworthiness and due diligence. It is common ground that the Charterers have to prove that the vessel was not cargoworthy. Once that is done, the burden is on the Owners to establish due diligence by themselves, servants and agents as well as their independent advisers.

49 Although the loss suffered is the same, it bears repeating that a breach of cl 1(a) of the Vegoilvoy form is distinct from the breach of the express term relating to the vessel's description (epoxy coated) which is due to the inaccurate description existing at the time of the contract. It therefore follows that even if cl 1(b) is applicable to a breach of cl 1(a) as argued for by the Owners, a breach of the express term of the fixture leaves the way open for a claim for damages which are

not too remote. We have explained that cl 1(b) is no protection for the earlier breach for the reasons stated (see [42] to [46] above).

50 As noted earlier, Mrs Thio argues that the Charterers had not discharged the burden of proof that the vessel was uncargoworthy at the time the vessel was presented for loading. Essentially, her point is that there was no evidence that cargo contamination was a likely result from the carriage of RBD palm oil in tanks with the coating condition as reported on 19 January 2004 in the Notice of Reserve. We disagree with counsel as the facts in evidence do not support her assertions.

51 Contrary to the Owners' suggestion, GPH's evidence was not premised on the FOFSA Regulations as shown in the transcripts of evidence. The Charterers accept that the articles relied upon by GPH in his expert report were not solely on refined palm oil. However, there was no reason to suggest that the articles augmented by GPH's comments would not equally apply to refined palm oil. Above all there was no countervailing evidence challenging GPH's testimony in cross-examination. In particular, his answers to a series of questions on this area were clear on this point.

> Q: ... I've read this article and I believe this article deals solely with crude palm oil. Do you agree with me?
>
> A: Yes.
>
> Q: Does this article have any bearing [on] RBD palm oil?
>
> A: I think so.
>
> Q: Given the difference in levels and the significant difference in acid levels between RBD palm oil and crude palm oil, do the findings … [have any relevance] to the product in this dispute?
>
> A: In this case, the contamination is compounded by the presence of free rust and loose scale. So …
>
> Q: No, you are not answering my question. I'm asking you, on this article, right, and given that the acid levels in RBD palm oil being maximum 0.1% as compared to crude palm oil, which is a maximum of 5%, given those different levels, does this article have any application to the cargo in this dispute, which is RBD palm oil?
>
> A: My opinion is that there will still be pickup of iron, only maybe at a moderately slower rate.

52 The judge accepted GPH's unchallenged evidence. It was said that the longer the cargo is in contact with mild steel, the greater is the risk of contamination. In this case, the risk of contamination was evidently present. The sailing time from Belawan to Turkey was estimated to be between 15 and 20 days. Apart from GPH, the judge was also persuaded by Wong's opinion which was not challenged.

53 The Owners raised other objections. It was suggested that the judge erred in failing to consider three other relevant factors. First, as we have mentioned earlier, it was contended that there was no failure of due diligence as was shown by the successful carriage of these cargoes. We are in agreement with the judge that such an assertion has little or no evidential value since cargoworthiness is judged by the standards and practices of the trade in question and it varies according to the nature of the cargo and the nature of the voyage to be undertaken, including the

exigencies encountered (see *Voyage Charters* ([37] *supra*) at para 11.28; *Malayan Motor & General Underwriter (Pte) Ltd v MH Almojil* [1982-1983] SLR 52 at 58, [26]). Besides, as Mr Govintharash correctly pointed out, there was no evidence that the vessel carried RBD palm oil before 19 January 2004. As for subsequent voyages after this fixture, the certificates of fitness of the cargo tanks issued by Prianto, a surveyor from PT Jasindo Testing Services acting on behalf of ITS, had little or no evidential value as he admitted that they were issued on the orders of the then charterers who had authorised loading of the cargo. The inference there was that the charterers had agreed to load the RBD palm oil notwithstanding the condition of the cargo tanks.

54 Second, in relation to the weight to be given to Ong's evidence, it was clear to us that this was the result of the judge preferring the testimony of one witness to the other, a matter that was well within his province. In any case, Ong was not a chemist and he was definitely not in a position to assist the judge in the way GPH did.

55 Finally, we turn to the hearsay point Mrs Thio had raised earlier. She said that the judge erred in relying on BMI's preliminary report as the surveyor was not called to testify. In our view, this objection is not available to the Owners as the very basis of the Owners' cancellation of the fixture was the breakdown of the tanks' coating as verified by BMI. In any event, the objection is also irrelevant given the Owners' acceptance before us of the extent of the coating breakdown as reported by Zulkiflee on 19 January 2004.

56 In the circumstances, there is no basis for us to disturb the judge's finding that the vessel was uncargoworthy at the time she was presented for loading. On the question of due diligence, the actions of the Owners to eliminate, avoid or reduce the risk of contamination were considered. The question of due diligence may be referable to anything from failure to clean the tanks before carriage to the condition or suitability of the tanks for loading and carriage. It was the Owners' pleaded case that there was no want of due diligence on their part, as the owners of the vessel, in making the vessel fit to carry the cargo and that all reasonable steps were taken to make the tanks clean and fit for the cargo. Notably, no particulars were given by the Owners as to what those steps were. The Owners had argued that they had discharged the burden of proving due diligence in the face of their earlier and subsequent experience when they carried the same type of cargo in the same tanks with no resulting trace of contamination. As discussed in [48] above, the burden was not upon the Charterers to establish a benchmark of the trade which had not been complied with, but for the Owners to show that due diligence had been displayed in terms of a proper system on the maintenance of the coatings with clear lines of communication, supervision and updating. In this case, they had failed. The obligation to clean the tanks arises under cl 5 of the Vegoilvoy form and not necessarily under cl 1(a). Given our observations and the judge's findings, the Owners have not shown exercise of due diligence on their part.

Would clause 1(b) of the Vegoilvoy form protect the Owners from the consequences of a breach of clause 1(a)?

57 We now turn to the broader question of whether it was agreed that no liability for loss or damage should attach to the Owners even if it resulted from a breach of cl 1(a) of the Vegoilovy form.

58 It is worth recounting some of the evidence again. Notice of readiness to load the cargo in question was given on 14 January 2004. This notice was invalid because the vessel, as it turned out, was not ready to load. A premature submission of the notice of readiness does not constitute a breach of the fixture; it merely means that the notice is ineffective to start laytime running. Zulkiflee inspected the tanks and found that they were not ready for loading. Separately, there is the

important finding of the judge that the vessel was not cargoworthy when the notice of readiness was given. The judge found that the poor condition of the epoxy coating would have affected the fitness of the vessel to load. The Charterers were thus entitled to claim that, contrary to cl 1(a), the vessel was not fit for carrying the cargo of RBD palm oil. It is against these findings of fact that we have to decide if the language of cl 1(b) upon which the Owners sought to rely is apt to excuse them from the consequences of failing to tender a vessel fit to carry the cargo in question.

59 The judge held that the words used in cl 1(b) were not capable of protecting the Owners from a breach of cl 1(a) in the absence of "express, pertinent and apposite" words to that effect. Reliance was placed on the decision of this court in *Sunlight Mercantile Pte Ltd v Ever Luck Shipping Co Ltd* ([18] *supra*) and the English decision of *Sleigh v Tyser* ([18] *supra*). We agree with the Owners that neither case is strictly applicable in the circumstances as both represent examples of the standard required for exemption clauses where there is an implied warranty of seaworthiness, as opposed to the present case which is in respect of an express warranty. In discussion, *Carver on Bills of Lading* (Sweet & Maxwell, 2nd Ed, 2005) at para 9-024 explained that this principle of interpretation stems from the notion that the implied requirement of seaworthiness is a fundamental obligation in a contract of carriage by sea and it is assumed that exclusion clauses do not affect it unless the implied duty is reduced or excluded by "express, pertinent and apposite" words. The principle of interpretation has less effect in the case of an express warranty of seaworthiness which is "an ordinary term of the contract and likely to be affected by other terms, even where these are exclusions" (*ibid*). Ultimately, it is only by clear and effective words in the other express terms of the fixture that the fundamental obligation under cl 1(a) of the Vegoilvoy form to provide a seaworthy ship can be modified or limited.

60 The language of cl 1(b) is indisputable. The opening sentence of cl 1(b), "It is understood that if the tank or tanks, into which the particular cargo covered by this Charter is to be placed, upon testing prove to be defective", is a reference to the cargoworthiness of the vessel in respect of the cargo tanks. It is therefore not necessary that cl 1(b) should expressly make reference to unseaworthiness in cl 1(a). Notably, loss or damage due to failure to exercise due diligence to make the cargo tanks cargoworthy is the only consequence for which the Owners seek to exclude liability under cl 1(b). In addition, cl 1(b) is clearly directed at the period of time *before* loading and is limited to defects to the tank or tanks in which the cargo is to be loaded. In contrast, cl 17(a) of the Vegoilvoy form excludes the Owners from liability for breach of cl 1(a) if, notwithstanding the exercise of due diligence by the Owners, loss or damage arose from the unseaworthiness of the vessel existing at the beginning of the laden voyage or developing during that voyage. Clause 17(a) and cl 1(b) relate to a different period of time and both clauses can be reconciled.

61 The language of cl 1(a) "before and at the beginning of the voyage" should be given the same construction as would have been placed on the same words as used in Art III r 1(2) of the Hague Visby Rules. There is the duty to exercise due diligence to make the tanks in which goods are carried fit and safe for the loading process, and thereafter to exercise due diligence to maintain seaworthiness in all respects over the whole period from loading to sailing (see *Carver on Bills of Lading* ([59] *supra*) at para 9-135). Lord Somerville in *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589 at 603 said *obiter* that the word "before" could not be read as meaning "at the commencement of the loading" and, as such, due diligence had to be exercised before loading of cargo had commenced (see William Tetley, *Marine Cargo Claims* (International Shipping Publications, 3rd Ed, 1988) at p 376). In the instant case, the coating deficiencies were already present at the time the fixture was made. In this regard, the judge found no evidence that the Owners had maintained the cargo tanks to make them fit to receive the cargo of RBD palm oil at Belawan for carriage to Turkey. Instead, there was a failure to monitor the state of deterioration of the coatings (see [17] above). A reasonably prudent owner, if he had known of the

defect, would have taken steps to rectify it. The Owners are liable on the ground of their actual or imputed knowledge of the coating deterioration going to the cargoworthiness of the vessel and want of due diligence at some point earlier than the beginning of loading. In fact, the want of due diligence continued till well after the tender of the notice of readiness as the coating deficiencies still existed, which means that the vessel was not fit for the loading process.

62 It follows that cll 1(a) and 1(b) can be given effect to without compromising the meaning or utility of cl 1(a). Significantly, loss or damage due to a failure to exercise due diligence to make the cargo tanks cargoworthy to load and carry the cargo in question is the only consequence for which the Owners are liable and in respect of which they may seek to exonerate themselves from liability under cl 1(b). In this narrow context, we are not persuaded that cl 1(a) will be rendered meaningless if effect is given to cl 1(b). In particular, as we see it, cl 1(b) affords the contracting parties some certainty in the event of a breach of cl 1(a) in respect of defective cargo tanks. Without cl 1(b), the innocent party faced with a breach of cl 1(a) may find himself in a dilemma. He cannot legally treat the fixture as discharged unless the breach is serious enough that it goes to the root of the fixture and deprives the innocent party of substantially the whole benefit of the fixture (see *Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26). If the innocent party purports to treat the fixture as discharged when in law the breach is not sufficiently serious to give him this right, he might find himself in repudiatory breach and be exposed to liability for damages. A converse situation presents itself where the defaulting shipowner's refusal or failure to take steps to repair the defect shows an intention no longer to be bound by the fixture and so amounts to a repudiation of the fixture. Either way, the innocent party may have to wait for a reasonable lapse of time before treating the fixture as repudiated by the defaulting shipowner or as frustrated. Inherent in the illustrations are the twin elements of uncertainty and delay with the attendant loss of time and money.

63 Correspondingly, by cl 1(b) the parties agree to afford the Owners an opportunity prior to loading to put the vessel in a fit state for the chartered service following a breach cl 1(a) in respect of defective cargo tanks. At the same time, the provision imposes an obligation on the Owners to repair the defect if it can be repaired within 24 hours and at reasonable expense. The innocent party will be told no later than in 24 hours whether the fixture will be cancelled or the defect repaired to put the vessel in a fit state for the chartered service. Both the expense of the repairs and the time necessary to repair the tanks adequately are such as to be commercially practical and legally acceptable in the context of the fixture. Besides, the discretion (*ie*, option to cancel) conferred upon the Owners is not wholly subject to the whims and fancies of the Owners. It must be exercised honestly and in good faith. In that regard, the observations of Leggatt LJ in *The Product Star (No 2)* [1993] 1 Lloyd's Rep 397 at 404 are apposite:

> Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably.

64 We now come to the concluding words in cl 1(b) which is this: "no responsibility shall rest with the Vessel, Owners, or Agents". The concluding words convey the Owners' intention not to be responsible for loss or damage due to a failure to exercise due diligence to make the tanks cargoworthy. That is the business effect of this clause as understood in its context, the terms of which must be satisfied before cancellation is proper. In our view, there is nothing either unusual or commercially unattractive about the parties stipulating for such a legal outcome. The concluding words in cl 1(b) are apt to relieve the Owners from the consequences of the Owners' failure under

cl 1(a) to exercise due diligence in respect of defective cargo tanks leading to the cancellation of the fixture prior to loading where the parties have *not* separately and expressly contracted for epoxy-coated tanks. At the risk of repetition, our decision in the main turned on the vessel not having coated tanks, which was contrary to the express term relating to the vessel's description (epoxy coated).

65 Finally, by way of observation (there being strictly no requirement for a definite pronouncement) we now come to the elements of cl 1(b) which must be present before the clause can be triggered. The condition of the tanks includes the tank coating, pipelines and valves in the tanks. Defects, which must be ascertained by testing, can range from physical damage to faulty parts but probably not permanent design faults which cannot be changed, as distinct from deficiencies that can be corrected by repairs. In addition, the reference to "testing" in cl 1(b) suggests that something more than visual examination is required. The tests could involve an analysis of the coatings, tests for oil-tightness of the tanks and so on. There is force in Mrs Thio's submissions that no testing is required as the Owners have accepted the coating failure as reported on 19 January 2004. This must be right as a matter of common sense where the nature and extent of the "defect" is not in issue. Lastly, the exercise of the option to cancel has to be made honestly and in good faith as we mentioned in [63] above.

Conclusion

66 In the result, we affirm the decision of the judge on the vessel not having coated tanks, contrary to the express term relating to the vessel's description (epoxy coated) and that cl 1(b) of the Vegoilvoy form is not a defence to the breach. Accordingly, this appeal is dismissed with costs. The security for costs furnished by the Owners is to be released to the Charterers' solicitors.

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